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SECOND SERIES

CULLIN v. FOXLEY.**L. A. 17185.****Supreme Court of California.****Aug. 3, 1939.****Rehearing Denied Aug. 31, 1939.****1. Bankruptcy ☞38**

The provisions of Federal Bankruptcy Act subjecting an insolvent farmer, filing petition seeking composition or extension, and all his property to exclusive jurisdiction of bankruptcy court and forbidding institution by creditors of enumerated proceedings against farmer or his property did not prohibit farmer from prosecuting an appeal from judgment of foreclosure which was entered prior to an order staying foreclosure proceeding, since prohibitory language of statute is directed only to further steps to deprive bankrupt of title to or possession of his property. Bankr.Act § 75(n), (o) (2, 6), (p), 11 U.S.C.A. § 203(n), (o) (2, 6), (p).

2. Bankruptcy ☞105**Mortgages ☞574**

Where order by conciliation commissioner of United States District Court, pursuant to Federal Bankruptcy Act, staying foreclosure proceedings in state court was entered after judgment of foreclosure, the stay order did not prohibit mortgagor from prosecuting an appeal from judgment of foreclosure, and hence an appeal not taken within time prescribed by statute would be dismissed on ground that it was taken too late. Bankr.Act § 75(n), (o) (2, 6), (p), 11 U.S.C.A. § 203(n), (o) (2, 6), (p); Code Civ.Proc. §§ 660, 939.

In Bank.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by E. W. Cullin against C. E. Foxley to foreclose a mortgage on real property executed by the defendant. From a judgment of foreclosure, the defendant appeals. On motion to dismiss the appeal on the ground that it was taken too late.

Motion granted and appeal dismissed.

C. E. Foxley, in pro per., and R. Bruce Findlay and Harry H. Parsons, both of San Bernardino, for appellant.

W. E. Schreyer, of Los Angeles, for respondent.

SHENK, Justice.

Motion to dismiss the appeal on the ground that it was taken too late.

The moving papers show that the action was brought to foreclose a mortgage on real property executed by the defendant, Foxley. Judgment of foreclosure was entered on May 28, 1938, and written notice of entry of judgment was served on June 4, 1938, and filed on June 6, 1938. On June 14, 1938, the defendant filed a notice of intention to move for a new trial as to which no decision has ever been made by the trial court. The defendant filed a notice of appeal from the judgment on April 6, 1939.

The certificate of the clerk of the trial court, dated May 10, 1939, attached to the moving papers states that no proposed bill of exceptions had been filed, that there had been no request to prepare transcript pursuant to section 953a of the Code of Civil Procedure, and that no proceedings were pending for the settlement of any transcript or bill.

The motion was heard on June 6, 1939. It was then brought to the attention of this court that the clerk's transcript (since filed herein on June 10, 1939) showed that on July 2, 1938, there was directed to and served on the plaintiff and her attorney, and on the commissioner appointed by the superior court in the foreclosure proceedings, an "Order staying proceeding in State Court", issued by the conciliation commissioner of the United States District Court for the Southern District of California, Central Division. That order recites that on the first day of July the defendant herein deposited with the conciliation commissioner a petition under section 75 of the federal Bankruptcy Act (11 U.S.C.A. § 203). The order conveyed notice that thereupon said District Court acquired exclusive jurisdiction of the debtor and the debtor's property, and enjoined and restrained the plaintiff, her attorneys and agents, and said commissioner, from further proceeding with the pending case of Cullin v. Foxley, and from "in any other manner interfering or attempting to interfere by judicial sale or otherwise with the debtor's property or debtor until the further order of this court".

On February 6, 1939, upon the petition of the conciliation commissioner the judge of said United States District Court dismissed the proceeding pending in said court.

Subsequently and on April 6, 1939, as noted, the defendant herein filed the notice

of appeal. On the oral argument it was the contention of the defendant that because of the service of the stay order on the plaintiff, her attorneys, and the commissioner, the sixty-day period denoting the automatic termination of the new trial proceedings, as provided by section 660 of the Code of Civil Procedure, did not expire until March 9, 1939; therefore that the appeal was taken within the thirty days prescribed by section 939 of the same code.

Whether this contention may be accepted as correct depends on the effect to be given to the stay order pursuant to the pertinent provisions of the Bankruptcy Act.

Section 75 of the Bankruptcy Act, in subdivision (n), provides that the filing of the petition "shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court * * *". Subdivision (o) following provides: "Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court * * *". Then follows a list of various proceedings, amongst which appears "Proceedings for foreclosure of a mortgage on land" (2) and "* * * sale, or other proceedings under an execution or under any * * * mortgage" (6). Subsection (p) reads: "The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in this section."

A question of the state court's jurisdiction arising under the foregoing sections was considered in the case of *Lehmer v. Scott & Borden*, 28 Cal.App.2d 128, 82 P. 2d 41. In that case the debtor farmer had filed a petition under section 75 of the

Bankruptcy Act. Subsequently and while that proceeding was pending, he commenced an action in the state court to recover damages for failure to discharge of record an allegedly fully satisfied crop mortgage, and similar relief. The court dismissed the action on the ground of lack of jurisdiction by reason of the pendency of the bankruptcy proceedings. On appeal it was held that the dismissal was erroneous. The consideration there given to the foregoing sections of the Bankruptcy Act led to the conclusion that the prohibitions therein had reference to the administrative control of the debtor's property and to proceedings against the farmer or his property, and did not include proceedings brought for relief on his behalf or to collect assets or enforce obligations due to him.

[1, 2] Similarly, in the present case, the prohibitory language in the sections referred to and in the injunctive or stay order could be directed only to the further steps the objective of which would be to deprive the bankrupt or his estate of the title to or possession of the property involved. There is no direction in the language of the sections nor in the stay order which could be interpreted as a restriction upon the bankrupt to pursue any remedy in the state courts, by appeal or otherwise, looking to a recovery or conservation of his property. In fact the stay order laid no injunction upon the defendant. It was directed only to the plaintiff, her attorneys, and to the commissioner appointed to sell the mortgaged property, and enjoined the sale or other disposition of the mortgaged property and any interference with the debtor or his property. There was nothing, either in the language of the Bankruptcy Act or in the order served herein, to prevent the defendant from diligently pursuing what was thus to his advantage, namely, the prosecution of the appeal from the judgment of foreclosure. Had he done so, it could not have been said that the provisions of the act or of the order would have been violated. It follows that the appeal herein was not taken within the time provided by the pertinent code sections.

The motion is granted and the appeal is dismissed.

We concur: HOUSER, J.; EDMONDS, J.; CURTIS, J.

SKALKO v. CITY OF SUNNYVALE.

S. F. 16279.

Supreme Court of California.

Aug. 18, 1939.

Rehearing Denied Sept. 14, 1939.

1. Municipal corporations ⇨600

A municipality has right to divide land into districts and prescribe regulations for its use consonant with reasonable exercise of police power. St.1917, p. 1420.

2. Municipal corporations ⇨63(1), 122(2)

A zoning ordinance must be considered with every intendment in its favor, and the court will not, except in a clear case, interfere with legislative discretion which has been exercised in its adoption, but unless the measure is clearly oppressive it will be deemed to have been adopted within purview of police power. St.1917, p. 1420.

3. Municipal corporations ⇨63(2)

Where exercise of police power in enactment of zoning ordinance results in consequences which are oppressive and unreasonable, courts will not hesitate to protect the rights of the property owner against unlawful interference with his property. St.1917, p. 1420.

4. Constitutional law ⇨81

The police power is not unlimited and regulation of the use of property must rest on a reasonable exercise thereof.

5. Constitutional law ⇨81

Legislatures may not under guise of police power impose restrictions that are unnecessary and unreasonable on the use of private property or the pursuit of useful activities.

6. Constitutional law ⇨81

The police power must be applied to existing conditions, and a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory.

7. Municipal corporations ⇨626

A municipal zoning ordinance was void as to owner of property in residential district, the boundary line of which was also boundary line between residential and industrial districts, where large cannery operating 24 hours a day for nine months of the year was located approximately 100 feet from property and, at distance of 450 feet, 80 trains a day passed over main line of railroad which maintained two spur tracks to

cannery upon which freight cars were hauled day and night. St.1917, p. 1420.

In Bank.

Appeal from Superior Court, Santa Clara County; H. S. Schaffer, Judge.

Action by Nick Skalko against the City of Sunnyvale for a declaratory judgment that a zoning ordinance restricting the use of his property was void as to the plaintiff. Judgment for defendant, and plaintiff appeals.

Reversed with direction.

Prior opinion, 91 P.2d 168.

Joseph F. Di Maria and Leon Warmke, both of San Jose, for appellant.

N. E. Wretman, of San Jose, for respondent.

EDMONDS, Justice.

The appellant, as owner of real property within a residential zone of the city of Sunnyvale, sought a declaratory judgment that a zoning ordinance restricting the use of his property is void as to him. Ruling adversely to his contentions, the trial court decided in favor of the city.

There is little dispute concerning the facts. It appears that by the challenged enactment, property within the city of Sunnyvale has been placed in either a residential, commercial or industrial zone. The appellant's land is in a residential district, but its north line is also the boundary between that district and an industrial district. A cannery said to be the largest in the world, employing about 3000 workers during six months of the year and many hundreds for an additional three months, is located about 100 feet from the appellant's property. This cannery works night and day, with three shifts of employees.

At one side of the appellant's property but upon the land of the cannery are a warehouse and some huge piles of empty boxes. In front of the property there are also four piles of these boxes, each about a city block in length and apparently more than 20 feet high. During most of the year boxes are being placed in or taken from these piles at all hours of the day and night. Automobiles of the cannery workers and others coming to the plant are parked for a distance of one-half mile away from it. The area around the appellant's property is sparsely settled, and

devoted to agricultural use. The few dwellings in the neighborhood have a rather low value.

There is heavy automobile and truck traffic in front of the appellant's property throughout the year, but principally during the operating season of nine months. For six months of the year this traffic continues during both day and night. At a distance of 450 feet, 80 trains a day pass over the main line of the Southern Pacific Company, and it maintains two spur tracks to the cannery upon which freight cars are hauled both day and night.

The machinery of the cannery can be heard for a long distance as a continuous hum. There is also, at irregular intervals, the noise of escaping steam from the popping off of safety valves and, twice a day, from the cleaning of boilers.

As described by the appellant his property consists of 5 acres upon which he had prune trees at one time. These trees were removed because of the insects which came over to them from the piled boxes of the cannery across the street, and there is now nothing on it but a barn and a house worth about \$1000. Desiring to operate a cafeteria, light lunch and refreshment stand upon his land, he submitted to the city trustees of Sunnyvale petitions for inclusion of his property in the business district. These petitions were denied.

Although challenging the validity of the zoning ordinance upon the ground that it was not adopted in compliance with the Zoning Act of 1917 (Stats. 1917, pp. 1419, 1420), the appellant's principal contention is that the present restriction upon the use of his property under the conditions now existing may not be upheld as a reasonable exercise of the police power to protect public health, safety, morals and general welfare. A zoning ordinance, he asserts, may be valid in its general aspects and at the same time be clearly arbitrary and unreasonable as applied to particular property.

[1-5] The constitutionality of the principle of zoning is no longer an open question, and the right of a municipality to divide land into districts and prescribe regulations for its use, consonant with a reasonable exercise of the police power, has long been upheld by the courts. *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47

S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016. Such an enactment must be considered with every intendment in its favor, and a court will not, except in a clear case, interfere with the legislative discretion which has been exercised in its adoption. Unless the measure is clearly oppressive it will be deemed to have been adopted within the purview of the police power. *Zahn v. Board of Public Works*, 195 Cal. 497, 234 P. 388. But where the exercise of that power results in consequences which are oppressive and unreasonable, courts do not hesitate to protect the rights of the property owner against the unlawful interference with his property. In other words, the governmental power is not unlimited, and a regulation of the use of property must rest upon a reasonable exercise of the police power. *Nectow v. Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842. Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. *State of Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210, 86 A.L.R. 654.

[6] Also, the police power must be applied to existing conditions. *Miller v. Board of Public Works*, *supra*. "The principle that a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory, carries with it the recognition of the fact that earlier compliance with the regulation does not forfeit the right of protest when the regulation becomes intolerable". *Abie State Bank v. Bryan*, 282 U.S. 765, 51 S.Ct. 252, 257, 75 L.Ed. 690. Where conditions have changed since the legislative action was taken, "statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall". *Euclid v. Ambler Realty Co.*, *supra* [272 U.S. 365, 47 S.Ct. 118, 71 L.Ed. 303, 54 A.L.R. 1016]. The question, therefore, is whether under the facts shown by the appellant his rights are now being invaded by the existence and maintenance of the ordinance.

[7] Considering all the facts shown by the record, it clearly appears beyond question that the land owned by the appellant is entirely unsuited for residential purposes. The adjoining cannery with the continuous noise which must neces-

sarily result from twenty-four hour operation, creates a situation similar to that which is found in the industrial part of a great city. Certainly no one wants to live next door to a large factory, and the question whether any consideration of public health, peace, safety or general welfare justifies the continued restriction upon the appellant's property which prohibits its use for commercial purposes is not fairly debatable. In its application to the land owned by the appellant, the ordinance is void. *Hurst v. City of Burlingame*, 207 Cal. 134, 277 P. 308.

The judgment is therefore reversed with directions to enter judgment for the appellant.

We concur: CURTIS, J.; SHENK, J.; HOUSER, J.; PULLEN, J., pro tem.



33 Cal.App.2d 474

H. H. HUBBARD, Plaintiff and Respondent, v. **MT. RAYMOND MINING COMPANY** (a Corporation), **R. L. Bradford**, Defendants and Appellants; **J. Wesley Smith**, **L. M. Bradford**, **J. J. Hurlburt et al.**, Defendants and Respondents.

J. Wesley SMITH and **L. M. Bradford**, Cross-Complainants and Respondents, v. **MT. RAYMOND MINING COMPANY** (a Corporation), **R. L. Bradford**, Cross-Defendants and Appellants; **H. H. Hubbard**, **J. J. Hurlbert**, Cross-Defendants and Respondents; **H. M. Gardiser et al.**, Cross-Defendants.

Civ. 6210(3).

Supreme Court of California.

Aug. 21, 1939.

In Bank.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

On rehearing.

Rehearing denied.

Prior opinion, 92 P.2d 411.

Robert E. Hatch and Louis Bulasky, both of San Francisco, for appellants.

Wyckoff, Gardner & Parker, of Watsonville, for respondent Hubbard.

Hubert Wyckoff, Jr., of San Francisco, for respondents Smith and Bradford.

PER CURIAM.

Appellants' petition for hearing herein is denied. In denying said petition, we withhold approval of that portion of the opinion wherein it is stated [92 P.2d 412], "inasmuch as all of the defendants did not join in the motion to change the place of trial, the court properly refused to grant the motion."



14 Cal.2d 224

WATERMAN v. STATE BAR OF CALIFORNIA.

L. A. 17133.

Supreme Court of California.

Aug. 18, 1939.

1. Attorney and client ⚡49

A disbarment proceeding is not a criminal investigation, but is to ascertain if the accused is worthy of confidence and possessed of good moral character.

2. Attorney and client ⚡58

In a disbarment proceeding defendant was required to tell the truth to be entitled to leniency, and needed no time for deliberation, notwithstanding he may have feared the consequences.

3. Attorney and client ⚡58

A member of State Bar who previously had been suspended, had employed another to solicit employment for him, and had given false testimony at a hearing before a committee of the State Bar, was not entitled to have a recommendation of disbarment reduced to a suspension, notwithstanding he may have testified falsely out of fear of the consequences and without time for proper deliberation, and notwithstanding that at a subsequent hearing he admitted true facts to committee. Rule 3 of Rules of Professional Conduct of The State Bar.

In Bank.

Proceeding on the petition of Herbert R. Waterman to review the recommendation

of the Board of Governors of the State Bar that petitioner be disbarred.

Recommendation sustained.

Herbert R. Waterman, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PULLEN, Justice pro tem.

This is a proceeding to review the recommendation of the board of governors of the State Bar that petitioner be disbarred.

It is charged that petitioner is guilty of a violation of rule 3 of Rules of Professional Conduct of the State Bar (213 Cal. cxiii) in that he engaged another to solicit professional employment for him, commonly referred to as "ambulance chasing", and, further, that the petitioner wilfully, intentionally and with a view of furthering his own personal interest gave testimony under oath before a committee of the State Bar, which testimony was untrue, and was given with the view of misleading such committee and the State Bar.

There is no substantial dispute as to the facts. Petitioner admits the charge of "ambulance chasing" in each of the three instances specified. He also admits having made false statements before the committee of the State Bar, but states that he so testified out of fear of the consequences, and not because of any corrupt motive, and that at a subsequent meeting of the committee he voluntarily repudiated all such false testimony and thereupon testified truthfully and fully in all matters.

The findings of the committee, as approved and adopted by the board of governors, declare that upon each of the three separate occasions alleged, petitioner, through one William T. Stevens, acting as his agent, had, from January, 1938, to May, 1938, solicited professional employment.

In June, 1938, Stevens was arrested and charged with a violation of an ordinance of the city of Los Angeles prohibiting the solicitation of such employment in tort cases, and was released on bail. When Stevens failed to appear and enter his plea, his bond was forfeited, and he is apparently still a fugitive.

In October, before this same committee of the State Bar, which was then conducting a preliminary investigation of petitioner's professional conduct with relation to the above matters, he testified that dur-

ing the year he had had no business with Stevens except in connection with a damage case for his wife; that he had not seen Stevens for several years; that he had no knowledge of Stevens' arrest; that he did not know whether he was in jail or had been tried; that he had done nothing in assisting Stevens in connection with the charges against him; and that he did not know what business Stevens was in except that he had heard that Stevens was once a cook.

The evidence before the committee, however, disclosed that, when Stevens was arrested, petitioner arranged for his bond, and signed as an indemnitor thereon, and that it was with petitioner that the bonding company dealt for the repayment of the bond after the flight of Stevens. It is also in evidence that petitioner stated to one Ralph that "his ambulance chaser" whom he had gotten out on bail had left for New York, and that petitioner was relieved because of his departure.

After the introduction of the foregoing testimony, petitioner filed an answer to the notice to show cause, wherein he admitted he had entered into the three contracts of employment as charged and that he had, on a prior hearing, testified falsely as to his connection with Stevens, but averred that his acts and conduct in so testifying were not wilful or entirely false, but, being wholly unprepared and by reason of fear of disgrace and humiliation, the answers were given without time for proper deliberation.

After a hearing, the committee found that petitioner had been guilty of soliciting business of a personal injury or negligence nature through an agent or "capper", knowing that such conduct was contrary to the rules of professional conduct of the State Bar, and that petitioner wilfully, intentionally and with a view to furthering his own personal interest had given testimony under oath before the committee which was incorrect in substance and was given with a view to mislead said committee.

It also appears that during petitioner's rather brief membership in the bar this is the third time he has come before the board of governors for professional misconduct.

In 1933 he was suspended from practice for one month by this court for misconduct in the use of funds delivered to him by a client. In the Matter of Waterman, misc.

1258. In 1936 he was suspended for six months for unprofessional conduct arising out of the manner of handling a divorce and advising certain witnesses to ignore subpoenas to attend before a committee of the State Bar. *Waterman v. State Bar*, 8 Cal.2d 17, 63 P.2d 1133.

Petitioner contends in his petition to review the recommendation of the State Bar that suspension, and not disbarment, is the penalty for employing another to solicit professional employment; but he seems to overlook the more serious charge of having knowingly given false testimony under oath before a committee of the State Bar. He now seeks leniency of this court and bases his plea therefor upon his voluntary admission of wrongdoing and his voluntary correction of all false testimony given at the prior session of the committee.

Let us examine the record. It was at a meeting of the investigating committee on October 7, 1938, that petitioner, under oath, denied any business dealings with Stevens, or that he had assisted in any way to obtain his release on bail. On October 26, 1938, some six or eight witnesses were called and examined as to the solicitation of them by Stevens for professional employment of petitioner.

Up to that point in the proceedings petitioner, who appeared as his own attorney, had filed no answer and had cross-examined but one witness. At that juncture, petitioner stated to the committee he had slipped and that it was a useless gesture to proceed with cumulative evidence. The matter was then continued to November 3, for further hearing. On that day an answer was filed by petitioner admitting the several instances of soliciting professional employment through Stevens, and admitting having signed his bond as an indemnitor.

[1,2] The claim for leniency cannot outweigh the right of the members of the State Bar to protect their professional standing. As was said in *Re Vaughan*, 189 Cal. 491, 209 P. 353, 24 A.L.R. 858, quoting from *In re Wellcome*, 23 Mont. 450, 59 P. 445, a proceeding such as this is not a criminal investigation, but is to ascertain if the accused is worthy of confidence and possessed of good moral character. Here, petitioner did not need several days to determine his course of conduct. The facts were within his knowledge. It

was incumbent upon him to tell the truth when called to testify before the committee. He did not need time for deliberation, nor does it look as if his motives were entirely pure, for the admission of wrong-doing did not come until it was quite obvious the committee had not only the evidence of unprofessional conduct but also of false swearing as well.

[3] The plea of petitioner for a reduction of the penalty cannot be permitted to prevail in view of the proven and admitted facts. His prior record, his unprofessional conduct in seeking business, his lack of truthfulness before the committee, all are elements indicating a want of appreciation of the requirements of a member of the legal profession, and disclose an unfitness to remain such a member.

The record fully sustains the recommendation of the board of governors that petitioner be disbarred, and it is so ordered.

We concur: EDMONDS, J.; SHENK, J.; CURTIS, J.; HOUSER, J.



14 Cal.2d 144
GEIBEL v. STATE BAR OF CALIFORNIA.
MORFOOT v. SAME.
L. A. 16511, 16510.

Supreme Court of California.
Aug. 7, 1939.

Rehearing Denied Sept. 5, 1939.

1. Attorney and client ⇐54

The disqualification of a member of the board of governors of the state bar would not invalidate disciplinary proceedings before local committee nor require a further hearing before it much less require a dismissal of all charges against attorneys; but the most that attorneys could claim would be a remand to the board for a new recommendation by qualified members.

2. Judgment ⇐552

An order of the Supreme Court denying attorneys' petitions to set aside a judgment of suspension and stay because of alleged disqualification of president of state bar on ground of interest constituted an adjudication that president was not disqualified and was res judicata of subsequent motion to va-

cate and set aside judgment on the same ground.

3. Judgment ⇨560

A determination on the validity of a former adjudication is *res judicata* in a subsequent proceeding attacking it.

4. Judgment ⇨548

Action of the Supreme Court taken by means of an order of denial is *res judicata* although no written opinion is filed.

5. Attorney and client ⇨51

Even if order adjudicating individual a bankrupt and order appointing bankruptcy trustee were void, disciplinary proceedings before local committee of state bar on complaint of trustee and his attorney were not invalidated, since if trustee and attorney had knowledge of acts requiring disciplinary action, they could file a complaint as private citizens, and committee in all cases conducts a preliminary investigation and only thereafter issues an order to show cause upon which hearing is held. St.1929, p. 1259, § 34.

6. Bankruptcy ⇨81(3)

Where creditor's petition upon which adjudication in bankruptcy was based set forth indebtedness arising from bankrupt's guaranty of notes, but did not allege directly that notes remained unpaid, failure to make that allegation did not invalidate adjudication and order appointing trustee, as urged by attorneys who contended that disciplinary proceedings before local committee of state bar on complaint of trustee and his attorney were void *ab initio*.

In Bank.

On motion to vacate and set aside judgment. Motion denied.

Prior opinion, 11 Cal.2d 412, 79 P.2d 1073.

Charles R. Morfoot, of Los Angeles, in pro. per.

Martin E. Geibel, of Los Angeles, in pro. per.

Joseph L. Lewinson and Morris E. Cohn, both of Los Angeles, for petitioners.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

Petitioners Martin E. Geibel and Charles R. Morfoot seek to set aside our final judgment suspending them from the practice of the law. 11 Cal.2d 412, 79 P.2d

1073. Their joint "Motion to Vacate and Set Aside Judgment" was ordered placed on the calendar and is now before us after oral argument. The contention is that all proceedings against them should be dismissed with prejudice for the reason that the recommendation of suspension made by the board of governors to this court was not by a majority vote of the entire board, as required by rule 34, Rules of Procedure of the State Bar (213 Cal. cxix), in that Alfred L. Bartlett, then president of the State Bar, was disqualified on the ground of interest.

Of the fifteen members composing the board, twelve were present when the charges against petitioners were considered. Eight, including Bartlett, voted that petitioner Geibel be suspended for three years, with the result that if Bartlett's vote is not counted, the recommendation is not by the required majority of the entire board. Nine members, including Bartlett, voted for suspension of Morfoot for one year. But Morfoot contends that the proceeding is also defective as to him for the reason that the resolution of the board adopting the findings of fact made by the local committee as the findings of the board was by an eight to four vote, including the affirmative vote of Bartlett.

Rules 27 and 34, Rules of Procedure of the State Bar, when considered together, provide for disqualification of a member of the board of governors on the ground of interest. Although the provision is for challenge before introduction of evidence upon a hearing, it may well be contended that disqualification may be raised on discovery. *Cadenasso v. Bank of Italy*, 214 Cal. 562, 570, 6 P.2d 944. But as will hereafter appear the claim that Bartlett was disqualified by reason of the facts set forth in the present application has already been passed upon adversely to petitioner's contention by this court on prior applications relying on the same grounds of disqualification. As to Geibel, the present petition is the third urging disqualification. As to Morfoot, it is the second.

[1] It should be remarked that the alleged disqualification, even if found, would not require a dismissal of all charges against petitioners, with prejudice. The disqualification of a member of the board of governors would not invalidate the prior proceedings before the local committee, nor require a further hearing before it, much less a dismissal of all charges.

The most the petitioners could claim would be a remand to the board for a new recommendation by qualified members.

On May 25, 1938, this court, adhering to the recommendation of the board of governors, suspended petitioner Geibel from practice for three years, petitioner Morfoot for one year, and a third petitioner, Shelley, for one year. All three filed petitions for rehearing. Geibel also filed an affidavit on June 13, 1938, in which he averred that on June 11, 1938, he had discovered the disqualifying interest of Bartlett. In passing upon the petitions for rehearing on June 23, 1938, we reduced the period of suspension to one year for Geibel, and ninety days for Morfoot and Shelley. Shelley has not participated in the further proceedings and his period of suspension has long since expired. Execution of the order of suspension has been stayed as to Geibel and Morfoot.

[2,3] On July 15, 1938, Geibel and Morfoot each filed a "Petition to Set Aside Judgment and Stay", attacking the qualification of Bartlett on the same grounds relied on in the present motion. These petitions were denied on July 21, 1938. On December 12, 1938, the Supreme Court of the United States denied petitions of Geibel and Morfoot for a writ of certiorari. 305 U.S. 653, 59 S.Ct. 248, 83 L.Ed. —. Our order of denial was a determination contrary to petitioners' contention that the judgment of suspension should be set aside by reason of the alleged disqualification of Bartlett. Said decision constitutes an adjudication that Bartlett was not disqualified. A determination as to the validity of a former adjudication is *res judicata* in a subsequent proceeding attacking it. *Lake v. Bonyng*, 161 Cal. 120, 118 P. 535; *Peterson v. Weissbein*, 80 Cal. 38, 22 P. 56; 2 *Freeman on Judgments*, 5th Ed., 1498; 15 *Cal.Jur.* 77, 103, 147.

[4] The action of this court taken by means of an order of denial is *res judicata* although no written opinion is filed. In *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366, 40 S.Ct. 174, 175, 64 L.Ed. 310, the Supreme Court of the United States considered the effect of our order denying without written opinion a petition for writ of review upon a decision of the railroad commission. It was contended that since no writ of review had issued, the court "instead of hearing refused to hear, instead of adjudicating refused to adjudicate, and that from this

negation of action or decision there cannot be an assertion of action or decision with the estopping force of *res judicata* * * *." The opinion rejected this contention and held that the order of denial was the exercise of the judicial power of the court. The United States Supreme Court affirmed the judgment of the District Court (257 F. 197, 199), wherein that court said:

"The contention by plaintiff that the ruling of the state court is not a proper predicate for invoking the doctrine of *res judicata*, in that it is not a judgment 'on the merits,' but purely a negative determination or refusal to assume jurisdiction, is unsound. We are bound to assume, if we accept the averments of the bill, that the petition put that court in full and complete possession of all the facts upon which it relies here * * *; and, that being true, the denial of the petition was necessarily a final judicial determination * * * based on the identical rights asserted in this court, and it was between the same parties. Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact. * * * Nor is it material that the reasons for the conclusion reached by the court are not given."

In *Southern California Edison Co. v. Railroad Commission*, 6 Cal.2d 737, 747, 59 P.2d 808, we referred to the effect to be attributed to our orders of denial without written opinion, citing the *Napa Valley Electric Company* case. The same effect must be attributed to our order denying the petitions to set aside judgment in the instant case.

Petitioners urge that since the orders entered following the filing of Geibel's affidavit of June 13, 1938, and the petitions of July 15, 1938, were in terms orders denying rehearing, it must be presumed that the claim of disqualification was not passed on, in view of our rule that points may not be raised for the first time on petition for rehearing. The applications filed by Geibel and Morfoot on July 15, 1938, as brought to this court, were each entitled "Petition to Set Aside Judgment and Stay," and were based squarely on the same claim of disqualification relied on in the petition now before us. The claims made in the affidavit of June 13, 1938, and in the petitions of July 15, 1938, were in fact considered, and our orders of June 23, 1938, and July 21, 1938, although in

terms orders denying rehearing, completely and finally disposed of the claim of disqualification.

[5, 6] Since the oral argument on their motion based on disqualification petitioners have filed a "Supplemental Affidavit" in which they contend that the proceedings are void ab initio for the reason that the complaint against them was filed with the State Bar by Russell B. Seymour, as trustee in bankruptcy of the estate of Frazier McIntosh, and Thomas S. Tobin, as attorney for said trustee. Their contention is that the order of the federal court adjudicating McIntosh a bankrupt is void, with the result that the order appointing the trustee is void, and the trustee and his attorney were without right to file the complaint with the State Bar.

This contention, if established, would not invalidate the proceedings before the local committee. If Seymour and Tobin had knowledge of acts requiring disciplinary action they could file a complaint as private citizens without reference to the validity of the order appointing the trustee in the bankruptcy proceeding. The local committee, of its own motion, without the filing of a complaint, may undertake an investigation of an attorney's conduct. Sec. 34, State Bar Act, St. 1929, p. 1259, 1 Deering's Genl. Laws (1937) page 185. The committee in all cases conducts a preliminary investigation and only thereafter issues an order to show cause upon which hearing is held. *Herron v. State Bar*, 212 Cal. 196, 200, 298 P. 474.

Furthermore, the matter which Geibel and Morfoot rely on as invalidating the adjudication of bankruptcy, and consequently the order appointing the trustee, clearly would not have that effect. It is contended that the adjudication is void for the reason that the petition of the creditor upon which it was based was insufficient. The creditor who filed the petition set forth indebtedness of McIntosh to it arising from McIntosh's guaranty of notes held by it. Said petition did not allege directly that the notes remained unpaid. The failure thus to allege clearly would not warrant a collateral attack, such as here made, on the entire bankruptcy proceeding. This was a mere omission in the petition which no doubt was supplied by evidence upon the hearing leading to the adjudication.

The motion to vacate and set aside judgment is denied.

**GREENFIELD et al. v. MATHER et al.
MATHER v. SAME.**

S. F. 15890.

Supreme Court of California.

Aug. 21, 1939.

Rehearing Denied Sept. 18, 1939.

Judgment $\Rightarrow$ 564(2)

A judgment which decreed that "plaintiff take nothing by reason of his complaint" but which without mentioning third count contained recitals indicating that the word "complaint" referred only to first and second alleged causes of action while appeal from purported judgment, which was in fact void, on third count, was pending, was not a "final judgment" barring assertion of similar claims in subsequent suit.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Edna Greenfield and others, as administrators with the will annexed of Louis R. Greenfield, deceased, in interpleader, against A. W. Mather and others, to determine the right to the balance due upon an approved claim against the estate, wherein the named defendant filed a cross-complaint against Dorothy Devore Mather and others. From a judgment in favor of the cross-defendants, the cross-complainant appeals.

Reversed.

Marcel E. Cerf, Robinson & Leland, of San Francisco, for appellant.

Don Lake, in pro. per., and James R. Jaffray, of Los Angeles, for respondents.

G. J. Irwin, of San Francisco, for intervener Lewis P. White.

PER CURIAM.

On this appeal the controlling question is whether a judgment entered in a prior action, and found by the trial court to bar appellant's claims herein, was in fact a final adjudication.

The subject of the present action, one in interpleader, is the right to the sum of \$12,549.60. This fund has been deposited in court by plaintiffs. It represents the balance due upon an approved claim of de-

fendant A. W. Mather against the estate which plaintiffs are administering, and said defendant and his former wife, defendant Dorothy Devore Mather, are chief claimants to it. They joined issue by cross-complaints and answers. The wife claimed the money under the terms of a property settlement agreement or purported assignment from the husband. The husband alleged that because the agreement was made in Hawaii, where a wife is not authorized to contract with her husband, it was void and he prayed that it be cancelled. In answer to this pleading the wife averred that the validity of the agreement had been conclusively established in a prior action, and as a plea in bar she set up two purported judgments entered in her favor in said prior action.

When the present cause came on for trial, the wife objected to the introduction of evidence by the husband to support his claim on the ground that her plea in bar should first be heard. The trial court acquiesced in this view and, over objection of the husband, admitted the pleadings and papers in the prior action. The husband then adduced evidence by which he sought to show that the prior action was still pending and that no final judgment had been entered therein. The trial court, however, concluded that the prior judgment was final, and the wife's plea in bar well taken. Accordingly, it made findings and rendered judgment directing distribution of the fund to her and to those defendants claiming under her. The husband appealed.

The question whether the judgment entered in the prior action was a final judgment is determinative of the appeal. Admittedly that action presented the identical issue raised by the pleadings herein with respect to the validity of the property settlement agreement. If the judgment entered therein was final, it constituted a conclusive adjudication that the agreement was valid. If the judgment was not final, then in this cause the trial court erred in sustaining the wife's plea in bar.

A review of the record of proceedings had in the prior cause shows the following: The action, number 376,729, was filed in the Los Angeles superior court on August 3, 1934, by the husband against the former wife, the present plaintiffs and others. The complaint was in three counts. It alleged that the spouses were

married in 1925, and divorced on August 16, 1933, and that just prior to the divorce, and on June 16, 1933, in the city of Honolulu, they entered into an agreement concerning their property, in pursuance of which the husband made valuable transfers to the wife. By counts 1 and 2 the husband sought to rescind the agreement on grounds of misrepresentation, conspiracy, and fraud, and to procure a return of the property transferred thereunder. The third count pleaded that the agreement, made in Hawaii, was void and invalid by reason of a statute in full force and effect in that jurisdiction which provided that a married woman might not contract with her husband. That is, it pleaded substantially the same cause of action which was set forth in the husband's cross-complaint in the present action.

Demurrers were interposed to the third count, and finally, on December 24, 1934, after it had been thrice amended, a demurrer was sustained without leave to further amend. On January 4, 1935, a formal judgment was entered, decreeing that plaintiff husband take nothing by his third amended third cause of action. He appealed from this judgment.

The cause then proceeded to trial upon the issues joined by the first and second counts of the complaint. The trial court found for the defendants, and on March 14, 1935, judgment was entered in their favor. This is the judgment which was held in the present action to be final, and a bar to the husband's claims herein. While it decreed that "plaintiff take nothing by reason of his complaint", this order was preceded by recitals indicating clearly that the word "complaint" referred only to the first and second causes of action which had been tried on the merits. That is, by preliminary recitals both findings and judgment stated that the action had been submitted after trial "upon the issues joined by the first and second counts or causes of action in the complaint and the respective answers thereto", but neither mentioned the third count or the attempted disposition which had been made of it.

The husband appealed from the second judgment in the prior action, as he had from the first. Thus at this stage of the proceedings in that action there were two separate judgments, one on the third count and the other on the first and second

counts, and there were two separate appeals therefrom. While these appeals were pending, and on April 12, 1935, the present action was commenced by the filing of plaintiff's complaint in interpleader.

In September, 1935, in the prior action, the wife and her codefendants moved this court to dismiss the appeal from the second judgment (judgment of March 14th on first and second counts), for failure to file a transcript within the required time. The motion was granted and the appeal dismissed (L.A. No. 15481). At that time the appeal from the first judgment (judgment of January 4th on the third count) was still pending in this court, and a transcript had been filed (L.A. No. 15233). On January 18, 1936, the wife and her codefendants moved to dismiss this appeal also, on the ground that the judgment was not final, and therefore not appealable. On March 17, 1936 (*Mather v. Mather*, 5 Cal.2d 617, 55 P.2d 1174), this court granted the motion, saying: "It is evident that the cause was attempted to be disposed of piecemeal—that a single object, although stated in several counts, was sought to be attained by the action, and that this single and unseverable object was arbitrarily attempted to be split up as the basis for two distinct judgments. It is at once apparent that no final judgment was entered in the action until March 14, 1935. The judgment of January 4, 1935, was not a final judgment and is not appealable under the terms of section 963 of the Code of Civil Procedure, or otherwise. Our conclusion is fully supported by the leading case of *Gunder v. Gunder*, 208 Cal. 559, 282 P. 794, and the many cases which follow it, notably *De Vally v. Kendall de Vally*, etc., Co., 220 Cal. 742, 32 P.2d 638; *Middleton v. Finney*, 214 Cal. 523, 6 P.2d 938, and *Potvin v. Pacific Greyhound Lines*, 130 Cal.App. 510, 20 P.2d 129. The motion is granted, and the purported appeal is dismissed."

Although the above quotation refers to the judgment of March 14th as a "final judgment", that judgment was not under review, and the remark is pure dictum. This is apparent upon a reading of the opinion as a whole, for the statement of facts therein reveals that the only data before the court which might have indicated that the judgment of March 14th was of a final nature was a clerk's certificate. As a matter of fact, although the opinion did not so note, the appeal from

the latter judgment had already been dismissed at the time the decision was rendered. The effect of the decision, therefore, was to place appellant husband in this situation: His appeal from the judgment of March 14th had been dismissed, not on the ground that it was a partial judgment and hence nonappealable, but for failure to make timely filing of transcript. The judgment of January 4th had been adjudged nonappealable. Hence, if the judgment of March 14th was final, appellant had lost his opportunity of securing a review by an appellate court, either in the prior action or the present one, of the sufficiency of the allegations of his third amended third count to state a cause of action, or of the similar allegations of his cross-complaint herein—and this due to the error of the trial court in the prior action in entering the partial judgment on demurrer to one count. But, on the other hand, if both the judgment of January 4th and that of March 14th were partial, each disposing of a fraction of the case, then the prior action was still pending, and appellant was at liberty to proceed in that action, or in the present action. The course which he adopted was to file in this court, on June 5, 1936, a clerk's transcript covering the entire prior action. He had previously filed a cross-complaint in the present action. In the prior action no motion was made before the filing of the transcript last mentioned for the entry of any final or further judgment. Evidently the transcript represented an attempt by appellant to revive one or both of the dismissed appeals.

On July 7, 1936, the wife and her codefendants moved to strike the transcript (L.A. No. 15924). On the same day (L.A. No. 15481) appellant moved to correct the remittitur which had issued dismissing the appeal from the judgment of March 14th so as to show the causes of action which it affected, that is, instead of "* * * appeal from judgment dismissed", to make it read: "* * * appeal from judgment upon first and second causes of action dismissed". Appellant's point in seeking this change was to substantiate his contention that the judgment covered only the first and second counts, and hence was partial and nonappealable for the reason upon which the judgment covering the third count had been adjudicated partial and nonappealable. *Mather v. Mather*, *supra*. On the hearing this court granted both

motions—that of the wife and codefendants by striking the transcript; that of appellant by correcting the remittitur as of its original date, October 11, 1935. On August 6, 1936, a petition for rehearing was denied. On December 1, 1936, the present cause came on for trial with result aforesaid.

The above recital of proceedings had in the prior action demonstrates the error of the trial court's conclusion in the present cause that the judgment of March 14, 1935, was a final judgment. Obviously that judgment was in no better position than the judgment of January 4th. It disposed of the first two counts of the complaint, whereas the latter judgment disposed of the third count thereof. The reasoning which this court employed in determining the character of the one judgment (*Mather v. Mather*, supra) is equally applicable to fix the character of the other.

The fact that the judgment of March 14th was the second judgment to be entered did not cloak it with finality because it did not purport to embrace a final disposition of the entire cause. By express terms it was confined to only counts 1 and 2, and erroneously failed to include a recital with respect to the disposition of count 3. It did not affect count 3. The appeal from the purported judgment on that count was pending; that purported judgment, being void, was in effect no judgment. Therefore, if count 3 in fact stated a cause of action, that cause remained pending in the trial court after the entry of the judgment on counts 1 and 2.

The erroneous procedure adopted in attempting to make piecemeal disposition of the prior cause was not of appellant's instigation, and he should not be penalized for it. He at no time waived his right to object to the splitting of the action. He contended throughout that he was entitled to test the sufficiency of his third cause of action before an appellate court. To permit a litigant to deprive his adversary of an opportunity for full appeal by erroneously procuring the entry of successive purported partial judgments, and then having appeals from all save the last of said judgments dismissed on the ground that the cause should not have been split, would be unfair.

In the present cause the trial court erred in denominating the second of the two partial judgments entered in the prior action a final judgment. As in fact no final

judgment had been entered in said prior action, appellant's assertion of his claim in the present cause was not barred. The action of the trial court in sustaining the plea in bar was erroneous.

The judgment is reversed.



14 Cal.2d 150

PAINE v. STATE BAR OF CALIFORNIA.

S. F. 16097.

Supreme Court of California.

Aug. 7, 1939.

1. Attorney and client ⇐41

The falsity of allegations, contained in petition prepared by attorney for presentation to probate court for compromise of a claim, relating to ownership of instruments evidencing claim and to identity of property involved warranted taking of disciplinary measures against attorney for misleading the court by a false document.

2. Attorney and client ⇐58

The suspension for six months of attorney who had misled probate court by means of false allegations in petition for compromise of a claim was proper punishment, notwithstanding that attorney was not shown to have benefited by transaction and no one had been injured thereby.

CURTIS and EDMONDS, JJ., dissenting.

In Bank.

Petition by Willard D. Paine against the State Bar of California to review a recommendation of the Board of Governors of the State Bar that the petitioner be suspended from practice for two years.

Petitioner ordered suspended for six months.

Prior opinion, 91 P.2d 877.

Harry J. Bias, W. A. Deans, and Bert B. Snyder, all of Santa Cruz, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

On a reconsideration of this matter, we cannot conclude that the petitioner should

be absolved from all discipline, as is so earnestly sought on petition for rehearing. On the record presented the petitioner should be subjected to some substantial discipline. We are persuaded, however, that the ends of justice will be subserved by the reduction of the period of suspension from two years to six months. Accordingly, the following portion of the opinion heretofore rendered is adopted and the period of suspension reduced as indicated:

"This is a petition to review a recommendation of the board of governors of the State Bar that petitioner be suspended from practice for two years.

[1] "The charges against petitioner were the making of false allegations in a petition to the probate court for compromise of a claim, and the procuring of a conveyance of property of the estate to another client without adequate consideration. The facts advanced in support of these charges were as follows: The decedent, Louis C. Rapetta, died intestate in 1934. His son and only heir at law, Clement S. Rapetta, received letters of administration. Petitioner was attorney for the administrator. The major part of the estate consisted of real property in Santa Cruz county, a certain parcel of which was a dairy ranch. This ranch had been mortgaged in 1931 to Harry Von Bargaen to secure a two-year note for \$3,700. It was past due at the time of the decedent's death.

"Shortly after the issuance of letters of administration, Von Bargaen called on petitioner to discuss the obligation. Petitioner asserts that the mortgagee demanded payment, though Von Bargaen denies this. Petitioner thereafter consulted another client, Mrs. Theresa Mattei, and advised her that the mortgage on the Rapetta property would be a good investment for her. Petitioner then states that he communicated with Von Bargaen requesting that he place the note and mortgage in escrow preparatory to Mrs. Mattei's purchase of it; this Von Bargaen also denies.

"On October 29, 1934, petitioner prepared and filed a petition by the administrator to compromise a claim against the estate. In it he stated that Mrs. Mattei was the holder of the Von Bargaen note and mortgage; that she had made demand for payment; and that a compromise had been agreed upon whereby the property would be deeded to her in satisfaction of the mortgage. These statements were not true,

for at that time Von Bargaen still owned the note and mortgage. The petition also contained a description of the property which included a small parcel not actually included in the mortgaged parcel. The petition was heard, its allegations found true, and the court ordered the execution of a deed of the property described to Mrs. Mattei as prayed. This was done. Some time later, C. D. Stocking, a real estate broker, informed Von Bargaen of the sale, and shortly thereafter petitioner paid Von Bargaen the money due him from the funds furnished by Mrs. Mattei.

"Charges were filed against petitioner before the local administrative committee by Stocking and Von Bargaen. The first letter to petitioner by the secretary of the committee, dated July 26, 1935, declares that the substance of the charges was that the court's order was made upon misrepresentations in the petition and that 'attempts of C. D. Stocking to purchase said property as a real estate broker prior to said proceedings in said estate were frustrated by you'. After a preliminary hearing the matter was dropped. On October 27, 1937, more than two years later, a notice to show cause was issued by the committee, setting forth the same charges in more detail. Stocking and Von Bargaen were again the complainants. Another hearing was had. The report of the committee recites that Stocking 'claimed to have been deprived of the privilege of bidding on the property or finding a purchaser therefor, stating that the property was worth much more than the amount of the mortgage'. After reviewing the facts in detail, the committee found that petitioner was guilty of the false statements in the petition to compromise, and that the probate court had relied on them in making its order authorizing compromise; and 'that the effect of the proceeding was to obtain for Theresa Mattei title to the real property without following the procedure prescribed by law applicable to sales in probate, thus depriving the estate of the safeguards provided by law relating to competitive bidding'. The committee concluded that he was guilty of professional misconduct and recommended a 'public reproof' by the board of governors. The proceeding came before the board of governors, and that body recommended that petitioner be suspended from practice for a period of two years.

"Throughout the proceedings petitioner conceded that, strictly speaking, the state-

ments in the petition concerning the ownership of the note and mortgage were not true, but stated his belief that they were substantially true. He refers vaguely to the transaction as an 'escrow' in the sense that the negotiations were going forward under which Mrs. Mattei would pay the money and become the 'equitable' owner of the mortgage; and points out further that the facts were all known to the administrator and sole heir, and the transaction was entered into with his approval. With respect to the additional property deeded to Mrs. Mattei, petitioner contends that though it may not have been described in the mortgage it was considered by all parties to be a part of the mortgaged tract, and contained a water right appurtenant thereto. We need not dwell on these defenses because it seems clear that petitioner as a reasonably competent attorney must have known that these statements in the petition were not true. The specific charge of misleading the court by a false document was proved, and discipline was therefore warranted.

[2] "There remains for consideration the extent of the disciplinary measures to be taken. Petitioner contends in his defense that the complainants in the proceeding had no legitimate interest in the matter; that the parties in interest made no complaint; that petitioner was not shown to have benefited by the transaction; and that no one suffered any real injury. The local committee found: 'Apparently no one has suffered any financial loss by reason of the transaction. The administrator who is also the son and only heir appeared in court at the time of final distribution and stated that he approved all acts of the respondent done in his behalf. C. D. Stocking brought the transaction to his attention, by letter, immediately after the order was made authorizing the compromise, but the communication was referred by Rapetta to the respondent. Rapetta has not made known any complaint which he might have.'

"Nevertheless, the plan conceived by petitioner was unworthy of an ethical practitioner. Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense."

It is ordered that the petitioner be suspended from the practice of the law for a period of six months from the date of the filing of this opinion and order.

CURTIS and EDMONDS, Justices.

We dissent from that part of said order fixing the petitioner's term of suspension at six months instead of two years as provided in our previous decision. The record in this case shows the petitioner to be guilty of a most serious offense. A suspension of two years as recommended by the board of governors of the State Bar cannot, under all the circumstances of this case, be considered too severe a penalty to be imposed for such an offense.



14 Cal.2d 254

Ex parte MEANS.

Cr. 4228.

Supreme Court of California.

Aug. 24, 1939.

Rehearing Denied Sept. 21, 1939.

1. Municipal corporations $\S$ 67(1)

The state in its proprietary capacity has power to lay down the qualifications for its employees, and in doing so it acts in an exclusive field, and is not subject to the legislative enactments of subordinate governmental agencies.

2. Municipal corporations $\S$ 78, 79

The state is not bound by the provisions of a municipal charter or ordinance unless it is mentioned specifically or by necessary implication.

3. Municipal corporations $\S$ 78

Courts will not assume a legislative intention on the part of a city council to interfere with the acts of the general government.

4. Municipal corporations $\S$ 592(1)

An ordinance of Sacramento requiring every person performing labor as a journeyman plumber to procure a certificate of registration, in so far as it attempts to regulate state civil service employees, is not valid as legislation having to do with a "municipal affair." Const. art. 11, $\S$ 6, 8.

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

5. Municipal corporations — 592(1)

An ordinance of Sacramento requiring every person performing labor as a journeyman plumber to procure a certificate of registration, in so far as it attempts to regulate state civil service employees, is not valid under constitutional provision authorizing city to make and enforce sanitary and other regulations not in conflict with general laws, even though the Legislature has enacted no statute regulating plumbing, since the regulation would result in a direct conflict of authority which must be resolved in favor of the state. Const. art. 11, §§ 6, 11.

In Bank.

Proceeding in the matter of the application of E. H. Means for a writ of habeas corpus.

Petitioner ordered discharged from custody.

John J. Hamlyn, of Sacramento, for petitioner.

Earl Warren, Atty. Gen., and Jess Heslion, Deputy Atty. Gen., amici curiae.

C. C. Carleton, C. R. Montgomery, Frank B. Durkee, and Robert E. Reed, all of Sacramento, amici curiae for Department of Public Works.

Hugh B. Bradford, City Atty., of Sacramento, for respondent.

Butler, Van Dyke & Harris and B. F. Van Dyke, all of Sacramento, for respondent Chief of Police.

EDMONDS, Justice.

By a writ of habeas corpus, E. H. Means seeks his discharge from custody under a warrant of arrest issued upon a complaint charging him with a violation of an ordinance of the city of Sacramento requiring that every person performing labor as a journeyman plumber procure a certificate of registration. The petitioner alleges in support of his application that at the time of his arrest he was a civil service employee of the state of California engaged in the work of a plumber at the California State Fair grounds in the city of Sacramento and that, as such employee, the ordinance does not apply to him. These facts are not denied; therefore, the only question presented for decision is whether a state employee, working entirely on state property, may be punished for his failure to comply with the municipal requirement.

For many years there has been in effect "An act to provide for a general system, based upon investigation as to merit, efficiency and fitness, for appointment to and holding during good behavior of office and employment under state authority * *." (Stats.1913, chap. 590, p. 1035.) Under an amendment to the Constitution approved by the people in 1934 "permanent appointments and promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination." (Art. XXIV, sec. 1.) The State Civil Service Act (Stats.1937, chap. 753, p. 2085), adopted pursuant to the constitutional amendment provides in detail the method by which persons may secure and retain employment by the state. Among other requirements, the statute prescribes the following: "Eligible lists shall be established as a result of free competitive examinations open to all persons who lawfully may be appointed to any position within the class for which such examinations are held and who meet the minimum qualifications requisite to the performance of the duties of such position as prescribed by the specifications for the class or by rule of the board." (Stats.1937, chap. 753, p. 2095, sec. 81.) It is conceded that the state personnel board, which is charged with the duty of administering these provisions, certified the petitioner for the position to which he was subsequently appointed.

By its charter, the city of Sacramento is given the power "to regulate the construction of and the materials used in all buildings * * *; to regulate * * * the manner of construction and location of drains and sewers * * * the materials and methods used for piping buildings for water * * * to regulate and prescribe all methods and materials used for the plumbing of all buildings, * * * and to provide for the examination and licensing of all persons * * * who shall engage in or work at the business of plumbing. * * *" (Sacramento Charter, sec. 9, Stats.1921, pp. 1919, 1925.) Under the state constitution it may "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." (Art. XI, sec. 11.)

The ordinance which the petitioner is charged with violating provides: "It shall be unlawful for any person to perform labor as a journeyman plumber * * *

for the purpose of repairing or installing plumbing work as defined in section 1 of this ordinance unless such person first procures from the Health Officer of said city a Certificate of Registration authorizing said person to labor as such mechanic." (No. 496, 4th series, sec. 3.) To procure this certificate the applicant must submit himself for examination by the examining board as to his qualifications; he must also execute and deliver a bond of \$2,500 in favor of the city of Sacramento conditioned that the whole or part of that sum shall be paid to any person who shall suffer damage by reason of a violation of any provision of the ordinance. Admittedly, the petitioner did not secure the certificate nor file the bond required by the city.

It is petitioner's contention that the state of California has prescribed a complete method by which qualified persons may become employees in the civil service; that this legislation occupies the field exclusively and, as a result, any local ordinance prescribing additional requirements for such employees are invalid as to them. In determining the necessary qualifications for employees, says the petitioner, the state is dealing with a matter which is its exclusive field and concern, and the ordinance should not be construed in derogation of sovereignty.

As against these contentions, the respondent justifies his position under provisions of the Constitution. He asserts that under article XI, sections 6 and 8, a chartered city has the exclusive right to regulate municipal affairs; that the general regulation of plumbing within the limits of a city is a municipal affair, and that the city has exercised its right by providing in its charter that it may "provide for the examination and licensing of all persons * * * who shall engage in or work at the business of plumbing either as a master or as a journeyman plumber". (supra, sec. 9.) A second point urged is that by another section of the constitution the city has the power to enact local police regulations "not in conflict with general laws" (Art. XI, sec. 11), and that as there is no general state law on plumbing the city's ordinance must be upheld.

The constitutional amendment of 1934 and statutes relating to civil service, taken as a whole, provide a comprehensive plan for the selection of state employees after examination to ascertain their qualifications for particular positions. And al-

though the Sacramento ordinance does not purport to prescribe conditions with which one must comply before being selected by the state for a civil service position, its construction as contended for by the respondent would bring about this result. If one who has been employed by the state may not work on state property within a municipality without the consent of the municipality obtained after examination, the city has, in effect, added to the requirements for employment by the state, and restricted the rights of sovereignty.

[1-3] There can be no question concerning the power of the state in its proprietary capacity to lay down the qualifications for its employees. It acts in an exclusive field (*Atkin v. Kansas*, 191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148; *Heim v. McCall*, 239 U.S. 175, 36 S.Ct. 78, 60 L.Ed. 206, Ann.Cas.1917B, 287), and is not subject to the legislative enactments of subordinate governmental agencies. For example, it has been held that a state has no power to require employees of the United States to obtain a license to operate an automobile. "Such a requirement," said the Supreme Court of the United States, "does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed." *Johnson v. State of Maryland*, 254 U.S. 51, 57, 41 S.Ct. 16, 17, 65 L.Ed. 126. Furthermore, considering the language of the particular enactment now in question, it is a rule of statutory construction based upon sound public policy that the state is not bound by the provisions of a charter or ordinance unless it is mentioned specifically or by necessary implication. *Estate of Miller*, 5 Cal.2d 588, 55 P.2d 491; *Sunny Slope Water Co. v. City of Pasadena*, 1 Cal.2d 87, 33 P.2d 672; *Marin Municipal Water District v. Chenu*, 188 Cal. 734, 207 P. 251; *Balthasar v. Pacific Electric Ry.*, 187 Cal. 302, 202 P. 37, 19 A.L.R. 452; *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 P. 646, 23 Am.St.Rep. 451. Courts will not assume a legislative intention on the part of a city council to interfere with the acts of the general government.

Turning to the contentions of the respondent that the regulation of plumbing is a municipal affair, the rule to be applied is not entirely a geographical one. Under certain circumstances, an act relating to property within a city may be of such general concern that local regulation concerning municipal affairs is inapplicable. *Young v. Superior Ct.*, 216 Cal. 512, 15 P.2d 163; *Civic Center Ass'n v. Railroad Comm.*, 175 Cal. 441, 166 P. 351; *Key System Transit Co. v. City of Oakland*, 124 Cal.App. 733, 13 P.2d 979. For example, where one of the city's streets has been declared by an act of the legislature to be a secondary highway, the improvement of that street is not a municipal affair within the meaning of the Constitution. *Southern California Roads Co. v. McGuire*, 2 Cal.2d 115, 39 P.2d 412. Also, regulations prescribed by charter or ordinance of a city requiring that the work of altering and improving buildings be subject to local supervision have been held inapplicable to state buildings. *City of Milwaukee v. McGregor*, 140 Wis. 35, 121 N.W. 642, 17 Ann.Cas. 1002.

In the case of *Kentucky Institution for Education of Blind v. City of Louisville*, 123 Ky. 767, 97 S.W. 402, 404, 8 L.R.A., N.S., 553, the city attempted to enforce an ordinance relating to fire escapes with respect to a state institution for the blind. The court held the ordinance inapplicable, stating: "The principle is that the state, when creating municipal governments, does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control. The municipal government is but an agent of the state—not an independent body. It governs in the limited manner and territory that is expressly or by necessary implication granted to it by the state. It is competent for the state to retain to itself some part of the government even within the municipality, which it will exercise directly, or through the medium of

other selected and more suitable instrumentalities. How can the city have ever a superior authority to the state over the latter's own property or in its control and management? From the nature of things it cannot have."

[4,5] The second point urged by the respondent is that by article XI, section 11, of the Constitution, the city is given power to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws". This provision is in addition to section 6 of the same article, adopted in 1914, which makes the ordinances concerning municipal affairs enacted by charter cities paramount to the general laws of the state. *Civic Center Ass'n v. Railroad Comm.*, 175 Cal. 441, 166 P. 351. But as the challenged ordinance, insofar as it attempts to regulate employees of the state, is not legislation having to do with a municipal affair, it cannot be upheld under the earlier provision of the Constitution if it conflicts with the general law.

Although the legislature has enacted no statute regulating plumbing, if the city's ordinance is a valid exercise of power, then one whom the state has examined and found eligible for employment as a plumber and who has later entered the state civil service, may be unable to work on state property because he cannot pass the examination of a city health officer or licensing board. The result is a direct conflict of authority. Either the local regulation is ineffective or the state must bow to the requirement of its governmental subsidiary. Upon fundamental principles, that conflict must be resolved in favor of the state.

It is, therefore, ordered that the petitioner be discharged from custody.

We concur: SHENK, J.; HOUSER, J.; CURTIS, J.; SPENCE, Justice pro tem.

GENOLA v. BARNETT et ux.**S. F. 16236.****Supreme Court of California.****Aug. 18, 1939.****1. Automobiles ⇨217(3, 6)**

The statute requiring pedestrian crossing roadway at point other than within crosswalk to yield right of way to vehicles does not constitute prohibition against crossing roadway other than at intersection, but requires only that pedestrian shall yield right of way. Vehicle Code, § 562, St.1935, p. 188.

2. Automobiles ⇨217(3)

In action for injuries received by pedestrian when struck by automobile while attempting to cross street at night between intersections, one of which only was controlled by traffic signals in city which had enacted no ordinance governing crossing of streets at point other than at intersection in residential districts, case was governed by general law as found in Vehicle Code. Vehicle Code, §§ 562, 563, St.1935, p. 188.

3. Automobiles ⇨217(6)

Under statute requiring pedestrian crossing street at point other than at crosswalk to yield right of way to vehicles on roadway, a pedestrian who ventures on the highway need not flee at the sight of an approaching vehicle, but must merely defer to the driver of the vehicle and permit the machine to pass ahead of him. Vehicle Code, § 562, St.1935, p. 188.

4. Automobiles ⇨217(6)

A pedestrian who, before venturing into street between intersections in residential district, stopped and looked in direction from which traffic would come and stopped after entering street and took one step backward to permit approaching automobile to pass, complied with statute requiring pedestrian crossing roadway at point other than at intersection or crosswalk to yield right of way to vehicles on roadway. Vehicle Code, § 562, St.1935, p. 188.

5. Automobiles ⇨245(43, 55, 59)

In action for injuries received by pedestrian who was struck by automobile traveling in excess of speed limit in residential zone after pedestrian had started to cross street between intersections and after having taken step backward had stopped about eight feet from curb, questions whether ac-

cident was due to speed at which motorist was driving, the visibility, or failure to observe pedestrian, and whether speed of motorist was under the circumstances a negligent rate of speed, were for jury. Vehicle Code, § 562, St.1935, p. 188.

6. Automobiles ⇨168(2)

A speed in excess of limit set forth in statute does not constitute negligence per se.

7. Automobiles ⇨245(72, 90)

In action for injuries received by pedestrian who was struck by automobile traveling in excess of speed limit in residential zone after pedestrian had started to cross street between intersections and had taken step backward and stopped about eight feet from curb, questions whether pedestrian was contributorily negligent and whether her negligence was proximate cause of injuries were for jury. Vehicle Code, § 562, St.1935, p. 188.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Lena Genola against Arthur A. Barnett and wife for injuries received by plaintiff when struck by defendants' automobile. Judgment for defendants, and plaintiff appeals.

Reversed.

For prior opinion, see (Cal.App.) 87 P. 2d 868.

Ingemar E. Hoberg and George J. Zech, both of San Francisco, for appellant.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondents.

PULLEN, Justice pro tem.

This is an action for personal injuries to plaintiff who was struck, as she was attempting to cross a street between the intersections in a residential district in San Francisco, by a car owned by defendant Arthur A. Barnett and operated at the time by his wife.

At the close of plaintiff's case, a nonsuit was granted on the ground that, as a matter of law, defendant, the operator of the car, was not guilty of negligence, and that plaintiff was guilty of contributory negligence. From this order for nonsuit and the judgment entered thereon this appeal was taken.

Reviewing the evidence in the light of the well-known principles governing nonsuit, the record discloses that, about 6 o'clock in the evening of February 3, 1938, the weather being clear and the street well lighted, plaintiff, a woman about sixty-two years of age, left her apartment on the north side of Pacific avenue between Franklin and Gough streets, and walked west on Pacific avenue approximately thirty feet to a point almost directly opposite a store on the south side of the avenue toward which she was making her way. She stepped off the curb, and proceeded about eight or nine feet into the street, looking easterly toward Franklin, stopped, took a step back, and was struck by the car driven by Mrs. Barnett, causing the injuries here complained of. Mrs. Barnett, just prior to the accident, was traveling west on Pacific avenue. She had stopped for a traffic signal at Franklin and Pacific, and was proceeding between thirty and forty miles an hour along Pacific when she struck plaintiff.

Three eye-witnesses testified for plaintiff. Two were employees in the store, and the third was sitting at an upper window of his apartment on the south side of Pacific avenue, and perhaps seventy-five feet east of the store. One of these witnesses testified he saw plaintiff leave her apartment and walk westerly on the sidewalk to a point opposite the store. He saw her glance first to the west and then quickly to the east as she stepped off the curbing. She continued to look easterly, or toward her left, and when she reached a point eight or nine feet from the curb she stopped, stood still, and then took a step about a foot and a half backward. As plaintiff was in the act of stepping back, the witness looked toward the east and saw defendant's car about forty or fifty feet away traveling toward plaintiff at a rate of between thirty and forty miles an hour. The car of defendant did not swerve, but proceeded in a straight course and, after striking plaintiff, came to a stop about sixty feet from the point of impact. This witness also testified that there was no other traffic on the street, that the street was well lighted, and that immediately after the accident he heard defendant state that she was at fault.

A second witness testified that there were no parked cars along the curb immediately to the left, or east, of plaintiff where she left the curb; that plaintiff

stopped at the curb before stepping off, and when about eight feet into the street stopped again. No cars were previously within view of this witness, but at that instant the witness saw the car of defendant approaching from the east about sixty or eighty feet from plaintiff, traveling between thirty-five and forty miles an hour.

The third eye-witness testified that after the impact plaintiff was lying in the street about eight feet from the curb; that there were no parked cars where plaintiff left the curb, and that the car of defendant traveled about forty feet after striking plaintiff, and came to a stop.

The foregoing is a brief narration of the facts as revealed by the record. The question for determination is whether or not these facts justified the granting of the nonsuit. The accident, as already noted, occurred in a residential zone in San Francisco where the legal rate of speed for an automobile is not in excess of twenty-five miles an hour. At the intersection of Pacific avenue and Franklin street the traffic on Pacific avenue was controlled by a traffic signal device; but at the next intersection, that is, at Gough and Pacific, there was no such traffic control. This is important in the light of section 563 of the California Vehicle Code, St.1935, p. 188, which provides: "Pedestrians at Controlled Intersections. (a) At intersections where traffic is controlled by a traffic control signal device or by police officers, pedestrians shall not cross the roadway against a red or stop signal. (b) Between adjacent intersections so controlled pedestrians shall not cross at any place except in a crosswalk."

[1] The general provision governing the crossing of a street at a point other than at an intersection or crosswalk is found in section 562 of the Vehicle Code, which provides: "Crossing at Other Than Crosswalks. (a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. (b) The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway." The first thing to be noticed in this section is that it is not a prohibition against crossing a roadway other than at an intersection, but only that the pedestrian shall yield the right of way.

[2,3] The city of San Francisco has enacted no ordinance covering this subject applicable to residential districts, and this case must be governed by the general law as found in the Vehicle Code. What is there meant by yielding the right of way is discussed in *Mitrovitch v. Graves*, 25 Cal.App.2d 649, 78 P.2d 227, which holds that a pedestrian who ventures upon the highway need not flee at the sight of an approaching vehicle, but must merely defer to the driver of the vehicle and permit the machine to pass ahead of him.

[4] In the instant case, it would seem that plaintiff did everything required of her to be done. Before venturing into the street, she stopped and looked in the direction from which traffic would come. She stopped to permit the car of defendant to pass, thereby complying with the rule expressed in *Mitrovitch v. Graves*, supra. In fact, she did even more—she not only stopped, but took at least one step backward.

[5] Pacific avenue between the blocks in question was thirty-eight feet nine inches from curb to curb. There was therefore approximately eleven feet of unobstructed highway between plaintiff and the center line thereof over which defendant could have traveled to have avoided striking plaintiff. Whether this accident was due to the speed at which defendant was driving, the visibility, or failure to observe plaintiff upon the highway, were matters which should have been considered by a jury.

In support of this judgment considerable reliance seems to have been placed upon the case of *Chase v. Thomas*, 7 Cal.App.2d 440, 46 P.2d 200. The distinguishing fact in that case, however, is clearly pointed out in *Mitrovitch v. Graves*, supra, where it is said, 25 Cal.App.2d at page 655, 78 P.2d at page 231: "In that case the plaintiff did not yield the right of way. He failed to stop for an approaching machine to pass ahead of him. He deliberately continued on his way and stepped into the very pathway of the machine, without warning. The driver was powerless to stop and avoid the collision."

Another case urged as controlling was that of *Meincke v. Oakland Garage*, 11 Cal.2d 255, 79 P.2d 91. There, plaintiff was governed by an ordinance which contained a positive prohibition against a pedestrian crossing at the point involved.

As previously noted, there is here no other prohibition than that found in the Vehicle Code.

Several of the cases relied upon by the respondents are considered in the case of *Brannock v. Bromley*, 30 Cal.App.2d 516, 86 P.2d 1062, 1067, and we need not here repeat what is there said beyond restating that "The duty of a pedestrian to 'yield' the right of way while crossing a street other than at a regular crosswalk, as imposed by section 562 of the Vehicle Code, * * * may call for a higher degree of care upon the part of such pedestrian than would be applied to one crossing at a regular crosswalk, but the question as to whether or not such care was exercised in a given case is one for the jury, unless he is so careless that it can be said he is negligent as a matter of law."

In *Varner v. Skov*, 20 Cal.App.2d 232, 67 P.2d 123, the deceased was crossing a county roadway where there were no designated crosswalks. She hesitated at the curb, then stepped into the street. Defendant swerved to the left to avoid the accident, but failed. Defendant, appealing from a judgment against him, claimed the trial court erred in refusing to hold as a matter of law that he was not guilty of negligence, but it was held that section 131½ of the Vehicle Code, St.1931, p. 2127, now section 562, did not give the driver of the car an absolute right of way without regard to the surrounding circumstances, and whether a reasonably prudent person would have crossed at the particular time and place depended upon a number of things, such as the distance and speed of the approaching car, and was a question for a jury.

In *White v. Davis*, 103 Cal.App. 531, 284 P. 1086, it is said, 103 Cal.App. at page 542, 284 P. at page 1091: "There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or seeing one, erroneously misjudges its speed or distance, or for some

other reason assumes he could avoid injury to himself, the question is usually one for the jury."

[6] It is to be recalled also that at the time of the accident respondent was exceeding the speed limit and, while a speed in excess of the limit set forth in the code does not constitute negligence per se, the jury was entitled to say whether or not the speed of defendant was, under all the circumstances, a negligent rate of speed. This rule is stated in Cal.Jur.Supp. 2, Automobiles, at page 406, as follows: "Although the statute requires the pedestrian, in crossing a roadway at a point other than a crosswalk, to yield the right of way to an oncoming vehicle, nevertheless, a recovery is sustainable where it appears that the defendant's vehicle was being operated at excessive speed. The requirement, so it is expressed, does not relieve the driver of the statutory obligation of operating his vehicle at a speed which is 'careful and prudent' and not such as to endanger 'life, limb or property.'"

[7] Not only did the trial court hold in the case at bar, as a matter of law, that plaintiff was contributorily negligent, but that her negligence was, per se, the proximate cause of her injury. Here, plaintiff was standing in the street, according to one eye-witness, about ten or twelve seconds. She then stepped back, at which time the car was not within an approximate eighty-foot range of vision of the witness. When defendant failed to see what was plainly visible, failed to slacken her speed, and failed to swerve her car a few inches to avoid striking plaintiff who had yielded the right of way, it cannot be said that, as a matter of law, the negligence of plaintiff was the proximate cause of her injury. *Griffiths v. Crawford*, 10 Cal.App.2d 543, 52 P.2d 548; *Arnaz v. Forbes*, 51 Cal.App. 665, 197 P. 364.

One of the results of the injury suffered by plaintiff, as is often the case in a head injury, was the inability to recall any of the events immediately before or after the accident, and she was, therefore, unable to testify. Under these circumstances, plaintiff claims she can rely upon the presumption that she was using due care. Inasmuch, however, as the direct evidence is sufficient to justify the submission of this cause to a jury, we need not now pass upon this question. And for the same reason it is likewise unnecessary to consider the doctrine of last clear chance.

Without further elaboration, we believe the trial court here erred, and the order and judgment must be reversed. It is so ordered.

We concur: EDMONDS, J.; SHENK, J.; CURTIS, J.; HOUSER, J.



14 Cal.2d 196

TEATER et al. v. GOOD HOPE DEVELOPMENT CORPORATION et al.

L. A. 16480.

Supreme Court of California.

Aug. 17, 1939.

1. Fixtures $\hookrightarrow$ 5

Machinery used in working or developing a mine is deemed to be affixed to the realty comprising the mine. Civ.Code, §§ 660, 661.

2. Fixtures $\hookrightarrow$ 21

Articles annexed or structures erected by a purchaser in possession who has not yet obtained title cannot ordinarily be removed without vendor's consent, in view of presumed intent that the structures or articles should be part of the land.

3. Fixtures $\hookrightarrow$ 27(1)

The statutes defining fixtures are subject to the exception that parties themselves may, in dealing with chattels annexed to or used in connection with realty, fix upon them whatever character, as realty or as personalty, that they desire. Civ.Code, §§ 660, 661.

4. Fixtures $\hookrightarrow$ 27(1)

Under contract for purchase of mine, providing that "appurtenances, and all buildings and other improvements" should be forfeited to vendors in event of default, and that machinery and equipment could be removed by purchaser in absence of default but should be deemed security for payment of installments, certain appurtenances, buildings and other improvements became fixtures, but other machinery and movable tools did not necessarily become part of the realty. Civ.Code, §§ 660, 661.

5. Fixtures ⇨21

Property constituting fixtures belongs to vendor in event of default by purchaser, and purchaser or purchaser's creditor cannot remove it.

6. Fixtures ⇨35(1)

Where a fixture annexed to a freehold is tortiously severed, right of immediate possession is created and owner of realty may, at his option, treat the fixture as personalty and recover it in replevin.

7. Replevin ⇨8(4)

The right to immediate and exclusive possession of the property at time of commencement of action is a prerequisite to maintenance of replevin, and existence of preliminary act or condition precedent to be performed precludes maintenance of the action.

8. Action ⇨65

An after-acquired interest will not support replevin.

9. Chattel mortgages ⇨1

Where the purpose and effect of a transaction is to create a lien on specific personalty as security for the payment of a debt, there is a "mortgage" irrespective of the language used.

[Ed. Note.—For other definitions of "Mortgage," see Words & Phrases.]

10. Chattel mortgages ⇨129

Even though the parties agree to the contrary, where the relation of the parties is that of debtor and creditor and property transferred is regarded as security for payment of the debt, there is no transfer of title.

11. Chattel mortgages ⇨158

Ordinarily, with some possible exceptions, a mortgagee is not entitled to possession of the property unless authorized by express terms of the mortgage. Civ.Code, § 2927.

12. Fixtures ⇨35(2)

In replevin by vendors of mine to recover machinery, tools, and equipment removed from mine by purchaser after default, evidence held to authorize findings that certain machinery placed upon the premises by purchaser was merely mortgaged, by virtue of contract provision that unattached and movable equipment should be

considered additional security, rather than part of the realty.

13. Appeal and error ⇨1008(3)

Where trial court's construction of an instrument appears reasonable and consistent with the party's intent, appellate courts will not substitute another interpretation, though it seems equally tenable.

14. Fixtures ⇨35(2)

In replevin by vendors of mine against purchasers after default, evidence held to establish that windows removed from mill building were part of the realty, and hence that vendors had right of possession thereof. Civ.Code, §§ 660, 661.

15. Chattel mortgages ⇨61, 63, 84, 155

Where chattel mortgagees did not comply with statutes governing affidavit of good faith, acknowledgment, and recording, the mortgage was valid between parties and persons who, before parting with value, had actual notice thereof. Civ.Code, §§ 2957, 2973.

16. Chattel mortgages ⇨61, 63, 84, 129, 155

Where chattel mortgagees did not comply with statutes governing affidavit of good faith, acknowledgment, and recording, they obtained a lien as against the mortgagors and subsequent purchasers with notice, but could not become absolute owners before foreclosure of the lien. Civ.Code, §§ 2957, 2973.

17. Replevin ⇨103(1)

To support judgment quieting title to defendants in replevin, trial court should make findings concerning defendants' knowledge of plaintiffs' chattel mortgage, and concerning actual possession of the property.

18. Appeal and error ⇨1178(6)

Replevin ⇨103(1)

Where evidence in replevin action showed conclusively that the admission in the answers that sheriff took possession of all the property was not correct, and it was not clear what became of property not described in judgment rendered on cross-complaint against plaintiffs, such judgment must be reversed and cause remanded for determination of what became of the property, and of cross-complainant's notice of plaintiffs' lien before cross-complainant parted with value. Civ.Code, § 2973.

19. Replevin ⇨10

In replevin action, possession by defendants is a necessary prerequisite.

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Velna N. Teater and another against the Good Hope Development Corporation and others, to obtain possession of described property, wherein defendant Dill Lumber Company filed a cross-complaint to recover possession. From an adverse judgment, plaintiffs appeal.

Affirmed in part, and reversed in part, with instructions.

Prior opinion, 86 P.2d 673.

Newby & Newby, Dee Holder, and Nathan Newby, all of Los Angeles, for appellants.

Best & Best and Eugene Best, all of Riverside, and Alford P. Olmstead, Welburn, Mayock, and Mayock & Lester, all of Los Angeles, for respondents.

PER CURIAM.

The appeal in this case was originally heard by the Fourth District Court of Appeal. 86 P.2d 673. Following a decision by that court, a petition for hearing by this court was granted. Consideration of the several points of law that have been presented by the respective parties to the litigation has resulted in a conclusion that the appeal was correctly decided by the District Court of Appeal. Its opinion rendered therein, which was prepared by Mr. Justice Griffin of that court, is therefore adopted by this court as its own. It is as follows:

"Velna L. Teater was the owner of certain real property known as the 'Good Hope Mine', situated in the county of Riverside. M. M. Teater is the husband of Velna L. Teater. On June 1, 1933, these appellants, as husband and wife, entered into a written contract for the conditional sale of this property to Clifford H. Marker. This contract was duly recorded September 13, 1934. Under its terms, among other things, it was provided that Marker should pay to appellants for this property the sum of \$55,000, payable \$3,500 upon the execution of the contract and the balance in specified monthly instalments; that title to the property should remain in Mrs. Teater until the full purchase price should be paid, at which time she would be required to deed the property to Marker. A given percentage of all ore was to be reserved to the seller, together with a 10 per cent royalty. Mar-

ker was to have possession of the property and retain it so long as he should 'fully perform each, every and all the terms, covenants and conditions of the within contract'. It was further provided that he should pay all bills and prevent any and all liens of mechanics and materialmen from being filed against the property; that time should be the essence of the agreement, and upon the violation of any of the covenants or conditions of the contract it should, at the option of the seller, terminate; that upon such violation the seller should be released from all obligations in law and equity, to convey the property, and the property '*and the appurtenances, and all buildings and other improvements shall become forfeited to second parties*'; that 30 days' notice should be given to Marker of the sellers' intention to exercise the option to terminate; that he should, upon the termination of the contract for 'any cause' execute and deliver to seller, Velna L. Teater, a quitclaim deed; and deliver to her quiet and peaceable possession of the premises. Paragraph 15 of the contract provides that upon its termination, '*all machinery and tools and other unattached and moveable equipment* which may be placed upon said premises by first party may be removed therefrom within forty-five days after the termination of the within agreement, provided, however, that no such tools or machinery shall be removed while first party may be in any manner indebted to second parties for past instalments due under the obligation of the within contract, and such machinery and equipment shall be deemed security for the payment of such instalments'.

"After execution of the contract Marker entered into possession of the premises. Thereafter the contract was assigned to respondent Good Hope Development Corporation (hereinafter referred to as the Development Corporation), which proceeded to attempt the mining of the property and the performance of the terms of the contract. The assignment of this contract was followed by a period of expansive and expensive development which resulted in placing on the property by the corporation of certain improvements, buildings, machinery and equipment. In the year between June, 1933, and June, 1934, the respondent Dill Lumber Company furnished certain lumber and materials to the Development Corporation and at different times the respondent Bank of Perris loan-

ed money to it. At the time of the assignment and subsequent thereto, Marker was the secretary of the Development Corporation.

"On July 1, 1935, an instalment of the purchase price in the amount of \$5,000 became due and payable and the purchasers were unable to make this payment. On July 3, 1935, appellant Mrs. Teater served respondents Marker and the Development Corporation with notice to pay this instalment within 30 days or she would terminate the contract if the payment was not made.

"On August 1, 1935, the respondent Development Corporation filed in the superior court of Riverside county a petition under the California State Moratorium Act, Stats. 1935, p. 1208. A hearing was had upon the petition and on November 14, 1935, that court made an order granting it nine months' extension of time to make the instalment payments on the purchase price under the contract.

"Under the terms of this order the Development Corporation was permitted to remain in possession of the property and to mine it in a certain way and appellants were prevented from taking possession of the property or terminating the contract, 'while said petitioners are complying with the terms and conditions of this order, and until the further order of this court, but in no event *not later* than February 1, 1937'. Respondent Development Corporation was also required to pay to appellants \$250 per month upon the instalments of the purchase price, 8 per cent interest upon the unpaid instalments and an 8 per cent royalty. The purchasing parties remained in possession of the property, by virtue of this order, until June 30, 1936.

"While in possession of the property under this order, the purchasers failed to comply with its conditions and terms in many respects. They failed to pay appellants the monthly instalments of \$250 for all months subsequent to March, 1936. They failed to pay the royalties due for the months of May, June, and July, 1936. They failed to pay their laboring men and in June, 1936, were indebted to them in the sum of \$900. Marker advised the unpaid laborers to file claims for liens against the property, which they did. The Development Corporation ceased actual work on the mine by June 11, 1936. On June 18, 1936, the purchaser was indebted to appellants under the terms of the con-

tract (but not under the court order) in an amount in excess of \$18,000 for instalments past due and about \$400 for royalties which they failed to pay over to appellants. On June 18, 1936, there was located on the premises a building, certain machinery, and equipment consisting in general of a mill erected upon the property by the purchaser and his assignee, together with the necessary machinery and equipment used in milling the ore obtained from the property.

"Plaintiffs and appellants in their complaint allege that they are entitled to the possession of the following described property and seek return thereof: 'windows from corrugated iron mill building, 1 jaw crusher—14 in., 1 conveyor belt—14"—200 ft., 1 marathon rod mill—4 x 8, 1 feeder and ½ HP motor, 9 amalgamation plates, 1 classifier, 1 Torster-flotation bell, 1 Plato concentrator, 1 flotation blower, 1 regrind barrel, 1 reagent feeder, 1 25-HP motor, 2 5-HP motor, 1 50-HP motor, 3 3-HP motor, 1 motor for regrind barrel, 2 15-HP motors in supply house, all machinery belts and pulleys, 1 electric hoist and cable, 1 Ingersoll-Rand compressor, 3 ore lears, 1 skip, 2 Denver hammers, 1 Cochisestoper, 1 Cameron pump, 1 Ingersoll-Rand motor pump, 1 American centrifugal pump, 1 circular saw and mantle and motor, 1 7½HP motor on reservoir, 1 15-HP motor in mine, 1 40 HP motor on compressor, 1 Auto-Car dump truck, 1 Kissel truck, ⅞ in. drill steel, shovels, picks, around 1200 ft. of track, estimate of about 1500 ft. of 1 in.—1½ in.—2 in.—2 in. 2½ in. and 2 in. pipe, 1 blacksmith shop, complete; following from assay office: 1 pr. button balances, 1 pr. pulp balances, 1 steel safe, 1 assay furnace, 1 Braun pulverizer, 1 jaw crusher, 1 muffle burner, 1, 2 or 3 HP motor and belt, 3 tables, cooking utensils, dishes, 1 General Electric refrigerator, 6 steel cots and mattresses, 1 3-burner coal-oil stove, 2 tables, 2 benches, * * *.' (The method of the affixation of this machinery and equipment will be discussed later.)

"All of respondents, by their various answers, admit that the sheriff, Carl Rayburn, by virtue of the writ of attachment, took into his possession on June 24, 1936, the property '*described in plaintiff's complaint*' and '*sold the same*' under the writ of execution to the Dill Lumber Company, which now has possession thereof; that at the time of the taking, the Good Hope De-

velopment Corporation was in possession of said property.

"Commencing on June 18, 1936, and continuing over the week-end holidays, the above-described equipment was claimed to have been removed from the premises by direction of Mr. Marker and stored in warehouses in the town of Perris for the Development Corporation. These warehouses were under the control of the Bank of Perris. There is a dispute as to the reason for the removal of the property. Marker testified that he was fearful that the equipment might be stolen while the mine was shut down; that he discussed the matter of the removal of the machinery with Teater.

"Appellants claim that they had no notice that the equipment was to be removed from the mining property. Removal of these fixtures and equipment was completed on Sunday, June 21, 1936. On the evening of this day, Mr. Teater claims that by chance he visited the mining premises and saw the last of the machinery being removed and that he registered an objection with the person hauling the same away and was told that the only thing that could stop the removal would be a court order. On June 22, 1936, Mr. Teater and one of his attorneys went to look for the machinery and upon inquiry of a Mr. Stewart, president of the respondent bank, they were told that he (Stewart) had arranged to pay the man for the work in removing the machinery to his warehouses. Stewart, however, denies such arrangement at the time stated. Teater then informed Stewart that the contract between Marker and Mrs. Teater prohibited the severance and removal of the machinery and that the removal thereof was wrongful.

"On June 23, 1936, an action was commenced in the name of the Dill Lumber Company against the Good Hope Development Corporation wherein the plaintiff sought to recover, in its first cause of action, the sum of \$773.68 for materials supplied to Marker, James M. Hyde and Fred E. Keller, between the dates of July 22, 1933, and June 21, 1934. In its second cause of action it sought to recover the sum of \$2,400 upon the note of the Development Corporation, assigned to it by the respondent Bank of Perris. In its third cause of action it sought to recover the sum of \$1,450, on account of a bill for legal services claimed to have been ren-

dered to the Development Corporation by Alford P. Olmstead and assigned to the Dill Lumber Company by said attorney. It is to be noted that Mr. Olmstead was attorney for the Development Corporation and Mr. Marker during the transactions related. A fourth cause of action sought recovery of the sum of \$100, being a bill for legal services claimed to have been rendered by the respondent Eugene Best, which bill was also assigned to the plaintiff in said action. Best made this charge for representing the Development Corporation in the moratorium proceedings wherein the contract of purchase above mentioned was thoroughly discussed. As a fifth cause of action, the plaintiff sought to recover the sum of \$2,633.42 for an alleged debt owing from the Development Corporation to Maude C. Marker, the mother of respondent Clifford H. Marker. On June 23, 1936, a writ of attachment was, at the direction of Mr. Best, attorney for the Dill Lumber Company, issued in that action and levied upon the machinery stored in the warehouses. The defendant Development Corporation filed no answer to the complaint but permitted its default to be taken and a judgment entered in the action for the full amount claimed in the prayer. No third party claim was filed by appellants but on June 27, 1936, the respondents Marker, Good Hope Development Corporation, Dill Lumber Company, Best, Olmstead, Mrs. Maude Marker and the Bank of Perris were notified in writing of the claim of the appellants that the removal of the machinery from the mining property was wrongful and a demand was made upon each of them to return the machinery or relinquish their claims thereto.

"On July 11, 1936, an execution sale was held at the direction of Mr. Best, upon the default judgment and the property was purchased at the execution sale by the Dill Lumber Company. Best, Olmstead and Marker attended the sale.

"Mr. Stewart of the Bank of Perris testified that no consideration was paid by the Dill Lumber Company for the note, but that it was understood in reference to the assigned claims that if the attachment was made, the Lumber Company would sell the machinery and divide the proceeds among the various claimants named in the attachment suit.

"On July 17, 1936, the appellants notified the Development Corporation and Marker

that they were in default under the contract of purchase and demanded a performance thereof within 30 days or, upon failure to perform, a forfeiture of the contract. Those respondents failed to comply with the terms of the contract and on August 24, 1936, they were served with formal notice of the forfeiture. At the time this last notice was served, the nine months' period of extension granted by the moratorium order had expired.

"On June 30, 1936, appellants filed this action alleging generally that they were the owners and entitled to the possession of the property described and that the defendants wrongfully and without right 'severed from said real property and removed therefrom all of said property'; that all of them were in wrongful possession of the property and were detaining the possession of it against the will of plaintiffs who were entitled to a return of the property or in lieu thereof, damages, both compensatory and exemplary.

"The respondents answered and denied generally and specifically the allegations of the complaint, except as hereinafter mentioned. Respondent Dill Lumber Company filed a cross-complaint to quiet title to the property sold under the attachment proceeding.

"The trial court found that 'It is not true that said property (fixtures) or any part or portion thereof is now or ever was affixed to the real property known as the Good Hope Mine hereinbefore described, so as to become a part thereof.'

"Appellant attacks this finding and claims that it is not supported by and is contrary to the evidence.

"There is some conflict as to the facts in reference to the manner of affixation and the uses to which the various articles were put. The witness Marker testified generally that the mill was placed in a rather substantial mill house that was built over it afterwards; that the building had certain mud sills on top of an old stone wall, certain mud sills on the ground, and that the building built thereon was just framework of 2 x 4's; that in the center of the building there were some 8 by 8 posts; that the building was covered with a corrugated iron roof and corrugated iron sides and had windows in it; that the dimensions of the building were 60 x 70 feet and about 8 to 10 feet in height; that the rod mill was composed of about three fixed parts and about a half dozen moving

parts; that there was a base upon which the other fixed parts sat and the base sat upon the top of a concrete block 10 by 15 feet in dimensions and about 8 feet deep; that the mill was fastened to these cement blocks by bolts and nuts; that the mill was placed there originally to mill certain values out of the dump of the Good Hope Mine, and afterwards they milled whatever ore there was in the mine to mill; that a 60-cycle, 3-phase, 440-volt electric motor drove the mill and it sat upon a block on top of the floor; that all the other machinery in the millhouse was affixed differently; that the concentrating table was set upon some rocking arms that were set upon three little concrete pillars; that the amalgamation plates rested upon wooden tables, the legs of which were nailed to the platform; that the tables were pretty heavy; and that the blower sat on a little concrete block about 2½ by 3 feet and one-foot thick, and it was bolted to the little block.

"One witness testified that all of the machinery in the millhouse constituted a connected and inter-related milling system and that if one machine was taken out, such as the table or plates, the whole mill would be shut down, because the values would be gone; that it was an entire operating unit.

"The witness Marker testified that there was no relationship between the various parts that were removed and that they were in no way fastened one to the other.

"The trial court, after hearing the evidence, made certain additional findings, i. e., (1) that the plaintiffs were not at any time the owners of or entitled to the possession of the property described in their complaint; (2) that a portion of the property was used in working and developing the mine; (3) that none of the defendants ever took possession of the property except as heretofore related by them; (4) that since the 11th day of July, 1936, the Dill Lumber Company has been in possession of said property; (5) that plaintiffs, prior to the commencement of this action, never demanded that respondents deliver the property to them; (6) that no part or portion of the property was ever affixed to the real property or severed therefrom; (7) that plaintiffs were not in possession of the real property at the time of the commencement of this action, but the Development Corporation and C. H. Marker were. The court then found that the Dill

Lumber Company was the owner of and entitled to the possession of the following described property which was removed from the mining premises:

"1 Jaw crusher—14 in.
 1 Conveyor belt—14"-200 ft.
 1 Marathon rod mill—4 x 8
 1 Feeder and ½ HP motor
 9 Amalgamation plates
 1 Classifier
 1. Torster-flotation bell
 1. Plate concentrator
 1 Flotation blower
 1 Regrind barrel
 1 Reagent feeder
 1. Ingersoll-Rand motor pump
 1 Circular saw and mantel and motor
 1 40 HP motor compressor
 1 Braun pulverizer
 1 Muffle burner
 1 25 HP Motor—2 HP Motors
 1 50 HP motor—3 3 HP motors
 1 Motor for regrind barrel
 2 Motors 15 HP
 1 Electric Hoist and cable
 1 Ingersoll-Rand compressor
 3 Oar lears
 1 Skip
 2 Denver hammers
 1 Cochise-Stoper
 1 Cameron pump
 1 American centrifugal pump
 1 15 HP motor
 1 Jaw crusher
 Quantity of odds and ends, mining equipment
 Odd lot of tools, shovels, and pipe, etc.'

"And entered judgment quieting title to this property in the Dill Lumber Company, decreeing that appellants had no right, title or interest in any of the property. It is to be noted from a comparison that the list of equipment claimed and described in appellants' complaint and admitted by the answers to have been removed differs materially from the list of articles described in the decree. From the pleadings it would appear that the Dill Lumber Company is now in possession of many of the articles not mentioned therein, such as 'windows from the corrugated iron mill building', which clearly seems to have been a part of the realty; also one Kissel truck; one Autocar Dump; 1200 feet of track; 1500 feet of pipe; one steel safe; one blacksmith shop complete; one General Electric refrigerator; and many other items. However, the certificate of the

sheriff received in evidence discloses a list of articles taken by him under the writ of attachment and sold, which compares closely with the list of articles set forth in the decree. From a study of the record, which contains about 485 pages, we are able to discover that the Autocar Dump Truck was left with Mr. Bert Stewart, the Kissel Truck was not taken from the property, and the 1200 feet of track was left at the mine, as well as the ore cars and skip, most of the pipe, some of the blacksmith shop equipment, a table, six steel cots and bedding and boarding house equipment. The General Electric refrigerator was left in Elsinore.

[1,2] "The real property involved in this action was mining property. Where this is the case, the machinery which is used in working or developing the mine is deemed to be affixed to the mine. *Malone v. Big Flat Gravel Mining Co.*, 76 Cal. 578, at page 583, 18 P. 772; Civ.Code, secs. 660 and 661. Articles annexed or structures erected by a purchaser of land who is in possession by virtue of his contract of purchase but who has not yet obtained title to the premises, cannot ordinarily be removed by him without the consent of the vendor, the presumption being, from his interest under the contract and expectation of acquiring absolute title, that he intended the structures or articles to be a part of the land. *Pomeroy v. Bell*, 118 Cal. 635, at page 638, 50 P. 683; 26 Cor. Jur. 675, sec. 36; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, at page 250, 22 P. 184, 13 Am.St.Rep. 147; *Oakley Co. v. Butler*, 15 Cal.App.2d 572, 59 P.2d 826.

[3] "There is an exception to the rule specified in sections 660 and 661 of the Civil Code which may be thus stated: that the parties themselves may, in their dealings with chattels annexed to or used in connection with real estate, fix upon them whatever character, as realty or as personalty, they desire and the courts will give to the property the character which the parties themselves have fixed upon. *Miller v. Struven*, 63 Cal.App. 128, 218 P. 287; *Fratt v. Whittier*, 58 Cal. 126, 41 Am.Rep. 251.

"Under paragraph 13 of the conditional sales contract we find this language: 'It is agreed * * * upon the violation of any of the covenants and/or conditions herein contained, the same shall, at the option of the second parties (Teaters) terminate * * * and said premises

* * * and the appurtenances, and all buildings and other improvements shall become forfeited to second parties * * * provided, however, that second parties shall not exercise the within option until they have given to first party (Marker) (30) days' written notice to cure his default. * * *

"The other provision in the contract relating to the purchaser's rights may be found in paragraph 15, which in part provides as follows: 'It is mutually understood and agreed that upon the termination of the within agreement, for any reason whatever, that all machinery and tools and other unattached and movable equipment which may be placed upon said premises by first party may be removed therefrom within forty-five days after the termination of the within agreement. Provided, however, that no such tools or machinery shall be removed while first party may be in any manner indebted to second parties for past installments due under the obligation of the within contract, and such machinery and equipment shall be deemed security for the payment of such installments.'

[4] "It was to be anticipated from a fair construction of this entire agreement, that certain appurtenances, buildings and other improvements would, under sections 660 and 661 of the Civil Code, become fixtures to the real property, and that there would be certain other machinery and tools that were movable and unattached that would not of necessity become a part of the realty.

[5,6] "Property constituting fixtures to the land belongs to the vendor in case the purchaser subsequently defaults in his contract, and he has no right at any time to remove it, and no creditor has any greater right. *Conde v. Sweeney*, 14 Cal. App. 20, 110 P. 973; *Pomeroy v. Bell*, supra; *Chowchilla Colonization Co. v. Thompson*, 39 Cal.App. 517, 179 P. 411; *In re Potee Brick Co. of Baltimore City*, D. C., 179 F. 525, 528; *Ewell, Fixtures* [2d] p. 73, sec. 49. Where a fixture annexed to a freehold is tortiously severed, the owner of the realty, at his option, may treat the fixture as personalty and recover the same by the action of replevin. *Bronson, Fixtures*, p. 380, sec. 1106. The right to the immediate possession of this property by the vendor was created by the act of the vendee. *Leonard v. Stickney*, 131 Mass. 541.

[7,8] "Appellants' action in this case was one of replevin and, of course, the essential prerequisite to such an action is the right to the immediate and exclusive possession of the property at the time of the commencement of the action (*Fredricks v. Tracy*, 98 Cal. 658, 33 P. 750) and hence, if there be any preliminary act or condition precedent to be performed before the unqualified right of possession attaches the action cannot be maintained, and an after-acquired interest will not support replevin. *People's Savings Bank of Fresno v. Jones*, 114 Cal. 422, 46 P. 278; 5 Cal.Jur. 160, sec. 4. It must be conceded that on the date of the commencement of this action Mrs. Teater was the owner of the Good Hope Mine (the real estate) subject to the contract of sale to the Development Corporation; that certain payments under the terms of that contract were in default but no forfeiture had been declared and that the appellants were enjoined from declaring such forfeiture. It must be conceded further that the Development Corporation purchased the personal property here in controversy and originally was its owner. Therefore, unless the title and ownership thereto were lost or encumbered between the date of its purchase in 1933 and the sale under the levy of the attachment by the Dill Lumber Company in 1936, the findings of the trial court on the cross-complaint must be upheld.

"The main question then presented to the trial court was whether the act of locating the machinery on the mine and using it in and about its development amounted to an absolute transfer of title and change of ownership or whether the transaction amounted merely to the giving of security on personal property.

[9-12] "It is the general rule that where the purpose and effect of the transaction is to create a lien on specific property as security for the payment of a debt it constitutes a mortgage, irrespective of the language used by the parties. *Ferguson v. Murphy*, 117 Cal. 134, 48 P. 1018; 5 Cal.Jur., p. 44, sec. 5; 5 R.C.L., p. 384. The rule is well stated in *Sterman v. Ziem*, 17 Cal.App.2d 414, 418-419, 62 P.2d 160, where it was held that a chattel mortgage does not transfer title to the mortgaged property and that the mortgagee has only a lien thereon as security for the payment of the debt. Even though the parties agree to the contrary, yet where the relation of the parties is that of debtor and

creditor and the property is regarded as security for the payment of the debt, there is no transfer of title. A mortgage ordinarily does not entitle the mortgagee to the possession of the property unless authorized by the express terms of the mortgage (sec. 2927, Civ.Code; 5 Cal.Jur. 117), with some possible exceptions. *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 76 P. 243; *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 P. 1071; *Wixom v. Davis*, 57 Cal. App. 620, 207 P. 694.

"It seems clear that the placing of *all machinery and tools and other unattached and movable equipment* upon the premises was to be considered as additional security for the overdue instalments of the purchase price in the face of the language of the contract between the parties.

[13] "The question now presents itself: Would the tools, machinery and equipment removed come under and be classified by the second provision of the contract or were they a part of the realty? When the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of a party, appellate courts will not substitute another interpretation though it seems equally tenable. *Kautz v. Zurich Gen. A. & L. Ins. Co.*, 212 Cal. 576, 582, 300 P. 34; *Estate of Boyd*, 24 Cal.App.2d 287, 74 P.2d 1049.

"It is quite evident from the record that the Teaters considered the equipment described to be mortgaged for the payment of delinquent instalments due, and were quite satisfied to allow the development corporation to remove it if the instalments were paid.

[14] "We have carefully examined the entire record as to the manner of affixation of the various parts of the machinery described, and as to a great portion of it there seems to be little doubt as to the correctness of the court's finding. As to other portions (although the record is very confusing) there may be some question. It is quite apparent to us that the windows at least, which were removed from the corrugated iron mill building, were a part of the realty notwithstanding the finding of the trial court. This being so, the appellants, under the case of *Chowchilla Colonization Co. v. Thompson*, supra, would have the right of possession as to this property. Under the present state of the pleadings and the evidence before us we are unable to determine in whose pos-

session the balance of the property not described in the decree may be found.

"Section 2957 of the Civil Code, as it existed in 1933, on the date of the execution of the contract of purchase, provided:

"'A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless:

"'1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors;

"'2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property.'

[15-17] "This section is modified by section 2973 of the Civil Code, making such an instrument valid between the maker and persons who, thereafter parting with value, have actual notice thereof. It is apparent that appellants have not complied with sections 2957 and 2973 of the Civil Code. Therefore the mortgage is valid between the parties and persons who, before parting with value, have actual notice thereof. The trial court has failed to find on this issue. It was held in *Stewart v. Leasure*, 12 Cal.App.2d 652, 55 P.2d 917, that where a lease provides that the landlord shall be the owner of all crops until the rent has been paid, the agreement must be construed as intending to give security to the landlord for the rental and to create a lien upon the crops, and that it was an attempt to obtain the advantages of a chattel mortgage without complying with the provisions of the statute upon the subject. In our opinion, the instant contract, in referring to the machinery and tools and other unattached and movable equipment, should be subject to the same rule of construction, viz., that as between the parties and subsequent purchasers with notice, appellants had a lien upon the property but were not the absolute owners of the same and could not become so until they took the necessary steps to foreclose such lien. *Stewart v. Leasure*, supra; *Ronning v. Way*, 18 Cal. App. 527, 123 P. 615. There is considerable evidence in the record that would support the finding that the Dill Lumber Company, or at least some of the assignors of its various claims, had notice of the provisions of the contract of purchase.

It therefore becomes material to the issue presented to determine this fact in support of the judgment quieting title to the property involved. *Tomlinson v. Ayres*, 117 Cal. 568, 49 P. 717; *Douglass v. Willard*, 129 Cal. 38, 61 P. 572; *Ronning v. Way*, *supra*; 5 Cal.Jur., p. 50, sec. 9.

with, if any, by cross-complainant, and determine what property described in the complaint was affixed to the realty, which was not described in the judgment, and enter judgment consistent with the findings and the views herein expressed."



14 Cal.2d 237

PEOPLE v. MITCHELL

Cr. 4221.

Supreme Court of California.

Aug. 22, 1939.

Rehearing Denied Sept. 21, 1939.

1. Homicide $\hookrightarrow$ 309(3)

Where some evidence in murder prosecution indicated self-defense or accident, but not killing without malice upon a sudden quarrel or in the heat of passion, refusal to give instruction defining manslaughter was not error. Pen.Code, § 192.

2. Homicide $\hookrightarrow$ 269, 276, 280

In murder prosecution, defendant's testimony indicating that he drew pistol in self-defense, and that pistol was accidentally discharged, was properly before jury for determination of whether defendant acted in self-defense or whether death was due to accidental means, but did not raise issue of sudden quarrel or heat of passion. Pen. Code, § 192.

3. Homicide $\hookrightarrow$ 244(1)

Evidence held to authorize conviction of murder as against claim of self-defense.

HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Willie B. Mitchell was convicted of murder, and he appeals.

Affirmed.

Rehearing denied; CURTIS, J., dissenting.

Willard W. Shea, Public Defender, and Hugh K. Forsman, both of Oakland, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

[18] "If the evidence of notice of the lien of appellants on the personal property would support a finding of lack of notice of appellants' lien at the time respondent parted with value, and if such a finding were made, then the judgment rendered on the cross-complaint could be supported. Such finding would leave undetermined the right of possession and ownership of the property described in the complaint which may have been a part of the realty and which is not described in the cross-complaint nor in the judgment. The evidence shows rather conclusively that the admission in the answers that the sheriff took possession of all of the property is not correct. It is not clear what became of the property not described in the judgment. If the sheriff still has possession of some of it, the trial court should make some proper finding concerning it. This is also true if possession is in the Dill Lumber Company or the Development Corporation. Because of this uncertainty, the judgment in favor of these respondents cannot be affirmed. As to the judgment on the cross-complaint in favor of the Dill Lumber Company, there also remains for determination the question of notice of the lien of appellants before this respondent parted with value, and also whether it did in fact part with value. Sec. 2973, Civ.Code.

[19] "Certain respondents admittedly did not have possession of any of the property, a necessary prerequisite in a replevin action. Therefore the judgment in favor of those respondents, namely, Bank of Peris, C. R. Stewart, sued under the name of H. G. Stewart, C. H. Marker, James H. Hyde, Maude C. Marker, Eugene Best and Alford P. Olmstead is affirmed. As to the Dill Lumber Company, a corporation, Carl Reyburn, sheriff of Riverside county, and the Good Hope Development Corporation, the judgment is reversed with instructions to the trial court to take further evidence, if necessary, to allow an amendment of the pleadings to conform to the proof and make the necessary finding on the issue of notice of the appellants' lien, value parted

CURTIS, Justice.

This appeal is from the judgment and order of the trial court denying defendant's motion for a new trial.

The defendant, Willie B. Mitchell, met Fannie Nolden sometime in 1936 at a night club in the city of Sacramento. Later they met again in the early part of the following year. Thereafter they met frequently and soon began living together as man and wife although they were never married. They both belonged to the colored race. He was less than seventeen years of age and she was twenty-five. In the summer of 1937 they moved to Oakland and took up their residence at Ninth and Center streets in that city. Their life together was not at all times harmonious, and according to the testimony of the defendant, Fannie Nolden "ran off" on a number of occasions. Some few days prior to November 21, 1937, Fannie Nolden left the home at Ninth and Center streets, and went to the home of Mr. and Mrs. Upshaw at 1115 Center street, two blocks from Ninth and Center streets. Mr. and Mrs. Upshaw were the uncle and aunt respectively of the defendant. On November 21, 1937, the defendant called two or three times at the home of his uncle and aunt, and at least on one of his earlier visits during that day he saw Fannie Nolden, but nothing of any moment took place between them at that time. He returned to the Upshaw home about 7 o'clock of the same day with an acquaintance by the name of Leonard Franklin. It was just getting dark. He had two pistols on his person, and Leonard Franklin had one. On entering the Upshaw home on that evening, he met and talked with his uncle and aunt in their living or "front" room. He then asked his aunt if he could have some food. She replied, "Sure, go down in the kitchen, help yourself." He and Franklin then went to the kitchen. When they entered they found Fannie Nolden and Dorothy Robinson, the latter a young lady cousin of the defendant. Fannie Nolden was washing dishes and Dorothy Robinson was seated at a table eating a meal. When defendant first entered the kitchen, he asked Fannie Nolden to fix him something to eat. Fannie replied, "I don't have anything to fix. This ain't my house." Defendant then said, "You ain't going to fix it?" He then reached down in his waist under his coat, and pulled out two "guns". Fannie then said, "Oh, yes, I fix it. Yes, I fix it," and ran across the room near the water tank. The defendant then stepped around and started shooting, and Fannie

fell to her knees, and the defendant stepped out a few feet further and started shooting again. Immediately after the shooting, the defendant put both pistols in his left hand and opened the back door and left the room. According to his own story, he left Oakland and went to San Francisco. From there he went to Los Angeles and eventually reached his old home in Arkansas. He remained in Arkansas for some months. Later he went to St. Louis, where he was arrested, charged with the crime of murder, and brought back to Oakland. The body of Fannie Nolden was examined by Dr. Mainwaring at 7:50 o'clock on the evening of her death. He found one bullet lying loose in her undergarments over the chest. An autopsy was performed on the body of the deceased on the following day by Dr. Hamlin. He testified that he found six bullet wounds on her body, but he discovered no marks other than the bullet wounds on her body. One bullet entered the tip of the left shoulder and passed out under the left shoulder. Another bullet entered the inner angle of the armpit, and passed into the chest cavity at the third rib, passed through the left lung, through the left ventricle of the heart, through the right lung, and lodged four inches below the armpit. This bullet was recovered. The courses of other bullet wounds were described by the doctor, six in number. Two bullets were removed from the body during the autopsy. The wounds found upon the body of the deceased were pronounced fatal by the doctor and were the cause of her death. Besides the two bullets recovered from the body and the one found in the clothing of the deceased, a fourth was found embedded in the woodwork of the kitchen, just back of where the deceased fell when she was shot. No one seemed to know just how many shots were fired. Dorothy Robinson, who was the only eye-witness to the shooting, said she was unable to tell the number of shots that were fired by the defendant. Leonard Franklin who entered the kitchen with the defendant was not called as a witness. He was not seen after the shooting by any witness who testified in the case, and neither the prosecution nor the defendant had been able to locate him before the trial. The defendant testified that he did know the number of shots that were fired. He never denied the shooting. He admitted his guilt to the arresting officers in St. Louis, and at that time made a written statement giving his version of the shooting. He also took the stand as a witness at his trial and admitted that he

shot the deceased. His version of the shooting does not entirely agree with that given by Dorothy Robinson, and will be discussed later. No claim is made by the appellant that the evidence is insufficient to support the verdict of the jury finding him guilty of the crime of murder as charged in the information. The only ground assigned by him for a reversal of the judgment is that the court erred in refusing to give an instruction on manslaughter. He predicates his right to such an instruction upon his testimony given at the trial of the case. He testified that when he entered the kitchen of the Upshaw house on the evening of the shooting, he said to Fannie Nolden: "Hello, Toots," and touched her on the back and said, "How about fixing me something to eat?"; that she looked at him and said, "I don't have nothing to eat here, I can't fix you anything," that she then walked to the sink and he went to the door and called, "Auntie, can I have some food?"; that he turned and came back while Fannie Nolden was still at the sink and said, "What's wrong?" and she replied, "I don't have time to talk to you"; that he then said, "How about some of my money then?" and she replied, "I ain't got time to fool with you. I am busy," and that he then said, "Leaving all jokes aside, Fannie, let me have some of my money," that at that time she was in front of the cupboard and wheeled around with a knife in her hand and said, "I'll give it to you. I'll fix you!" that he then jumped back to the door and said, "Don't come over here," but she kept coming. "I could not get out the door. I come up and knocked the automatic safety off, just went off like that, and it stopped. When the automatic stopped shooting, Fannie laid one hand on the stove and looked at me and gritted her teeth, and I was trying to get the door open from the back with this hand, back with this hand. When I went to move around the automatic went off one more time."

[1,2] Appellant prepared an instruction defining manslaughter in the language of section 192 of the Penal Code with the added statement, "If you are satisfied beyond and to the exclusion of a reasonable doubt that the defendant unlawfully killed Fannie Nolden without malice and upon a sudden quarrel, or in the heat of passion, your verdict should be guilty of manslaughter." This proposed instruction the court refused to give. We think it was properly refused. Nothing in appellant's testimony indicated in the slightest extent that appellant killed

the deceased either upon a sudden quarrel or in the heat of passion. At most his testimony tended to show that he drew his automatic pistol in self-defense, by an inadvertence he knocked off the safety appliance, and the gun was accidentally discharged. This evidence was properly before the jury for the purpose of their determination as to whether the defendant killed deceased in self-defense, or whether her death was due to accidental means. This evidence in no way tended to prove that the homicide was committed upon a sudden quarrel or heat of passion. There was no error, therefore, in the trial court's refusal to give the proffered instruction. In support of his claim that the refusal to give this instruction was error and that it was prejudicial of his legal rights, the appellant argues that had such an instruction been given the jury under all the evidence might have found him guilty of manslaughter instead of murder. We find no force whatever in this argument. The jury was correctly and properly instructed respecting the degrees of murder, and of their power to fix the punishment in case it found the defendant guilty of murder in the first degree. With these instructions before them, they found the appellant guilty of murder in the first degree without recommending life imprisonment. If under the evidence and these instructions the jury rendered a verdict calling for the death penalty, it is not reasonable to suppose that their verdict would have been different had the proposed instruction on manslaughter been given.

[3] It might be appropriate to add a few words regarding the claim of the appellant that he was attacked by the deceased with a knife. Dorothy Robinson, who, as we have stated, was the only eye-witness to the tragedy, flatly contradicted the appellant in his statement that the deceased attacked him with a knife. She was asked the direct question as to whether Fannie had anything in her hand at the time appellant shot her, and she replied, "No. She did not." No knife was found in or near the body or in any place on the kitchen floor after her death although a careful search of the room was made by the officers on their arrival on the scene. Appellant stated to the officers in St. Louis that she attacked him with a butcher knife, and it was so described in his written statement made to said officers at the time of his arrest. At his trial, the appellant testified that he did not pay any attention to the knife and could not tell

what kind of a knife it was and repudiated his statement made to the officers at St. Louis that it was a butcher knife.

There is also considerable doubt whether the gun with which he shot deceased was an automatic pistol. His statement made at St. Louis contains the following account of the shooting, "I pulled out a 38 caliber Smith & Weston blue steel revolver which I had concealed in my waistband of my shirt and trousers and shot in the direction of Fannie."

Appellant gave as a reason for being armed with two pistols when he left his room and went to the Upshaw home on the day of the tragedy that he had been attacked on two previous occasions and severely injured before leaving Sacramento and that he saw his assailant on the streets of Oakland on the morning of the day he killed the deceased. He further stated that he was going to a dance that evening, but gave no sufficient reason for arming himself on that occasion except that he might meet the man who had assaulted him in Sacramento. Whatever may have been his motive in arming himself, there is no creditable evidence from which an inference might be drawn that he had any intention of violently assaulting, and much less intention of killing, the deceased before he entered the Upshaw home on that evening. Nevertheless, the evidence is clear and convincing that he deliberately shot the deceased in cold blood. It is beyond human belief that his automatic pistol could have been accidentally discharged from four to six times and that each shot took effect in the body of the deceased. This is especially true of the last shot that was fired when, he says, he was attempting to leave the room through the rear door of the house, which would place him with his back towards the deceased. In stating that all shots fired by the appellant took effect in the body of the deceased, we have not overlooked a bullet which was found embedded in the woodwork of the room. From all the evidence in the case, it is apparent that this bullet passed entirely through the deceased's body, and then embedded itself in the woodwork just back of where the deceased was standing when she was shot.

We find no error in the record, and are of the opinion that the evidence is amply sufficient to support the verdict of the jury.

The judgment and order denying the motion for a new trial are, and each of them is, affirmed.

We concur: EDMONDS, J.; SHENK, J.; THOMPSON, J. pro tem.

HOUSER, Justice.

I dissent.

My inability to agree with the conclusion that has been reached herein by my associates arises from their ruling that defendant's rights were not prejudiced by reason of the fact that, in disregard of defendant's request therefor, the trial court refused to give to the jury an instruction relative to the crime of manslaughter, as follows:

"Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds:

"1. Voluntary—upon a sudden quarrel or heat of passion.

"2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. (Sec. 192, Pen.Code).

"If you are satisfied beyond and to the exclusion of a reasonable doubt that this defendant unlawfully killed Fannie Nolden, without malice and upon a sudden quarrel, or in the heat of passion, your verdict should be guilty of manslaughter."

As is stated in the main opinion herein, testimony was given by defendant to the effect that, immediately preceding the shooting, in a conversation or "quarrel" which he had had with the woman whom he thereafter killed, at a moment when she was in front of a cupboard, she "wheeled around with a knife in her hand and said, 'I'll give it to you. I'll fix you!'; that defendant "then jumped back to the door and said, 'Don't come over here!' But she kept coming."

In the case of *People v. Wilson*, 29 Cal. App. 563, 156 P. 377, the facts were not nearly so strong in the defendant's favor as were those in the instant case with respect to the defense of this defendant, and yet it was ruled not only that the defendant was entitled to have given to the jury an instruction by which the crime of manslaughter would be defined, but also that the failure of the trial court to give such an instruction to the jury constituted prejudicial error;—and solely for those reasons the judgment was reversed.

In the case of *People v. Hayes*, 9 Cal. App. 301, 305, 99 P. 386, 388, the court

said: "The case of *Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839, 40 L. Ed. 980, is a case in its essential particulars similar to the case at bar. In the *Stevenson Case* the judgment was reversed solely for the reason that the trial court refused to submit to the jury the issue of manslaughter. The language of the court, speaking through Justice Peckham, is exceedingly appropriate to the matter before us. It was there said: 'The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question; so long as there is *some* evidence upon the subject, *the proper weight to be given it is for the jury to determine*. If there were *any evidence* which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true, and whether it showed that the crime was manslaughter instead of murder. * * * The evidence *might appear to the court to be simply overwhelming* to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was *some* evidence relevant to the issue of manslaughter, the credibility and force of such evidence *must be for the jury*, and cannot be matter of law for the decision of the court.'" (Italics added.) See, also, *People v. Logan*, 175 Cal. 45, 50, 164 P. 1121. The court also ruled in the *Hayes case* (syllabus) that "No matter how conflicting the evidence, if there is any evidence tending to show that the crime might be manslaughter, it is the duty of the court to submit the question to the jury for its decision."

Also, it was declared in the case of *People v. Manzo*, 9 Cal.2d 594, 598, 72 P.2d 119, 121, that "If there was sufficient evidence in the case upon which the jury might have returned a verdict of manslaughter, an instruction defining it should have been given. * * *" To the same effect, see: *People v. Wilson*, 29 Cal.App. 563, 156 P. 377; *People v. Hayes*, 9 Cal. App. 301, 99 P. 386; *People v. Sidelinger*, 9 Cal.App. 298, 99 P. 390; *People v. Darrow*, 212 Cal. 167, 298 P. 1; *People v. Best*, 13 Cal.App.2d 606, 57 P.2d 168.

In the instant case it may be noted that in the prevailing opinion it is stated that "The jury was correctly and properly instructed respecting the degrees of murder, and of their power to fix the punishment in case it found the defendant guilty of

murder in the first degree. With these instructions before them, they found the appellant guilty of murder in the first degree without recommending life imprisonment. If under the evidence and these instructions, the jury rendered a verdict calling for the death penalty, it is not reasonable to suppose that their verdict would have been different had the proposed instruction on manslaughter been given."

An examination of the transcript of the proceedings that occurred in the trial court reveals the fact that in the instructions which were given to the jury relative to the crimes of first and second degree murder and the law of self-defense, more than 2000 words were employed; yet no instruction whatsoever was given to the jury by the trial court regarding the crime of manslaughter. It was not even mentioned. In the instant case, it is clear that, irrespective of evidence to the contrary, the jury was entitled to believe as true the facts as testified to by defendant,—which testimony was susceptible of the inference either that he was acting in self-defense, or that the shooting occurred "upon a sudden quarrel or heat of passion." It is not unreasonable to infer that the colloquy which assertedly had occurred between defendant and the woman whom he killed amounted to a "sudden quarrel" which engendered a "heat of passion"; and if, from a consideration of the evidence, the jury believed that either of such conditions was the cause of the shooting,—under the provisions of section 192 of the Penal Code, had the jury been properly instructed as to the law thereon,—it would have been fully authorized to return a verdict of "guilty of manslaughter". In such circumstances, defendant was entitled to have the jury apprised of the law concerning the offense of manslaughter in accordance with the instruction which he had offered, but which instruction the trial court refused to give. Indeed, the authorities are numerous to the effect that, in such circumstances, it became the duty of the trial court, of its own motion, to give to the jury such an instruction. See *People v. Heddens*, 12 Cal.App.2d 245, 247, 55 P.2d 230, where it was said: "It is the duty of the court in criminal cases to give of its own motion instructions on the general principles of law pertinent to such cases, even though they are not proposed or presented in writing by the parties themselves. *People v. Scofield*, 203 Cal. 703, 265 P. 914; *People v. Bill*, 140 Cal.App.

389, 35 P.2d 645; *People v. Peck*, 43 Cal. App. 638, 185 P. 881; *People v. Wagner*, 65 Cal.App. 704, 225 P. 464." (Italics added.) Likewise, in the case of *People v. Manzo*, 9 Cal.2d 594, 598, 72 P.2d 119, 121, it was said that "In the trial of criminal cases it is the duty of the judge to instruct the jury on all of the general principles of law pertinent to the case. *People v. Scofield*, 203 Cal. 703, 265 P. 914. * * * " And in the case entitled *People v. Best*, 13 Cal.App.2d 606, 611, 57 P.2d 168, 170, the rule again was reiterated, that "It is the duty of the court in a criminal case to give, *of its own motion*, instructions on the general principles of law pertinent to such cases [even], where they are not proposed or presented in writing by the parties themselves. 8 Cal.Juris p. 309." Italics added. To the same effect, see, also, *People v. Curran*, 24 Cal.App.2d 673, 75 P.2d 1090.

In the case entitled *People v. Darrow*, 212 Cal. 167, 184, 185, 298 P. 1, 8, the source of this mandate as to the duty of the trial court was pointed out, as follows:

"Section 1127, Penal Code, makes it the duty of the court to state to the jury all matters of law necessary for their information. * * * Section 1159, Penal Code, further provides that, 'The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged.' This court * * * said in *People v. Wright*, 167 Cal. 1, 138 P. 349 * * * 'It is not the "theory" which the prosecution advances, nor the "theory" which the defense adopts which governs the court in the giving or in the refusing to give instructions. Theories are of moment in a criminal case only as they are supported by substantial evidence. What the trial court is commanded by law to do is to state to the jury all matters of law necessary for their information in their deliberations. * * * '"

Likewise, it is well established that the presentation by the defendant of a "self-defense" plea does not preclude the rendition of a verdict of "guilty of manslaughter". In other words, although the evidence that is presented may be of such a character that a plea of "self-defense" might not avail the defendant as a basis for an acquittal,—nevertheless, from a consideration of the same facts, the defendant might be entitled to a verdict of "guilty of manslaughter". In that regard, in the case of *People v. Hayes*, 9 Cal.App.

301, 306, 99 P. 386, 388, the court said: "The trial court seems to have been of the opinion that the evidence showed, either an unlawful killing with malice aforethought, or a killing in necessary self-defense. This was also the position of the trial court in the *Stevenson Case*, supra, and upon this subject it was said: 'The ruling of the learned judge was to the effect that, in this case, the killing was either murder, or else it was done in the course of self-defense, and that under no view which could possibly be taken of the evidence would the jury be at liberty to find the defendant guilty of manslaughter. The court passed upon the strength, credibility, and tendency of the evidence, and decided as a matter of law what it seems to us would generally be regarded as a question of fact, viz., whether, under all the circumstances which the jury might, from the evidence, find existed in the case, the defendant was guilty of murder, or whether he killed the deceased, not in self-defense, but unlawfully and unjustly, although without malice. The presence or absence of malice would be the material consideration in the case, provided the jury should reject the theory of self-defense. * * * '"

To the same effect is the ruling in the case entitled *People v. Best*, 13 Cal.App.2d 606, 609, 57 P.2d 168, 169, where it was said: "The court instructed the jury that the crime of manslaughter was included in the charge of murder. A form of a verdict of manslaughter was handed to the jury upon their retirement, together with the usual forms in a murder trial. The court, however, failed to instruct the jury as to the definition of manslaughter, or as to what facts must be found by them before they could convict of the lesser offense. At the trial the defendant relied upon the plea of self-defense. This is indicated, not only by the evidence offered by him, but also by the instructions which he submitted. His brief upon this appeal, as well as the oral argument of his counsel, show clearly that the case was tried on the theory that the crime of manslaughter was not involved." The court then said that although self-defense (where it is established) excuses, rather than fixes, the degree of the homicide, and entitles defendant to an acquittal, nevertheless "the evidence and the inferences reasonably to be drawn therefrom may be sufficient to warrant the jury in concluding that, *though the killing was not justifiable under a plea*

of self-defense, it was done under such circumstances as to reduce the offense to voluntary manslaughter. If malice is lacking and the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the offense is reduced to manslaughter. *People v. Freel*, 48 Cal. 436." (Italics added.)

From a consideration of the prevailing opinion herein, the question immediately is suggested as to whether, in a case such as here is presented, it is the law that it would be unnecessary to give any instruction regarding the crime of manslaughter, where, as here, the jury was fully instructed respecting first and second degree murder; also as to the power of the jury to fix the punishment in case it found defendant guilty of murder in the first degree;—and where, under the evidence shown to have been adduced, the jury thereupon returned its verdict of "guilty of murder in the first degree," without recommendation as to what punishment should be imposed. If so, by the same token, in the instant case, had the trial court instructed the jury as to first degree murder only, and a verdict identical with that herein had been returned, it should follow that defendant would not have been prejudiced by reason of the fact that no instruction had been given respecting second degree murder. In other words, is it possible that, in the happening of such event, it properly might be declared the defendant had not been prejudicially affected by the failure of the trial court to instruct the jury regarding the law pertaining to second degree murder, because, in effect, by its verdict the jury had determined that the death penalty should be imposed?

Again referring to the transcript of the proceedings had in the trial court regarding the fact that the trial court employed 2000 words or more in defining the crime of murder, and in telling the jury in detail about the various ramifications of the law regarding the same,—does it seem reasonable to presume that had even a small percentage of those 2000 words been dedicated to the purpose of informing the jury relative to its right under the circumstances to convict the defendant of the crime of manslaughter, the result would have been identical with that which was reached in the absence of such information? Otherwise stated,—in the light of the evidence herein adduced,—may it confidently be de-

clared as the law of this state that because the jury, in effect, recommended the "death" penalty, and thereby precluded the imposition of any lesser punishment, the giving of instructions regarding lesser offenses than that of first degree murder would be rendered unnecessary as far as the rights of defendant were concerned? If that question may not be answered affirmatively with respect to the crime of second degree murder, no sufficient reason is readily discernible for failing to give instructions regarding the crime of manslaughter, where evidence supporting such offense is adduced. In my opinion, the law concerning the question herein being considered is ably and aptly expressed in the very recent decision entitled *Kinard v. United States*, 68 App.D.C. 250, 96 F.2d 522, 524, wherein the court said:

"In a criminal case a court should instruct on all essential questions of law involved in the case, whether requested or not. *People v. Odell*, 230 N.Y. 481, 130 N.E. 619; *Commonwealth v. Ferko*, 269 Pa. 39, 112 A. 38; *Pearson v. State*, 143 Tenn. 385, 226 S.W. 538; *Duroff v. Commonwealth*, 192 Ky. 31, 232 S.W. 47; *State v. Lackey*, 230 Mo. 707, 132 S.W. 602. * * * It is further assigned as error that the trial court, in its charge, instructed the jury concerning manslaughter as follows: 'This indictment which charges the defendant with murder in the first degree carries the charge of what we call the included offenses. The included offenses of murder in the first degree are murder in the second degree and manslaughter. But you are told that in the judgment of the Court the facts as revealed in the evidence in this case are not of such a nature and character as to sustain a verdict of manslaughter, and therefore you are instructed that your verdict, which will come at the end of the case, will be either guilty of murder in the first degree, or guilty of murder in the second degree, or not guilty.' * * * It is true that defendant's testimony was sharply contradicted. It is arguable that the evidence was overwhelmingly indicative of murder rather than manslaughter. But that is beside the point so far as concerns the propriety of the instruction given. It was not the duty of the trial court to weigh the evidence and determine whether the defendant was guilty of murder or manslaughter, but merely to determine the preliminary question of law—whether there was such a complete absence of evidence upon the is-

sue of manslaughter as to require that it be taken from the consideration of the jury. The applicable rule has been stated by the Supreme Court in *Stevenson v. United States*, 162 U.S. 313, 323, 16 S.Ct. 839, 843, 40 L.Ed. 980, as follows: 'A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be *any evidence fairly tending to bear upon* the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter.' [Italics supplied.] In the same case, 162 U.S. 313, at page 314, 16 S.Ct. 839, 40 L.Ed. 980, the court stated the rule again, in the following language: 'The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question. So long as there is *some evidence* upon the subject, the proper weight to be given it is for the jury to determine. If there were *any evidence* which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder.' [Italics supplied.] The only situation, then, in which an instruction taking the issue of manslaughter from the jury is proper, is one in which, as ruled in the *Stevenson Case*, there is no 'evidence relevant to the issue of manslaughter' or no 'evidence fairly tending to bear upon the issue of manslaughter.' * * *

The fact that in the present case there was other evidence highly persuasive of guilt of murder does not affect the applicability of the rule stated. As the court said in *Stevenson v. United States*, supra, 162 U.S. 313, at page 315, 16 S.Ct. 839, 40 L.Ed. 980: 'The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.' [See footnote where it was said: "This rule has been followed by the state courts. See *People v. Colantone*, 243

N.Y. 134, 152 N.E. 700; *Lewis v. State*, 89 Tex.Cr.R. 345, 231 S.W. 113; *Mason v. Commonwealth*, 209 Ky. 157, 272 S.W. 57."'] The Government contends, in support of the instruction given by the trial court, that the facts in the present case are susceptible of but two possible interpretations: One, that the appellant was not guilty because he acted in self-defense; the other, that he was guilty of murder in the first or second degree, hence, that a killing upon provocation in a heat of passion is necessarily inconsistent with the facts. Although such a conclusion properly follows where a defendant urges, in the alternative, killing upon provocation in a heat of passion and accidental killing (*Bell v. United States*, supra [60 App.D.C. 76, 47 F.2d 438, 74 A.L.R. 1098]), it does not follow where he urges, in the alternative, killing upon provocation in a heat of passion and self-defense. The two, in the latter alternative, are not mutually exclusive and inconsistent. *Stevenson v. United States*, supra, 162 U.S. 313, at page 322, 16 S.Ct. 839, 40 L.Ed. 980. Provocation sufficient to produce a heat of passion and a resulting absence of malice may give such character to a homicide as to make it manslaughter; the same provocation may, under slightly varied circumstances, justify a person in killing in self-defense. *Wallace v. United States*, 162 U.S. 466, 16 S.Ct. 859, 40 L.Ed. 1039. Heat of passion may be produced by fear as well as by rage (*Stevenson v. United States*, supra, 162 S.Ct. 313, at page 320, 16 S.Ct. 839, 40 L.Ed. 980) and, if the provocation therefor is adequate (*Jackson v. United States*, 48 App.D.C. 272), the resulting killing may be manslaughter. The essence of the self-defense situation is a reasonable and bona fide belief of the imminence of death or great bodily harm. *Brown v. United States*, 256 U.S. 335, 343, 41 S.Ct. 501, 502, 65 L.Ed. 961, 18 A.L.R. 1276. Heat of passion may or may not be present. *It is the function of the jury, under proper instructions, to determine whether either defense is available to the accused under the circumstances of the particular case.* [See footnote where it was said: "See *State v. Kidd*, 24 N.M. 572, 175 P. 772; *Tucker v. Commonwealth*, 159 Va. 1038, 167 S.E. 253. The defendant is entitled to an instruction on the law of manslaughter although he relies solely upon the theory of self-defense. *State v. Greenlee*, 33 N.M. 449, 269 P. 331; *State v. Rish*, 104 S.C. 250, 88 S.E. 531; *Commonwealth*

CHARLES et al. v. CRESCENT CITY et al.

Sac. 5234.

Supreme Court of California.

Aug. 21, 1939.

1. Appeal and error ⇨917(1)
Pleading ⇨214(8)

In action to have city tax assessments and levies declared invalid and to enjoin tax sales, allegations of complaint concerning irregularities in the tax proceedings are admitted for the purposes of demurrer and of appeal from judgment of dismissal after sustaining of general demurrer.

2. Municipal corporations ⇨980(2)

Before equitable relief could be granted in action to have city tax assessments and levies declared invalid and to enjoin tax sales, where plaintiffs concededly owned property and objected only that taxes were irregularly assessed and levied, owners must pay or tender that sum which was legal and fair.

3. Municipal corporations ⇨980(2)

In action to have city tax assessments and levies declared invalid and to enjoin tax sales, allegation that plaintiffs "are ready, able and willing and now tender and offer to pay" such taxes as the court might find "legally due and owing" was sufficient where plaintiffs alleged that because of irregularities in assessments and levies plaintiffs could not determine the amount actually due.

4. Pleading ⇨225(1)

In action to have city tax assessments and levies declared invalid and to enjoin tax sales, alleged misjoinder of city councilmen and city clerk did not justify sustaining general demurrer without leave to amend.

5. Municipal corporations ⇨980(2)

In action to have city tax assessments and levies declared invalid and to enjoin tax sales, complaint alleging that description of plaintiffs' property, its value, the rate charged, and the amount assessed were not ascertained and stated in the manner required by law, was not defective for failure to allege those matters.

6. Municipal corporations ⇨980(2)

In action to have city tax assessments and levies declared invalid and to enjoin tax sales, wherein defendants did not show ground for dismissal on general demurrer, matter should be brought to trial and if tax

v. Colandro, 231 Pa. 343, 80 A. 571.] We are satisfied that there was some evidence in the present case tending to show that the killing occurred while appellant was in a heat of passion provoked by the actions of his wife, the deceased; and, consequently, that the trial court, in giving the portion of the charge complained of, invaded the province of the jury. Although no exception was taken by appellant to the charge when it was given, it is our duty, nevertheless, as an appellate court, to correct any error prejudicial to him, especially in a capital case, or other case where the crime charged is of serious character. Patten v. United States, 42 App.D.C. 239, 247; Wiborg v. United States, 163 U.S. 632, 658, 16 S.Ct. 1127, 1197, 41 L.Ed. 289; Meadows v. United States, 65 App.D.C. 275, 82 F.2d 881. See, also, Crawford v. United States, 212 U.S. 183, 194, 29 S.Ct. 260, 53 L.Ed. 465, 15 Ann.Cas. 392. It is the imperative duty of the court to see that a defendant *has a fair trial* 'no matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, * * * Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained.' Clyatt v. United States, 197 U.S. 207, 222, 25 S.Ct. 429, 433, 49 L.Ed. 726." (Italics added.)

As hereinbefore has been indicated, in the instant case the jury was elaborately instructed with respect to the crime of murder in the first and second degrees. No complaint in that regard has been made by appellant. But by no instruction was the crime of manslaughter defined or in anywise mentioned. As far as the instructions that were given were concerned, the jury had no knowledge or information as to the existence of such a crime; neither did it know—nor was it informed—that, even if in its opinion the evidence adduced on behalf of the "self-defense" theory was insufficient to justify an "acquittal", nevertheless, it might return a verdict of "guilty of manslaughter." The verdict which was returned contains no certain indication that, had the jury been as elaborately and emphatically instructed with reference to the crime of manslaughter as it was relating to the crime of murder, the verdict would not have been at least more favorable to defendant than was the one which was returned.

To my mind the error was most prejudicial to the rights of defendant.

proceedings were irregular, the amount of tax legally due should be ascertained after proper hearing.

In Bank.

Appeal from Superior Court, Del Norte County; Albert F. Ross, Judge.

Action by Fred Charles and another, suing for themselves and for the benefit of all persons similarly situated, against the City of Crescent City and others, to have assessments and tax levies declared invalid, and to enjoin tax sales. From a judgment of dismissal, plaintiffs appeal.

Reversed, with directions.

G. H. Van Harvey, of San Francisco, and John L. Childs and C. A. Degnan, both of Crescent City, for appellants.

T. F. Peterson, of Eureka, for respondents.

PER CURIAM.

This is an action by taxpayers to declare invalid the assessments and tax levies of respondent city for the year 1931-32, and to enjoin the city and its officers from selling plaintiffs' property at tax sales. The trial court sustained a general demurrer to plaintiffs' complaint and thereafter entered judgment of dismissal, from which plaintiffs appealed.

[1] In view of the ruling on the demurrer, the question is whether the complaint states a cause of action. It alleges that respondent city purported to assess, levy and collect taxes for general municipal purposes and special assessments, pursuant to its governing tax ordinance, but that there was a failure to comply with the provisions of said ordinance in numerous particulars, among which were the following: that the assessor failed to include within the assessment book all persons and property subject to taxation; that he failed to specify therein the cash value of property; that the city council did not fix the rate of city taxes for general municipal purposes or for the payment or retirement of bonds or other obligations; that the city clerk did not enter in the assessment book the respective sums in dollars and cents levied on each one hundred dollars valuation of taxable property, and the total value of the property in the city and the total amount of city taxes for the period. Many other irregularities in the proceedings for assessment and levy and in the

proceedings for enforcement of the taxes by sale of the delinquent property are set forth. Since these are all admitted for the purposes of the demurrer, and therefore, for this appeal, we start with the proposition that the attempted sale of plaintiffs' property for delinquent taxes was improper and plaintiffs are entitled to some relief.

[2] Defendants, however, point out that in seeking equitable relief, as this complaint does in its demand for an injunction against the collection of the tax, a distinction must be drawn between situations where it is claimed that the tax is wholly unauthorized, as where there is no jurisdiction over the property, and where there is jurisdiction but the proceedings were irregular. It is conceded in this case that plaintiffs own property subject to tax and their only objection is that the taxes were irregularly assessed and levied. It follows, under the settled rule, that before equitable relief can be given in such a case, the property owner must recognize that a tax in some amount is actually owed, and must pay or tender that sum which is legal and fair, and which, therefore, in good conscience he ought to pay. *DeMille v. Los Angeles*, 25 Cal.App. 2d 506, 77 P.2d 905; *Los Angeles v. Ransohoff*, 24 Cal.App.2d 238, 74 P.2d 828; *Esterbrook v. O'Brien*, 98 Cal. 671, 33 P. 765; *Couts v. Cornell*, 147 Cal. 560, 82 P. 194, 109 Am.St.Rep. 168.

[3] Plaintiffs in turn admit this proposition and refer to the following allegation in their complaint: "that said plaintiffs are ready, able and willing and now tender and offer to pay to said city of Crescent City, such taxes for the year 1931-32, which, upon hearing, this court may find, adjudge and determine to be legally due and owing by said plaintiffs to said city of Crescent City." The question is whether this allegation is sufficient, without a payment or tender of any specific sum. Plaintiffs assert that, because of the irregularities mentioned, they cannot determine the amount actually due or any part thereof and must necessarily await the court's judgment. This seems to us to be a reasonable position in the present state of the record. Under the allegations of the complaint the tax legally due is so uncertain that any specific sum offered would be purely speculative, and consequently the only tender reasonably necessary is the one made, namely, to pay that which the court shall find due.

[4,5] Defendants also urged several grounds of special demurrer in the lower court, principally the misjoinder of parties defendant. It is contended that the tax collector and the city are the only proper parties and that the special demurrer of the councilmen and city clerk should be sustained. The trial court, however, expressly based its rulings on the failure to allege a sufficient tender, and if there is any merit in the point of misjoinder, it did not justify the sustaining of a general demurrer without leave to amend. It is further urged that the complaint was defective in failing to allege a description of plaintiffs' property, its value, the rate charged, and the amount assessed against the same, but plaintiffs point out that the reason for this is found in other allegations which show that these matters were not ascertained and stated by the defendants in the manner required by law.

[6] Defendants having failed to produce either authority or reason for the determination of this case on the demurrer, the matter should be brought to trial, and, if the proceedings are irregular, the amount of tax legally due should be ascertained after a proper hearing on the issue of the validity of the assessment and levy.

The judgment is reversed with directions to the trial court to overrule the demurrers and to permit the defendants to answer, if they be so advised.



14 Cal.2d 189

**DEPARTMENT OF MOTOR VEHICLES v.
INDUSTRIAL ACCIDENT COMMISSION et al.**

S. F. 16224.

Supreme Court of California.

Aug. 16, 1939.

Rehearing Denied Sept. 14, 1939.

1. Workmen's compensation § 857

Generally, an employee is entitled to an award for permanent disability without regard to receipt of wages after the injury, since inability to return to a re-employment is not a test for allowance of permanent disability under statute. St.1937, p. 283, § 4660.

2. Workmen's compensation § 905

The amount earned by employee subsequent to an award of compensation for permanent disability cannot be credited against such award, since disability embraces any loss of physical functions which detract from former efficiency in ordinary pursuits of life, and ability to do exact work formerly done by the employee is not sole measure of disability. St.1937, p. 283, § 4660.

3. Workmen's compensation § 857

Members of law enforcement branch of government are not to be deprived of compensation for permanent injuries because of ability to do the exact work formerly done, unless statutes expressly prohibit compensation in such instances. St.1937, p. 283, § 4660.

4. Workmen's compensation § 905

The statute providing that no disability indemnity shall be paid highway patrolman concurrently with salary payments or for time after retirement was drafted to prevent the payment of both salary and indemnity during the one-year period during which an injured officer is allowed to receive leave of absence on full pay, or payment for both indemnity and retirement, and the admonition that no disability indemnity shall be paid concurrently with salary, refers solely to the one-year period when highway patrol officer is on leave due to injury at full salary which is expressly paid in lieu of disability payments. St.1937, pp. 265, 285-287, §§ 3202, 4800-4804.

5. Workmen's compensation § 905

Statutes relating to compensation for injuries to highway patrol officers do not abrogate general rule in compensation cases that where an employee has received a permanent disability but is thereafter able to return to work and earn salary for such services rendered, he is entitled to receive both disability indemnity payments, and salary. St.1937, pp. 282, 286, 287, §§ 4650, 4803, 4804.

6. Statutes § 174

Words must be given such interpretation as will promote rather than defeat the general purpose and policy of the law.

7. Statutes § 181(2)

Where the language of a statute is reasonably susceptible of two constructions, one of which in application will render it reasonable, fair and harmonious with its manifest purpose, and another which would be

productive of absurd consequences, former construction will be adopted.

8. Statutes $\Rightarrow$ 207

If certain provisions of a statute are repugnant, effect should be given to those which best comport with the end to be accomplished and render the statute effective rather than nugatory.

9. Workmen's compensation $\Rightarrow$ 857

Under statute relating to compensation for injuries to highway patrol officer, where officer sustained permanent partial disability, and returned to work and was rendering services for salary received, officer was entitled to compensation for permanent partial disability. St.1937, pp. 282, 285-287, §§ 4650, 4800-4804.

In Bank.

Proceeding by the Department of Motor Vehicles of the State of California against the Industrial Accident Commission of the State of California, and another, to annul an award of the Commission against petitioner.

Award affirmed.

Earl Warren, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., (Carroll S. Bucher and B. E. Pemberton, both of San Francisco, of counsel), for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Frank T. O'Neill, of San Francisco, for respondent William Y. Dinan.

Fred M. Cross, of Los Angeles, amicus curiæ for California Ass'n of Highway Patrolmen.

PULLEN, Justice pro tem.

A proceeding to annul an award of the Industrial Accident Commission against the Department of Motor Vehicles.

William Y. Dinan, while a member of the state highway patrol and engaged in active law enforcement, suffered, in the course of his employment, a gunshot wound. For approximately twenty weeks Dinan was temporarily disabled and on leave of absence without loss of salary, as permitted by section 4800 of the Labor Code, St.1937, p. 285. At the end of the leave, the injured employee returned to active duty and shortly thereafter applied to the Industrial Accident Commission for

permanant disability rating. After a hearing, the commission found the employee had sustained a permanent disability amounting to 24¾ per cent, and awarded him the sum of \$2,475, less the sum of \$457.14 which he had received on account of temporary disability. Sec. 4661, Labor Code.

This award is here questioned by the petitioner upon the ground that the Industrial Accident Commission has exceeded its jurisdiction in granting compensation to a member of the highway patrol for permanent partial disability after the employee had returned to work and was receiving full salary.

[1] The rule is well recognized that, generally, an employee is entitled to an award for permanent disability without regard to the receipt of wages after the injury. That the inability to return to re-employment is not a test for an allowance of permanent disability is determined by the Labor Code itself. Section 4660 thereof provides that, in determining the percentage of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury. In *Frankfort General Ins. Co. v. Pillsbury*, 173 Cal. 56, 159 P. 150, it was stipulated that the injured employee, a carpenter who had lost the greater part of the index finger of the left hand, could do and was doing the same quantity and quality of work as prior to the injury, and was receiving the same rate per hour as wages. The commission held it was not limited by the stipulation in making an award of compensation, and found the disability to be 20¼ per cent, and awarded some \$1,200 to the employee.

[2] In *Postal Telegraph, etc., Co. v. Industrial Accident Commission*, 213 Cal. 544, 3 P.2d 6, the rule is announced that wages earned by and paid to an injured employee subsequent to an award of compensation for a permanent disability could not be credited against such award, holding, in accordance with the rule followed in several industrial states, that the disability referred to in the statute was not such disability as impaired present earning power only, but embraced any loss of physical functions which detracted from the former efficiency in the ordinary pursuits of life. It is the prospective loss of future earning power under the existing handicap of physical impairment that is

to be considered; and ability to do the exact work formerly done by the employee is not the sole measure of disability.

[3] Inasmuch as state employees generally or employees in industrial life are not deprived of compensation for permanent injuries under the circumstances here existing, the rule should be the same for members of a law-enforcement branch of our government, unless some express statutory prohibition is found.

Petitioner claims that inasmuch as this employee was a member of the state highway patrol it finds such prohibition in section 4804 of the Labor Code, which, it urges, prevents an award to a state highway patrolman concurrent with the payment of salary. The effect of this contention would, in fact, go to the extent of preventing a highway patrolman, under any circumstances, receiving a permanent disability industrial award.

Petitioner points out that prior to the adoption of the Labor Code in 1937, St. 1937, p. 185, the Workmen's Compensation Act, section 9a, St. 1935, p. 1494, set apart the members of the highway patrol who were engaged in active law enforcement from all other employees of the state, placing them in a separate classification and granting them various special benefits, among others full salary for a period of not exceeding one year following an injury. Upon the enactment of the Labor Code, this provision of the Compensation Act was adopted in substance and became section 4800 of the Labor Code.

Sections 4801 and 4802 have no bearing upon the present problem, dealing, as they do, with the proper agency to determine the nature of the injury and the right to hospital and medical expenses. Section 4803 of the Labor Code provides: "Whenever such disability of such member of the California Highway Patrol continues for a period beyond one year, such member shall thereafter be subject, as to disability indemnity to the provisions of this division other than section 4800, during the remainder of the period of such disability or until the effective date of his retirement under the State Employees' Retirement Act, except that such compensation shall be paid out of funds available for the support of the Department of Motor Vehicles, and the leave of absence shall continue."

Section 4804, wherein petitioner claims to find the prohibition against awarding

the injured highway patrol officer permanent indemnity, reads as follows: "No disability indemnity shall be paid to said member concurrently with wages or salary payments or for time after the effective date of retirement under the State Employees' Retirement System." In construing this section, petitioner contends that "no disability indemnity" unequivocally means compensation for either temporary or permanent disability, and that to sustain the award would defeat the sole purpose of this section.

The point is not without merit, but, having in mind the direct admonition of section 3202 of the Labor Code that "the provisions of Division IV [which includes the sections here under consideration] and Division V of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment", and the evident purpose of the law to protect and compensate those members of the highway patrol whose principal duties consist of active law enforcement, we should adopt, if possible, that construction of section 4804 which would enable the injured officer to receive the benefits of the act rather than accept a literal construction which would tend to deprive him of all disability indemnity, and not only render meaningless the language of section 4803, but also provide a rule for highway officers different from that applicable to others.

[4] Examining section 4804, not as it stands alone, but in its relationship to the entire subject-matter, we find section 4800 permits an injured officer to receive a leave of absence for a year on full pay. Section 4801 imposes upon the Industrial Accident Commission the duty of determining whether or not such disability arose in the course of duty. Section 4802 grants certain medical, surgical and hospital benefits. Section 4803 provides that if the injury, either temporary or permanent, referred to in section 4800, extends beyond a period of one year, such member shall receive such disability indemnity benefits as may be provided elsewhere in division IV of the Labor Code, as long as the disability shall continue, or until retirement. It also grants him, if necessary, a leave of absence beyond one year without pay. Division IV, which by reference is made a part of this section, embraces the whole subject of workmen's compensation and in-

surance, with more than 2,800 sections covering various matters pertaining thereto, and particular section 4650 et seq. dealing directly with disability payments. Section 4804 provides "no disability indemnity shall be paid * * * concurrently with * * * salary payments, or for time after * * * retirement". This section appears to have been drafted to prevent the payment of both salary and indemnity during the one-year period, or payment for both indemnity and retirement. The admonition that no disability indemnity shall be paid concurrently with salary seems, under the circumstances, to refer solely to the one-year period when the highway patrol officer is on leave due to injury, and on full salary which is expressly paid in lieu of disability payments.

[5] Nowhere in this section can be found an intent to abrogate the general rule in compensation cases that, where an employee has received a permanent disability but is thereafter able to return to work and earn a salary for such service rendered, he is entitled to receive both disability indemnity payments and salary. Such a rule is recognized by section 4803, and it was not the purpose of the legislature, we believe, to change it by the very general language found in section 4804.

[6] As it is a cardinal rule of construction that words must be given such interpretation as will promote rather than defeat the general purpose and policy of the law, we cannot believe the legislature intended that interpretation to be placed upon section 4804 for which petitioner contends, thereby entirely nullifying and making meaningless the provisions of section 4803, which directly make applicable after one year the general provisions of the Labor Code relating to disability indemnity payments.

[7,8] This conclusion is in accord with such general rules of statutory construction as "where the language of a statute is reasonably susceptible of two constructions, one of which in application will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted" (23 Cal.Jur., sec. 140, p. 766);

and "if certain provisions are repugnant, effect should be given to those which best comport with the end to be accomplished and render the statute effective, rather than nugatory". 23 Cal.Jur., § 133, p. 759.

If it was the purpose of the lawmakers to recognize and compensate a California highway patrol officer for the hazardous duties he is called upon to perform, surely the legislature did not intend to deprive him of disability indemnity, as would result if the rule contended for by petitioner were to prevail.

It is claimed by petitioner that such officer is amply provided for under the Retirement Act (Deering's Gen.Laws, 1937, Act 5847, p. 2751), and is therefore not entitled to permanent disability indemnity under the Workmen's Compensation Act. However, the Retirement Act cannot, in the absence of express language, control the provisions of the Compensation Act, and, furthermore, we do not find the patrol officer is in any favored position. If such officer leaves the service of the state, he also loses all rights to benefits under the Retirement Law, except as to his own contributions thereto, and, upon severance from state service, the highway patrolman who has sustained a permanent disability would then, if petitioner is correct, receive nothing for such handicap after his temporary disability had ceased. We cannot believe that the legislature intended such a result.

[9] If, in reading section 4804 of the Labor Code, there is kept in mind the provisions of section 4803 of the same code, the meaning becomes clear that no disability indemnity shall be paid to a patrol officer concurrently with salary, except where such officer has sustained a permanent partial disability and has returned to work and is rendering services for the salary received. Such is the reasonable construction, and conforms to the spirit and intent of the Workmen's Compensation Law and is in consonance with the provisions of the Retirement Act.

The award is affirmed.

We concur: HOUSER, J.; SHENK, J.; CURTIS, J.; SPENCE, Justice pro tem.; EDMONDS, J.

14 Cal.2d 168

WRIGHT v. LOS ANGELES RY. CORPORATION et al.

L. A. 17164.

Supreme Court of California.

Aug. 15, 1939.

Rehearing Denied Sept. 14, 1939.

1. Street railroads $\hookrightarrow$ 81(4), 99(1)

On approaching an intersecting street, the duties of a street car motorman and those of a driver of an automobile which is about to cross street car tracks at the intersection are reciprocal, and each is required to approach the intersection with due regard for the rights of the other.

2. Street railroads $\hookrightarrow$ 117(28)

In action against street railroad company and street car motorman for injuries received by motorist when automobile was struck at intersection by street car traveling at speed of from 20 to 30 miles per hour in zone in which speed limit was 15 miles per hour after motorist had stopped and observed street car when it was approximately one block away before attempting to make left turn across street car tracks, question of contributory negligence of motorist was for jury.

3. Negligence $\hookrightarrow$ 136(9)

Negligence is a fact question for the jury even when there is no conflict in the evidence if reasonable men might differ on the question whether the particular acts and circumstances shown to have been present did in fact constitute negligence.

4. Evidence $\hookrightarrow$ 588

Where evidence was conflicting, jury was entitled to believe evidence adduced on behalf of either party.

5. Street railroads $\hookrightarrow$ 114(10)

In action against street railroad and street car motorman for injuries received by motorist when motorist made left turn in front of street car intersection, evidence that motorman was operating street car at rate of speed in excess of speed limit was sufficient to establish negligence of street railroad and motorman.

6. Negligence $\hookrightarrow$ 6

The violation of an ordinance or statute is "negligence per se."

[Ed. Note.—For other definitions of "Negligence Per Se," see Words & Phrases.]

7. Street railroads $\hookrightarrow$ 117(8)

In action against street railroad company and street car motorman for injuries received by motorist when automobile was struck by street car as motorist attempted to make left turn at intersection in front of street car traveling in excess of speed limit, question of liability of street railroad company and motorman was for jury.

8. Street railroads $\hookrightarrow$ 118(7)

In action against street railroad company and street car motorman for injuries received by motorist when struck at intersection by street car which was being operated at speed in excess of limits fixed by municipal ordinance, instruction that provisions of city ordinance were applicable to street car operated by company on its own private right of way was not error.

9. Street railroads $\hookrightarrow$ 74

A city may by general municipal ordinance prescribe reasonable conditions and regulations under which street railroad companies shall operate their cars over or across streets of the city, including the rate of speed.

10. Street railroads $\hookrightarrow$ 99(10)

The purpose of the rule requiring motorist to stop, look, and listen before crossing interurban tracks is to cause motorist to become aware of any possible danger which might exist from the fact that an interurban car or train was approaching and in close proximity.

11. Negligence $\hookrightarrow$ 138(4)

It is not improper to instruct jury on doctrine of last clear chance when on any valid theory there is substantial evidence to support the application of that principle.

12. Negligence $\hookrightarrow$ 136(32), 142

Where the facts of the case do not bring the last clear chance doctrine into play, the court must so decide; and, if the facts are such that the doctrine may be applied, it is the duty of the trial judge to submit it to the jury by proper instructions or to find on it in the absence of a jury.

13. Street railroads $\hookrightarrow$ 118(15)

In action against street railroad and street car motorman for injuries received by motorman when motorist attempted to make left turn in front of street car at intersection, instruction on last clear chance doctrine was not error under evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Olive Wright against the Los Angeles Railway Corporation and another for injuries received when automobile driven by plaintiff was struck by street car. Judgment for plaintiff in the sum of \$7,500, and defendants appeal.

Affirmed.

For prior opinion, see (Cal.App.) 87 P. 2d 877.

Gibson, Dunn & Crutcher and E. H. Chapman, all of Los Angeles, for appellants.

Ira J. McDonald, of Los Angeles, for respondent.

PER CURIAM.

In this action plaintiff sought to recover a judgment for damages alleged to have been suffered by her when an automobile which she was driving in the city of Huntington Park was struck by a street-car owned by the defendant railway corporation and operated by defendant Sherman.

It was alleged in the complaint that the proximate cause of the collision was the negligent operation of the street-car by the defendants. By the answer the charge of negligence was denied and the issue of contributory negligence of plaintiff was specifically raised. At the close of plaintiff's case, and again at the close of the trial, the defendants' motions for a nonsuit and for a directed verdict, respectively, were denied. The jury returned a verdict in plaintiff's favor in the sum of \$7,500, and the defendants have appealed from the judgment entered thereon.

At the time of the accident here concerned, there was in effect an ordinance of the city of Huntington Park, by the provisions of which it was made unlawful for any street-car to be operated at a speed greater than 15 miles per hour in a business or a school district. The accident happened early in the afternoon of October 12, 1936, at the intersection of Pacific boulevard and Fifty-seventh street, which latter thoroughfare runs east and west in said city. The district along Pacific boulevard from Fifty-sixth street southward to Fifty-seventh street is a business district; from Fifty-seventh street to Fifty-eighth street is a school zone, and there is a "school crossing" sign on the south side

of the intersection of Pacific boulevard and Fifty-seventh street. On the day of the accident the defendant corporation owned and, through defendant Sherman, was operating an electric street-car upon its right of way, which extended upon and along the center of Pacific boulevard in a northerly and southerly direction. Shortly before the accident happened, the street-car was being operated in a southerly direction in the block immediately north of the intersection of the boulevard and Fifty-seventh street. At the same time, plaintiff was operating her automobile in a southerly direction along the west side of Pacific boulevard, on a portion of the street which runs parallel with the street-car tracks. When plaintiff reached Fifty-seventh street she assertedly stopped at the south end of the safety zone, after which she turned her automobile in an easterly direction across the southbound tracks of the electric railway, at which point the collision occurred—the left side of the automobile having been struck by the street-car.

The records shows that the evidence was substantially conflicting in each of several respects. The version given by defendant Sherman as to the speed and position of the respective vehicles, and of his acts as well as those of plaintiff, immediately prior to and at the time of the accident, differs in several material respects from the recital of plaintiff in that regard. The former testified that when the street-car was about half a block north of Fifty-seventh street he saw the automobile traveling south on Pacific boulevard midway of a safety zone which was located near the intersection of Fifty-seventh street; that at that time the street-car was traveling at a speed of about 20 miles per hour and that the automobile was moving very slowly; that from the time he first saw the automobile until it reached the intersection he was watching it "to see what move it was going to make"; that plaintiff gave no signal that she was about to make a left turn, and that he "didn't think she [the plaintiff] was going to whirl right around in front of the street-car, * * * which was done"; and that when he observed the automobile on the track in front of the street-car, he threw off the power and "tried to stop as soon as he could". He also testified that he rang the bell continuously from the time he first saw the automobile until he reach-

ed the intersection, but that he did not slacken the speed of the street-car from the time he first saw the automobile until the street-car had reached the intersection where the accident occurred. On the other hand, plaintiff testified as follows: " * * * when I was about half a block north of 57th street I gave a signal with my left hand to turn. From that time I dropped my hand to stop at the intersection. When I stopped my front wheels were about even with the end of the loading zone. * * * I shifted into low gear and made a signal for a left-hand turn and looked back alongside the automobile and by that time I had started into the intersection. When I looked back I saw the street-car. It hadn't entered the intersection of 56th [an entire block to the north]. I proceeded into the intersection, making a signal for a left-hand turn, and then I took my hand in and shifted to second gear and then made the left-hand signal and proceeded to make the left-hand turn across the tracks. * * * I had almost crossed the track and the rear wheels were just about in the center when I heard a bell ring. * * * When I heard the bell I looked around and saw the street-car. It was just a few feet from my automobile. There wasn't time to do anything" then, as it was just an instant until the street-car struck the automobile. She also testified that, from the time she stopped until she started to make the left turn across the tracks,—except when she shifted gears of the automobile and looked backward—*she was observing a northbound street-car which was nearing the intersection of Fifty-seventh street.*

There was evidence adduced with respect to the position and speed of the respective vehicles, which in part tended to support the version of the accident as related by defendant Sherman, as well as evidence which in part supported that given by plaintiff. Two witnesses testified that, while it was traversing the block between Fifty-sixth and Fifty-seventh streets, the speed of the street-car was 30 miles an hour—although, at a former time, one of those witnesses had stated that he had not noticed the speed of the respective vehicles at or about the time of the accident. The testimony of four of the witnesses, as well as that of defendant Sherman, was that the speed of the street-car was greater than 15 miles per hour. There was also testimony offered by the defend-

ants to the effect that the automobile had been traveling "parallel" with the street-car at the time it was approximately midway of the block north of the intersection where the collision occurred.

[1] The principal contention of the appellants is that plaintiff was contributorily negligent. Or, otherwise stated, they contend that, at or about the time of the accident, the conduct of plaintiff was not that of an ordinarily prudent person, under the same circumstances. However, it is generally conceded that, on approaching an intersecting street, the duties of a street-car motorman and those of the driver of an automobile which is about to cross the street-car tracks at such intersection, are reciprocal and that each is required to approach the intersection with due regard for the rights of the other. *Smith v. Southern Pacific Co.*, 201 Cal. 57, 255 P. 500; *Shipley v. San Diego Electric Ry. Co.*, 106 Cal.App. 659, 289 P. 662. In that regard it was said in the case entitled *Aungst v. Central California Traction Co.*, 115 Cal.App. 113, 116, 1 P. 2d 56, 57: " * * * 'that where both street car companies and automobiles have the right to use the public streets, the right of each must be exercised with due regard to the rights of the other, and in such a manner as not unreasonably to infringe upon the rights of the other.' While street cars must run upon the tracks provided for them, they have no absolute or pre-eminent right of way over intersections, but must use the same with due regard to the safety and rights of the general public. *O'Connor v. United Railroads*, 168 Cal. 43, 141 P. 809." (Emphasis added.)

In support of her contention that, as a matter of law, her conduct in the premises could not properly be declared to constitute contributory negligence, respondent directs attention to that which was said in the case entitled *Scott v. San Bernardino Valley, etc., Co.*, 152 Cal. 604, 611, 93 P. 677, 680, as follows: "It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching. If that were so, he could never attempt to cross such a track in the crowded parts of a city where there is practically always an approaching car; and, in such case, as street cars go at a comparatively low rate of speed and are quickly stopped, the question of negligence

would depend on the proximity or remoteness of the car, and upon all the other circumstances surrounding the occurrence. In such a situation the traveler cannot be held to exercise the very highest prudence and judgment. It is sufficient if he exercises that degree of care and prudence and good sense which men who possess those qualities in an ordinary or average degree exercise.' * * *

The case entitled *Bate v. Los Angeles Ry. Corp.*, 30 Cal.App.2d 604, 86 P.2d 856, 857, involved an accident which occurred between a street-car and an automobile at an intersection in a business district. There, also, according to his testimony, the plaintiff, who was traveling in a northerly direction, made a left turn across the street-car tracks, after he had seen a southbound street-car approaching about two-thirds of a block away, and where there was other traffic at the intersection which called for the attention of the driver of the automobile. In that case the court said:

"The issue of the alleged contributory negligence of the driver of an automobile is ordinarily to be left to the determination of the jury and it may not be taken from the jury by the court if the circumstances in evidence are such that reasonable minds might differ on the issue. Mr. Bate entered the intersection first and he had the right to assume that the motorman of the street car would obey the law and operate the car in a proper manner. The law permitted him [Mr. Bate] to make a left turn if he could do so 'with reasonable safety'. Vehicle Code, § 544, St.1935, p. 185. * * * The jury might reasonably have concluded that an ordinarily prudent driver would have made the turn as did Mr. Bate. He noticed nothing unusual about the operation of the car but even if he had noticed its undue speed, as stated in *Runnels v. United Railroads*, 175 Cal. 528, 532, 166 P. 18, 20, 'he was not in law bound to believe that a car, though traveling at undue speed when he saw it half a block or more away, would continue to violate the law and not check its speed as it drew near an intersecting street'. * * * We know of no rule which makes the act of the driver of an automobile in going in front of an approaching car negligence as a matter of law *regardless* of the attendant circumstances. On the contrary *it has been frequently held that in such cases the issue of the negligence of the operator of*

the automobile ordinarily should be submitted to the jury. *Scott v. San Bernardino Valley, etc., Co.*, 152 Cal. 604, 93 P. 677; *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 P. 152, 5 L.R.A., N.S., 1059; *Cowan v. Market Street Ry. Co.*, 8 Cal.App.2d 642, 47 P.2d 752; *Hoff v. Los Angeles Pacific Co.*, 158 Cal. 596, 112 P. 53; *Ring v. Los Angeles Ry. Corp.*, 116 Cal.App. 93, 2 P.2d 404; *Commonwealth Bonding, etc., Co. v. Pacific Railway Co.*, 42 Cal.App. 573, 184 P. 29. The words of the court in *Ross v. San Francisco-Oakland Terminal Railways Co.*, 47 Cal.App. 753, 759, 191 P. 703, 706, are appropriate in the present situation: "But a traveler may cross an electric street railway track in front of an approaching car which he sees and hears and not be negligent. If, in view of his distance from the car, the rate of its speed, and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross the highway, a traveler may do so, and the propriety of his conduct *is ordinarily a question for the jury.*" * * * (Emphasis added.)

[2] In the instant case, as in the *Bate* case, plaintiff was traveling at a moderate rate of speed. If, in accordance with her testimony, it was true—and the jury believed it was—that a very short time before she attempted to make the turn into the intersection, she had observed the street-car a block away from her, she could not have been charged with the knowledge that it might travel the length of the next block at a high or unlawful rate of speed. Under the facts of this case, the jury might well have found that plaintiff reasonably could have relied on the belief that the street-car was traveling at a lawful rate of speed, and that there was no danger to be expected from a street-car which was a block away at the time when plaintiff was preparing to make the left turn. Whether she acted reasonably under those circumstances was a question of fact for the jury.

[3] As was said in the case entitled *Seller v. Market-Street Ry. Co.*, 139 Cal. 268, 271, 72 P. 1006, it is rarely that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. And it frequently has been declared by the appellate courts of this state that negligence is a question of fact for the jury even where there is no conflict in the evidence, if rea-

sonable men might differ on the question whether the particular acts and circumstances shown to have been present in the case did in fact constitute negligence. *Jansson v. National Steamship Co.*, 189 Cal. 187, 208 P. 90; *Wahlgren v. Market Street Ry. Co.*, 132 Cal. 656, 62 P. 308, 64 P. 993; *Carlson v. Cucamonga Water Co.*, 7 Cal.App. 382, 94 P. 399; *Burr v. United Railroads*, 163 Cal. 663, 126 P. 873; *Kimic v. San Jose-Los Gatos, etc., Ry. Co.*, 156 Cal. 379, 104 P. 986.

[4-6] But, as hereinbefore has been indicated, in the instant case, the evidence was conflicting in each of several material particulars and the jury was entitled to believe either the evidence adduced on behalf of the defendants, or that which was offered by plaintiff. *Hinkle v. Southern Pacific Co.*, 12 Cal.2d 691, 87 P.2d 349. If the jury believed that defendant Sherman was traveling at a rate of speed in excess of 15 miles an hour,—and according to his own testimony he was so traveling—the defendants' negligence was established. The violation of an ordinance or statute is negligence per se. *Hurtel v. Albert Cohn, Inc.*, 5 Cal.2d 145, 52 P.2d 922; *Kellner v. Witte*, 133 Cal.App. 231, 23 P.2d 1045. Not only did defendant Sherman testify that the street-car was traveling at a rate of speed which, it was evident, was prohibited by the ordinance, but also that he was watching the automobile from the time he first saw it to "see what move it was going to make", and that he *did not slacken the speed* of the street-car while he was watching the automobile,—although it was shown that during that time he was operating the street-car through a business district of the city, and was about to approach an intersection, immediately beyond which was a school zone.

[7] The record herein shows that the trial court denied the motion for a directed verdict on the ground that there was a sufficient conflict in the evidence for the case to go to the jury. There was no error in that ruling. On the other hand, what was said by this court in the recent case entitled *Hinkle v. Southern Pacific Co.*, 12 Cal.2d 691, 87 P.2d 349, 351, is applicable here: "As often happens in cases of this character, the evidence with reference to the accident was sharply conflicting and the testimony of the witnesses for the appellant, not being reconcilable with the testimony of the respondents and their

witnesses, it was necessary for the jury as triers of fact, to determine which of the contrary versions of the accident should be accepted as true. It is self-evident that the jury accepted as true the testimony of the respondents, and necessarily rejected a portion, at least, of the evidence proffered by appellant. It follows that it is incumbent upon this court upon appeal to accept as true the evidence in favor of respondents and to resolve all conflicts in the evidence in their favor."

[8, 9] The appellants also contend that the trial court erred in instructing the jury that the provisions of the city ordinance were applicable to a street-car operated by appellant corporation upon its own private right of way. In that regard, it may be noted that in the case entitled *Simoneau v. Pacific Electric Ry. Co.*, 166 Cal. 264, 269, 136 P. 544, 547, 49 L.R.A., N.S., 737, it was said: "It is, of course, well settled that a city may by a general municipal ordinance prescribe reasonable conditions and regulations under which street railroad companies shall operate their cars *over or across* the streets of a city, including the rate of speed, * * *." (Emphasis added.) Ordinances regulating the speed of trains and street-cars within city limits are proper police regulations, made in the interests of the general welfare. See *Switzler v. Atchison, etc., Ry. Co.*, 104 Cal.App. 138, 152, 285 P. 918.

[10] Appellants make the further contention that the street-car tracks herein concerned are utilized for "interurban" street-car service and that since the right of way on which they are laid is unpaved (except at street intersections) and therefore is open to other vehicular traffic only at such intersections, the "stop, look and listen" rule of caution pertaining to a steam railroad should have been applicable to respondent herein. Although the street-car was operated between the city of Los Angeles and the city of Huntington Park, it appears to have been operated as an ordinary street-car which made local stops while traveling through the city. However, the question whether the rule was applicable does not become material, in the instant case, in view of the fact that, according to her testimony, when plaintiff reached the intersection and was about to make the left turn, she *did* stop and look, and that at that time she *saw* the street-car (a block away). Plaintiff further testified that after she had given the

signal for a left turn, her attention was taken up with traffic approaching from the opposite direction. As was said in *Callett v. Central California, etc., Co.*, 36 Cal.App. 240, 246, 171 P. 984, 986: "The fact that the driver of such [a] vehicle, after looking back and not seeing any approaching car, failed to again look back during an interval in which he drove a distance of about 500 feet, did not constitute negligence per se." And in the case entitled *Hansen v. Market Street Ry. Co.*, 64 Cal. App. 426, 431, 221 P. 955, 957, it was said that "The failure of a person to look or listen for an approaching car before crossing a street car track in a city is not always and under all circumstances an act of negligence." Again, in the case entitled *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 776, 780, 89 P. 1109, 1111, the court said: "Manifestly it is impossible for one driving a vehicle along a street to look in both directions at once, and it should ordinarily be left to the jury to determine, under the circumstances of each particular case, what amount of vigilance was requisite in order to constitute due care." See, also, *Babcock v. Pacific Gas, etc., Co.*, 120 Cal.App. 218, 222, 7 P.2d 736. Obviously, the purpose of the rule—that is, to cause plaintiff to become aware of any possible danger which might exist from the fact that an interurban car or train was approaching and in close proximity to her—was completely accomplished through the fact that after stopping her automobile and looking in the direction from which the street-car of the defendant was approaching the intersection, she not only *saw* the street-car, but also at the same time made an estimate of its distance from the intersection and the rate of speed at which it was traveling. In other words, plaintiff's error, if any, consisted not in a failure to observe that the street-car was approaching the intersection, but in the making of a poor estimate as to its speed and distance.

[11-13] The final contention made by appellants is that the court erred in instructing the jury on the doctrine of "last clear chance". It is not improper to instruct the jury on the doctrine of "last clear chance" when, on any valid theory, there is substantial evidence to support the application of that principle. *Gardini v. Arakelian*, 18 Cal.App.2d 424, 430, 64 P.2d 181. In the case entitled *Wheeler v. Buerkle*, 14 Cal.App.2d 368, 373, 58 P.2d

230, 232, it was said that "if the facts of a case do not bring the doctrine into play, the court must so decide," and if the facts be such that the doctrine *may be applied*, it is the duty of a trial judge to submit it to a jury by proper instructions, or to find upon it in the absence of a jury. Upon the state of the record herein presented, it cannot properly be said that the trial court erred in instructing the jury thereon. As was said in the case entitled *Keena v. United Railroads of San Francisco*, 57 Cal.App. 124, 129, 207 P. 35, 37, wherein it was contended that instructions on the doctrine should not have been given: "There was a conflict in the evidence, and the jury were entitled to be advised as to the law and then to believe the plaintiff's witness, or witnesses, or to believe the defendant's witness."

We find no error in the record with respect to either the giving of certain instructions objected to by the appellants, or in the refusal to give certain others requested by them.

The judgment is affirmed.



14 Cal.2d 179

CARTER v. COMMISSION ON QUALIFICATIONS OF JUDICIAL APPOINTMENTS et al.

S. F. 16280.

Supreme Court of California.

Aug. 15, 1939.

1. Officers ⇐77

The right to hold public office, either by election or appointment, is one of the valuable rights of citizenship, and constitutes an implied attribute of citizenship.

2. Officers ⇐77

Exercise of right to hold office should not be declared prohibited or curtailed except by plain provisions of law.

3. Officers ⇐18

Ambiguities in constitutional provisions regarding qualification to hold public office are to be resolved in favor of eligibility to office. Const. art. 4, § 19.

4. Constitutional law ⇨19

Contemporaneous interpretation by Attorney General over a long period of time of constitutional provisions governing appointment of members of state senate and assembly to other state offices was not of controlling significance but was entitled to great weight. Civ.Code, § 3535; Const. art. 4, § 19.

5. Constitutional law ⇨19

Statutes ⇨218

The rule that contemporaneous exposition is in general the best is applicable alike to interpretation of organic law as well as to a statute. Civ.Code, § 3535.

6. Constitutional law ⇨16

Argument contained in ballot pamphlet sent to voters to induce adoption of constitutional amendment governing appointment of members of state senate and assembly to other state offices could be resorted to as an aid in determining intention of framers of amendment and of electorate. Const. art. 4, § 19.

7. Officers ⇨30

Under constitutional provision prohibiting appointment of members of state senate or assembly to state offices and excepting elective offices from application of provision, an office is acquired "by appointment" in exercise by appointing authority of a delegated power. Const. art. 4, § 19.

[Ed. Note.—For other definitions of "Appoint; Appointment," see Words & Phrases.]

8. Officers ⇨30

Under constitutional provision prohibiting appointment of members of state senate or assembly to state offices and excepting elective offices from application of provision, an office is acquired "by election" as the direct choice of all members of class or body from whom choice can be made. Const. art. 4, § 19.

[Ed. Note.—For other definitions of "Elect; Elected; Election," see Words & Phrases.]

9. Officers ⇨30

The constitutional provision stating that no member of the state senate or assembly shall during his elective term hold any state office, and containing a proviso stating that the constitutional provision does not apply to any office "filled by election by the people," prohibits appointment of members of

state senate and assembly to "appointive offices" and did not prevent appointment of a member of state senate to fill vacancy in elective office of associate justice of the Supreme Court. Const. art. 4, § 19; art. 6, § 26.

10. Officers ⇨30

Under constitutional provisions that a justice of the Supreme Court may file a declaration of candidacy for election to succeed himself, that when such a declaration is filed name of no other candidate shall be placed on ballot, that electorate shall vote as to whether such candidate should be elected, and that Governor shall appoint suitable persons to fill vacancies, office of associate justice of the Supreme Court is an "elective office" and not an "appointive office," as respects constitutional provision prohibiting appointment of members of state senate or assembly to appointive state offices. Const. art. 4, § 19; art. 6, § 26.

[Ed. Note.—For other definitions of "Appointive Office" and "Elective Office," see Words & Phrases.]

In Bank.

Mandamus proceeding by Jesse W. Carter against Commission on Qualifications of Judicial Appointments and William H. Waste, John T. Nourse, and Earl Warren, members of said Commission, to compel respondents to consider and act upon petitioner's qualifications for the office of associate justice of the Supreme Court of the State of California.

Peremptory writ issued.

M. Mitchell Bourquin, Herbert Erskine, Edward F. Treadwell, and Edward Hohfeld, all of San Francisco, for petitioner.

Albert A. Rosenshine, Randolph V. Whiting, and John L. McNab, all of San Francisco, amici curiæ.

Earl Warren, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondents.

SHENK, Acting Chief Justice.

In this proceeding in mandamus the petitioner seeks to compel the respondents, constituting the Commission on Qualifications of Judicial Appointments, to consider and act upon the matter of his qualifications for the office of Associate Justice of the Supreme Court of the State of California. The cause is submitted on the allegations

of the petition and on a general demurrer interposed by the respondents as a return to the alternative writ.

The petitioner is and has been for some twenty-six years an attorney at law, admitted to practice before all the courts of this state. On January 17, 1939, he was duly elected state senator from the fifth senatorial district, comprising Shasta and Trinity counties, for the term ending January 6, 1941.

On July 15, the governor appointed the petitioner to the office of Associate Justice of the Supreme Court to fill the vacancy caused by the death of Mr. Justice Emmet Seawell on July 7. Under date of July 15, the governor submitted the name of the petitioner to the Commission on Qualifications for confirmation pursuant to section 26, article VI of the Constitution. Thereafter and under date of July 24, 1939, the commission informed the governor in writing that it would "not consider the name of Senator Jesse W. Carter", and would "not undertake to investigate his qualifications because of the fact that he is a state senator, and, therefore, ineligible for the office of Associate Justice of the Supreme Court of the State of California by virtue of section 19, of Article IV of the Constitution".

In view of the refusal of the respondent commission to consider and pass upon his qualifications for the office to which he has been appointed, the petitioner seeks the writ, not to compel the commission to confirm his appointment, but to compel it to exercise the function and jurisdiction conferred upon it by section 26 of article VI of the Constitution.

[1,2] At the outset it should be noted that the right to hold public office, either by election or appointment, is one of the valuable rights of citizenship. Mr. Mechem in his work on Public Officers, section 67, refers to the right to hold a public office under our political system as an "implied attribute of citizenship". The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office. *People ex rel. Galvin v. Dorsey*, 32 Cal. 296. The petitioner relies on these well-established rules in support of his position.

[3] On the other hand, the right to occupy a public office, once assumed, should not be left in a state of uncertainty. The undoubted attitude of the commission is that the question of the eligibility of the

petitioner to assume and occupy the office to which he has been appointed is of such grave import that it should be determined in an appropriate judicial proceeding. No suggestion has been made that the present proceeding is not appropriate to that end.

The commission urges the ineligibility of the petitioner because of the provisions of section 19 of article IV of the Constitution as amended in 1916, and section 26 of article VI, adopted in 1934. The history of those and other related provisions of our organic law, together with the practical and contemporaneous construction placed thereon, will be helpful in a solution of the problem presented.

The Constitution of 1849 contained the following provision (sec. 20, art. IV): "No senator, or member of assembly, shall, during the term for which he shall have been elected, be appointed to any civil office of profit, under this State, which shall have been created, or the emoluments of which shall have been increased, during such term, except such office as may be filled by elections by the people."

This section was readopted in the Constitution of 1879, but was designated as section 19 of the same article in the new Constitution. The language of this section without the exception was plain and certain and could admit of no interpretation. Its import was clear, to the effect that members of the legislature were ineligible for *appointment* to the prohibited offices. But the inclusion of the exception had the effect of injecting doubt and uncertainty as to the limitation thereby placed upon the operation of the language which preceded it. Did the exception mean that the language preceding it should not apply to the appointment of a legislator who should run and be elected to another elective office during the term for which he had been elected a member of the senate or the assembly? Or did the exception mean that the prohibition should not apply to the appointment of a legislator to an elective office, that is, an office normally filled by election by the people? The question, otherwise stated, is whether a legislator may be appointed to an elective office and, if so, is the office of Associate Justice of the Supreme Court an elective office?

No judicial interpretation of the admittedly uncertain meaning of the constitutional provision has been available, but the question of its proper construction was from time to time officially submitted to

the attorney-general of this state for his opinion. In 1911, he advised the governor that a legislator was ineligible for appointment to the office of member of the railroad commission, an appointive position newly created by constitutional amendment having its origin in the legislative resolution adopted during his term. In 1913, the attorney-general advised the chief executive of the state that said section 19 did not render a member of the legislature ineligible for appointment to the office of a judge of the superior court. Under this advice, members of the legislature, in numerous instances, were appointed to elective positions such as members of boards of supervisors and judges of the superior court.

In 1916, section 19 of article IV was amended to read as follows: "No Senator or member of Assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State; provided, that this provision shall not apply to any office filled by election by the people."

It will be observed that the section was amended in two particulars,—first, the positive prohibition was enlarged to include in the prohibited class all offices under this state, whereas prior to the amendment the prohibited class included only offices "created, or the emoluments of which shall have been increased, during" the term of the legislator; and, secondly, the language of the exception or proviso was changed from "except such office as may be filled by elections by the people", to "provided, that this provision shall not apply to any office filled by election by the people".

In 1917, the attorney-general was called upon to advise the chief executive as to the effect of the amendment on the eligibility of members of the legislature for appointment to public office. He was of the opinion that the amended section enlarged the number of offices in the prohibited class, but that the continued prohibition applied only to appointive offices; that the change in phraseology in the exception or proviso resulted in no change in meaning; that both before and after the amendment the effect of the exception and proviso was to describe the kind or character of the offices removed from the prohibitory clause and not to describe the method by which the offices would be obtained. He called attention to the fact that prior to the amendment members of the legislature had been appointed superior court judges and had

discharged their duties as such without any question having been raised as to their eligibility. He further stated: "This was a practice presumably familiar to the framers of the new amendment, and if it had been the intention to prevent in the future this practice, it would seem that language clearly prohibiting the same would have been adopted, and such language not having been written into the provision it must be assumed that it was not intended to change the practice in this regard."

It is true that in his opinions on the subject the attorney-general often expressed some doubt as to what judicial construction ultimately would be placed on the language of the exception in the original section and of the proviso in the amendment, but his advice down through the years, indeed for more than a quarter of a century, has been uniform to the effect that the exception in the one case and the proviso in the other had the effect of removing elective offices from the prohibited class. It should be stated, however, that, in 1938, he declined to advise with certainty that it was within the power of the governor to appoint a member of the assembly to a vacant judgeship. His reluctance to advise more definitely apparently resulted from the belief that the then members of the Commission on Qualifications, or some of them, entertained and had expressed a doubt as to the eligibility of a member of the senate for appointment to the Supreme Court. But as late as June 7, 1939, he officially advised that a member of the legislature was not ineligible for appointment to the office of judge of the superior court. Since the adoption of section 26 of article VI in 1934, the opinion of the legislative counsel of this state has been requested and has been given on the question of the eligibility of a member of the legislature for appointment to the office of judge of the superior court and also to the office of Associate Justice of the Supreme Court. After considerable research as reflected in his opinion the answer on each occasion was in favor of eligibility.

[4,5] The contemporaneous interpretation thus placed on concededly vague and uncertain provisions of the Constitution is referred to not as of controlling significance, but to indicate that under familiar rules of construction such practical interpretation, extending over a long period of time, is entitled to great weight. *Riley v. Thompson*, 193 Cal. 773, 227 P. 772. The maxim

of the civil law to that effect is incorporated in the Civil Code which declares in section 3535: "Contemporaneous exposition is in general the best." And the rule is applicable alike to the interpretation of the organic law as to a statute. *Knowles v. Yates*, 31 Cal. 82, 83; 23 Cal.Jur., p. 776; 5 Cal.Jur., p. 603.

[6] The argument in favor of the amendment of 1916, sent to the electors of the state in the ballot pamphlet, contained the following pertinent statement: "The proposed law to render a member of the legislature ineligible to any office under the state, *other than an elective office*, during the term for which he shall have been elected, is therefore in the interest of good government and should be adopted." This argument may be resorted to as an aid in determining the intention of the framers of the measure and of the electorate when such aid is necessary. *People v. Ottey*, 5 Cal.2d 714, 723, 56 P.2d 193.

Commenting on the effect of the prohibitory clause of section 19, as amended in 1916, the District Court of Appeal said in *Chenoweth v. Chambers*, 33 Cal.App. 104, at page 106, 164 P. 428, at page 429: "The amended section is much more sweeping than its progenitor, for it applies to all offices, *other than elective offices*. * * *

With reference to the same amendment it was said in *Satterwhite v. Garrison*, 34 Cal.App. 734, at page 736, 168 P. 1053, at page 1054: "Upon the merits of the whole case we are of the opinion that the intent and purpose of the framers in proposing, and of the people in adopting, this constitutional provision was the preclusion of members of the law-making branch of the state government from seeking or holding any *appointive* office or employment in or under any department or subdivision of the general state government, by the seeking or holding of which his independent action as such member of the Legislature might be in any wise influenced or affected." This language was quoted with approval in *Leymel v. Johnson*, 105 Cal.App. 694, 696, 288 P. 858.

The words "elective" and "appointive" in the foregoing quotations have been italicized for the purpose of emphasizing the fact that when the amendment of 1916 was proposed and when its language has been under observation by the courts, it has generally been considered, and apparently never contended otherwise, that appointment to appointive offices only was prohibited and that

appointment to elective offices was not within the prohibition.

[7,8] Independently of the argument to the voters and contemporaneous construction, the meaning of section 19 of article IV, both before and after the amendment of 1916, would appear to be in accordance with the interpretation contended for by the petitioner. If the section as originally adopted had any other meaning than that the exception removed elective offices from the operation of the prohibitory clause, the inclusion of the exception was meaningless and surplusage, for the section would then mean that legislators were ineligible for appointment except when they obtained their offices by election. There is, of course, a well-defined and fundamental difference between the acquisition of an office by appointment on the one hand, and by election on the other. An office is acquired by appointment in the exercise by the appointing authority of a delegated power. An office is acquired by election as the direct choice of all the members of the class or body from whom the choice can be made. Some meaning must be ascribed to the excepting clause and when we seek to ascertain it, the reasonable, if not the only logical conclusion is that the exception had the effect of describing the kind or character of the offices thereby removed from the operation of the prohibitory clause and not the method by which the offices were to be filled.

If by the 1916 amendment it was intended to prohibit entirely the appointment of legislators to public office, it would have been a simple matter to employ language to express that intent. Since no substantial change was made, no clear intent to disqualify a legislator appears and, under the established rules of construction above referred to, the doubts must be resolved in favor of eligibility.

[9] Either approach to a solution of the question leads to the conclusion that under section 19 of article IV of the Constitution, a legislator may be appointed to that kind of an office which is normally "filled by election by the people". The office of Associate Justice of the Supreme Court is such an office unless the adoption of section 26 of article VI of the Constitution in 1934 had the effect of changing it from an elective to an appointive office. The answer on this phase of the question necessarily depends on the language used in section 26, together with the terms of related sections of the same article.

“Within thirty days before the sixteenth day of August next preceding the expiration of his term, any justice of the Supreme Court, justice of the District Court of Appeal * * * may file with the officer charged with the duty of certifying nominations for publication in the official ballot a declaration of candidacy for *election* to succeed himself. If he does not file such declaration the Governor must nominate a suitable person for the office before the sixteenth day of September, by filing such nomination with the officer charged with said duty of certifying nominations.

“For
(title of office)
Shall
(name)
be *elected* to the office for
the term expiring January
.....?
(year)

Yes
No

“Whenever a vacancy shall occur in any judicial office above named, by reason of the failure of a candidate to be *elected* or otherwise, the Governor shall appoint a suitable person to fill the vacancy. An incumbent of any such judicial office serving a term by appointment of the Governor shall hold office until the first Monday after the first day of January following the general *election* next after his appointment, or until the qualification of any nominee who may have been *elected* to said office prior to that time. * * *

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We have put the words "election", "elected" and "elective" in italics to indicate the uniformity with which the framers of the section referred to the office of Justice of the Supreme Court as an "elective" office or an office to be filled by "election". The new method of electing Justices of the Supreme Court and Justices of the District Courts of Appeal has brought about an important change in the method of their selection. But they have continued to be elective officers as distinguished from appointive officers of the state. The adoption of section 26 of article VI has not repealed by implication or otherwise the following provisions of section 3 of the same article: "The chief justice and the associate justices shall be elected by the qualified electors of the State at large at the general elections, at the time and places at which State officers are elected. * * *" The method of filling vacancies by appointment by the governor under the new procedure is not materially different from the old. The method of nomination has been materially changed, and the candidacies for the office have been restricted to persons who occupy the offices or to persons who have theretofore been nominated by the governor. But the names of the candidates continue to be "placed upon the ballot for the ensuing general election", and the electors vote on the question whether such candidate shall "be elected to said office".

[10] The language of the new section 26 and of the older sections of the same article which were left undisturbed indicate without question that the Justices of the Supreme Court hold and continue to occupy their offices only at the will of the electorate. Resorting again to the argument sent to the electors we find that when section 26 was submitted to a vote of the people of the state, the argument in favor of adoption stated: "Under the proposed plan the ultimate control would remain in the hands of the people." The fact that the new method of election may make for more permanence in tenure, as was clearly intended by the framers of the new section and of the electorate in adopting it, affords no foundation for the conclusion that the electors have relinquished the right to say by their votes whether a candidate should or should not be retained in office. When the vote is cast on that question in favor of a

candidate he is "elected" the same to all intents and purposes as under the old method. A vote for or against a proposition has been held to be an election thereon. State ex rel. Birchmore v. State Board of Canvassers, 78 S.C. 461, 59 S.E. 145, 14 L.R.A., N.S., 850, 13 Ann.Cas. 1133. The same effect should be accorded to the result of such a vote on the continuance in office of a candidate.

Let the peremptory writ issue as prayed.

We concur: CURTIS, J.; EDMONDS, J.; PULLEN, Justice pro tem.; SPENCE, Justice pro tem.



14 Cal.2d 154

PEOPLE v. ADAMS.

Cr. 4222.

Supreme Court of California.

Aug. 15, 1939.

1. Infants ⇨20

In prosecution for violating statute relating to crimes against children, proof of complaint of the act while it is recent may be shown by the prosecutrix and also by the person to whom complaint was made. Pen. Code, § 288.

2. Infants ⇨20

In prosecution for violating statute relating to crimes against children, rule that proof of complaint of the act while it is recent may be shown by prosecutrix and also by person to whom complaint was made does not extend to details of the act complained of. Pen.Code, § 288.

3. Infants ⇨20

In prosecution for violating statute relating to crimes against children, admission of testimony of child's mother relating to conversation with child relative to details of former similar conduct toward child by defendant which had taken place approximately two years prior to alleged commission of offense, when child was only three years old, was prejudicial error. Pen.Code, § 288.

4. Criminal law ⇨729, 730(14)

In prosecution for violating statute relating to crimes against children, reference

by prosecuting attorney in argument to other notorious cases with plea to jury to render verdict that jury would be proud of was reversible error as depriving defendant of benefit of fair trial, notwithstanding that on objection prosecuting attorney withdrew remarks and jury was instructed to disregard them. Pen.Code, § 288.

5. Criminal law ⇨829(13)

In prosecution for violating statute relating to crimes against children, refusal of instruction that because charges of nature involved could be easily made and often were not easy to disprove, jury should treat testimony of prosecuting witness with caution, was not error in view of cautionary instruction given at request of prosecution. Pen.Code, § 288.

6. Criminal law ⇨769

In prosecution for violating statute relating to crimes against children wherein child prosecutrix testified in detail with respect to conduct of defendant on occasion when another five year old child as well as prosecutrix was asserted victim of defendant's misconduct, and such other child when called as witness was unable to qualify as such, refusal of trial court to instruct that jury should not draw any inference from fact that court ruled that such other child was not competent to testify and that jury should not surmise as to nature of such child's testimony if she had been allowed to testify was error. Pen.Code, § 288.

7. Criminal law ⇨633(1)

In prosecution for violation of statute relating to crimes against children, courts of last resort rigorously insist on observance of salutary rules regarding admission of evidence and trial of actions in general which have long been in practice to the end that an accused may be assured of a fair trial. Pen.Code, § 288.

8. Criminal law ⇨308

An accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt.

9. Infants ⇨20

In prosecution for violation of statute relating to crimes against children, errors committed either by the prosecution or by the court in the course of the trial which ordinarily might be considered trivial and as of no material consequence from the standpoint of adverse effect on the rights

of the defendant may be regarded as of greater importance. Pen.Code, § 288.

greater magnitude and present a most serious aspect.

In Bank.

Appeal from Superior Court, Los Angeles County; Thos. L. Ambrose, Judge.

John Adams was convicted of violating Penal Code, § 288, and he appeals.

Reversed and remanded for new trial.

Prior opinion, 87 P.2d 372.

R. H. Cantillon, John E. Glover, and Gladys Towles Root, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, Justice.

From each of two judgments which were rendered against defendant pursuant to several verdicts by a jury to the effect that defendant was guilty of a violation of the provisions of section 288 of the Penal Code, defendant has caused to be presented to this court his appeal which originally was decided by the District Court of Appeal. Specifically, it was charged in the information upon which he was tried that defendant did "lewdly commit a lewd and lascivious act upon and with the body, members and private parts thereof, of one Cornelia ———, who was then and there a female child * * * of the age of five years * * *." Defendant also appeals from the order by which his motion for a new trial was denied.

Although the child testified in great detail concerning the commission of the offense, an examination of her testimony, as it appears in the reporter's transcript thereof, reveals many discrepancies, inconsistencies and improbable statements in her story. Indeed, in various respects, her several incidental statements are directly contradicted by different apparently disinterested witnesses. In no essential particulars was the testimony of the child directly corroborated; and when the fact is considered that defendant emphatically denied each of the accusatory statements which was made by the little girl, the asserted errors that have been urged by appellant on this appeal, as constituting reasons that impel a reversal of the judgment that was rendered against him, assume a

The first complaint that is made by appellant relates to erroneous admission of evidence against defendant. It appears that in the redirect examination of the mother of the child, she was permitted to repeat the substance of an asserted conversation which had taken place between her and the child relative to former similar conduct toward the child by defendant, which assertedly had occurred about two years prior to the alleged commission of the instant offense, at a time when the child was only three years old. That incident of the trial is disclosed by the following excerpt from the record, to-wit:

"Q. By Mr. Ferguson: Will you tell us what, if anything, Cornelia told you on a prior occasion? A. Cornelia was so small; I was sitting her on the toilet in the bathroom and she said that John Adams had taken his hand and put it on her body, as she called her privates. And I asked her how John was dressed and she said he was in his pyjamas. But Cornelia wasn't more than three years old at the time and I just—children always follow you around the house and into the bath room, and I paid no further attention to it."

[1,2] When the child was on the witness stand, she expressed her inability to remember any such occurrence. It is obvious that to permit the mother to repeat either the details or the substance of such a narrative constituted the admission of asserted facts which were most damaging to defendant, and which were hearsay in character. That such evidence was detrimental in character, and that it was admitted in violation of the rule which ordinarily obtains with relation to criminal actions, require the citation of no authority to sustain the claim of prejudicial error. However, in the case of *People v. Ewing*, 71 Cal.App. 138, 142, 234 P. 917, 918, the defendant was charged with the offense denounced by section 288 of the Penal Code. There also the mother testified to the alleged misconduct of the defendant which she said had been related to her by her child, shortly after the alleged offense had taken place. The court there said: "The rule is that in prosecutions of this character proof of complaint of the act *while it is recent* may be shown by the prosecutrix and also by the person to whom the complaint was made. While such evidence is

in the nature of hearsay, its admission is justified upon the ground that in such cases, when restricted to the fact of complaint alone, it is in the strictest sense original evidence. The rule also applies to complaint on the part of one under legal age, there being no distinction between cases where there was actual resistance and those in which nonconsent is inferred. *People v. Baldwin*, 117 Cal. 244, 251, 49 P. 186; *People v. Wilmot*, 139 Cal. 103, 72 P. 838. Here, however, the original statement made to the mother was one not in the nature of a complaint, but was elicited from the child only after a spanking had been administered to her, and later, and after the mother had interviewed defendant, the further declaration was made by the child inculcating him." The court proceeded to say: "This is not the character of complaint contemplated by the rule. *It is purely hearsay*, and the rule does not extend to the details of the acts complained of. The cross-examination of Mrs. Wells upon this subject did not justify the admission of this incompetent evidence, and it was no more admissible on redirect examination than it would have been in chief. *Wagner v. People*, 30 Mich. 384; *State v. McDonough*, 232 Mo. 219, 134 S.W. 545; *People v. Flaherty*, 162 N.Y. 532, 57 N.E. 73; 4 Wigmore on Evidence, § 2119. The error is even more apparent when it is considered that the child was not sworn, she being incompetent as a witness. *Hearsay* evidence cannot be given of the declarations of a child who has not the capacity to be sworn, nor can such child be examined in court without oath. 4 Blackstone's Com. chap. 15, § 3. There can be no doubt but what the admission of this evidence constituted error. * * * (Emphasis added.) See, also, to the same effect: *People v. Mayes*, 66 Cal. 597, 599, 6 P. 691, 56 Am.Rep. 126. In the case entitled *People v. Gutierrez*, 126 Cal.App. 526, 529, 14 P.2d 838, 839, it also was said: "It is conceded that the person to whom a child, who is too young to become a competent witness, has made complaint concerning a recent assault upon her, may testify regarding the fact that such complaint was made. * * * But this rule does not authorize the *hearsay statement of circumstances concerning the attack which may have been related by the child*. It is said in the *Ewing Case*, supra: 'The rule does not extend to the details of the acts complained of.' In the present case the statement which was related by the

mother of the child does include circumstances and details which, under a proper objection, would be inadmissible." (Emphasis added.) Again, in the case entitled *People v. Wilmot*, 139 Cal. 103, 105, 72 P. 838, 839, it was said: "The rule enunciated by the authorities generally, and by all the decisions in this state, is in all cases to admit evidence of the *fact of complaint*, and in no case to admit anything more (*People v. Mayes*, 66 Cal. 597, 6 P. 691, 56 Am.Rep. 126; *People v. Tierney*, 67 Cal. [54] 55, 7 P. 37; *People v. Snyder*, 75 Cal. 323, 17 P. 208; *People v. Stewart*, 97 Cal. [238] 241, 32 P. 8; *People v. Barney* [114 Cal. 554, 47 P. 41], supra; *People v. Baldwin* [117 Cal. 244, 251, 49 P. 186], supra; *People v. Lambert*, 120 Cal. [170] 171, 52 P. 307), for, as said by Greenleaf: 'The evidence, when restricted to this extent, is not hearsay, but in the strictest sense original evidence. *When, however, these limits are exceeded, it becomes hearsay in a very objectionable form.*' It is clear that to allow any mere statement of the prosecutrix as to the details of the affair, or as to the name of the person accused by her, to be given in evidence, would be to allow hearsay evidence to prove the offense. See *People v. Lambert* [120 Cal. 170, 171, 52 P. 307], supra. * * *

[3] It would seem clear in the instant case that, for several reasons, the evidence related by the mother of the prosecutrix to the effect that, at a time some two years prior to the time of trial, when the child was but three years of age, the latter had told her of the alleged actions of defendant at or about that time, erroneously was admitted. In the light of the cases just cited, not only was the purported "complaint" of the child as to the acts of the defendant not "recent" in relation to the alleged offense for which defendant was on trial in the instant action (within the rule set forth in the *Ewing case*), but the asserted "complaint" of the child, as purportedly was related to the mother, contained the "circumstance concerning the attack", which testimony was specifically denounced in the *Wilmot case* as being "hearsay in a very objectionable form". The evidence was purely hearsay. In that regard the language of the court in the case of *Englebreton v. Industrial, etc., Commission*, 170 Cal. 793, at page 798, 151 P. 421, at page 423, employed in a discussion with regard to the hearsay evidence rule, is pertinent: "The unreliability of a re-

lation by one person of statements made to him by another is so well known that it has become customary and is considered necessary for courts, in cases where oral admissions of a party are proved against him, to instruct the jury that they must view such admissions with caution, because of the tendency of witnesses to make perverted or inaccurate reports. We have many decisions of courts of the highest standing declaring the importance and substantial character of the rule against hearsay testimony. It has been said that the fact 'that this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible. * * *

The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all. * * *

[4] The next assignment of error relates to asserted misconduct of Mr. Ferguson, the deputy district attorney, who was in charge of the prosecution of the action. The incident regarding which complaint is made occurred near the beginning of the opening argument to the jury. In substance, Mr. Ferguson drew attention to the fact that the ordinary citizen was loath to believe in the existence of the happening of episodes such as that to which the child had testified; and then said: " * * * If there is any woman upon this jury who has any such a thought as that, I will ask you to just remember back to the things you have heard about in this city of ours and adjoining communities during the last several years. * * *" Immediately thereafter the following colloquy occurred:

"Mr. Cantillon: Just a moment. If your Honor please, I am going to object to that as being improper argument, inflammatory in character and assign it as misconduct and ask that the jury be instructed to disregard it. * * *

"Mr. Ferguson: I think it is legitimate argument, your Honor.

"The Court: Objection overruled.

"Mr. Ferguson: You remember the Dyer case, the Northcott case—

"Mr. Cantillon: I am going to object to that as improper argument, inflammatory and ask that it be stricken from the record and the jury instructed to disregard it.

"Mr. Ferguson: I am willing that should be done, your Honor.

"The Court: Very well. The last remark, whatever it was, is stricken.

"Mr. Cantillon: I move that the jury be instructed to disregard it, your Honor. He just mentioned the Dyer case, your Honor.

"Mr. Ferguson: Please forget the Dyer case. I don't claim it is proper in this case. I am not silly and I know none of you men and women are silly."

A few minutes thereafter, Mr. Ferguson made the further statement that: " * * * I don't seek to inflame your minds against this defendant as an individual. On the contrary, I ask you to view the evidence calmly and dispassionately and *render a verdict such as you will be proud of and can adhere to in the days to come*, not to be led away by any passion against the defendant because of the terrible nature of the accusations against him, but yet, on the other hand, don't believe for a moment that these things don't occur in this metropolitan area of ours, in this modern life we are living, because they do occur—they occur time and again without number. So I am merely asking you to take this evidence as it is and base your verdict upon the evidence as it is and upon the law as given to you by the court, and that was my only purpose in making the very brief reference I made a few moments ago, to other things you know of, you know of by your own knowledge as having occurred in this city of ours and adjoining communities". (Emphasis added.) Counsel for defendant objected to the foregoing remarks and moved the court to strike,—which objection was overruled by the trial court.

In connection with the Northcott and the Dyer cases, to which the deputy district attorney had referred, it need only be said that they were not only the most outrageous in character, but also were the most notorious that have occurred within the state of California in recent years. Each of them received so much newspaper publicity and were so much the subject of general conversation that it would have been unbelievable that any person who had read the newspapers at all, or who had

indulged in ordinary conversation with his neighbors or friends, was not made familiar with the details of the atrocities perpetrated in each of those cases. It is charged by the appellant herein, and it is not entirely improbable of belief, that the purpose of the deputy district attorney in making reference to those cases was not confined to that of assuring and reminding the jurors that occurrences of the nature of that involved in the instant case were not uncommon,—but that, by recalling the Northcott and the Dyer cases to the minds of the jurors, they might entertain a feeling of hostility toward defendant and thereby engender a hatred of him, with the consequence, as Mr. Ferguson suggested, that they would “render a verdict such as you will be proud of and can adhere to in the days to come”. No conclusion other than that the remarks were inflammatory and most objectionable may reasonably be reached. Nor by the expedient of attempting to withdraw the remarks was it possible to erase from the minds of the jurors the suggestions originally made. Jurors are human, and it is not within human possibility to forget so easily outstanding facts or situations pertaining to other cases which have been brought to their attention and which are similar to those of the case on trial before them. The damage had been done. It was irreparable. That the remarks objected to may have influenced the verdict that was rendered against defendant is not at all improbable; and if such influence prevailed, in that respect defendant was deprived of the benefit of a fair trial.

[5] The third assignment of error presented by the appeal consists of the refusal by the trial court to give to the jury the following instruction which was requested by defendant:

“By reason of the fact that charges of the nature involved in this case can easily be made and are often not easy to disprove, I instruct you that it is your duty to treat with great care and caution the testimony of the prosecutrix Cornelia ——. You are not to be moved by passion, sympathy or prejudice to find a verdict of guilty on any count of the information and unless you are convinced beyond a reasonable doubt from the evidence that the defendant is guilty as charged on one or more of the several counts of the information, you should find the defendant not guilty.”

In that connection, and with particular reference to the certain inability of any

accused man to produce evidence sufficient either to create in the minds of the jurors a reasonable doubt respecting his guilt, or to disprove a charge of the nature of that here involved, the language employed by this court in the case of *People v. Benson*, 6 Cal. 221, 223, 65 Am.Dec. 506, is interesting. It was there said: “There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenceless, and Courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding. From the days of Lord Hale to the present time, no case has ever gone to the jury, upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the Court warning them of the danger of a conviction on such testimony.”

The question also received careful consideration in the case of *People v. Vaughan*, 131 Cal.App. 265, 273, 21 P.2d 438, 442, where the court said: “The learned trial judge at the time he denied defendant’s motion for a new trial stated as his reason for refusing to give these instructions that they were cautionary, evidently viewing them as prohibited by section 19, article 6 of the Constitution, providing that judges shall not charge juries with respect to matters of fact. There is authority for this position. *People v. Anthony*, 185 Cal. 152, 160, 196 P. 47. However, a review of cases of this type would indicate that the courts generally have been reluctant, where testimony of the complaining witness is uncorroborated, to disregard the observation made by Chief Justice Murray in deciding the *Benson* Case [*People v. Benson*], 6 Cal. 221, 65 Am.Dec. 506, involving a child of thirteen years: ‘From the days of Lord Hale to the present time, no case has ever gone to the jury, upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the Court warning them of the danger of a conviction on such testimony.’ For example, we find the following in *People v. Caldwell*, 55 Cal.App. 280, 298, 203 P. 440, 448: ‘Cautionary instructions of this character are proper in rape cases, under many decisions, either when the prosecutrix is a child of tender years, or when her testimony is uncorroborated.’ And in the case

of *People v. Scott*, 24 Cal.App. 440, 141 P. 945, 947, involving a moral offense against a girl about fourteen years old, the court says: 'For reasons readily suggested, though, it is entirely proper for the court to caution the jury to weigh the testimony of the prosecutrix with the utmost care, that no wrong be done the defendant.' * * * To like effect, see the case of *People v. Garrett*, 27 Cal.App.2d 249, 81 P.2d 241.

However, the conclusions announced in the foregoing authorities may have been somewhat weakened by the decision that was rendered by this court in the case of *People v. Anthony*, 185 Cal. 152, 197 P. 83, where it was declared (syllabus) that it was not error "to refuse an instruction embodying the statements that it is particularly difficult for a defendant to clear himself of such a charge, that no charge is more easily made or more difficult to disprove, and that the two parties are usually the only witnesses to the act, as the same are statements of fact, not of law".

Notwithstanding the seeming conflict which thus appears in the several decisions by the courts of this state, no great difficulty is presented in the instant case for the reason that this court is of the opinion that the rights of defendant in the premises were carefully guarded and fully protected by the giving to the jury, at the request of the prosecution, the following instruction: "That a charge of this nature is particularly difficult for a defendant to clear himself of. No charge can be more easily made, and none more difficult to disprove. From the nature of the case, the complaining witness and the defendant are generally the only witnesses. The law does not require in this character of case that the prosecuting witness be supported by another witness or other corroborating circumstances, but does require that you examine her testimony with caution."

In addition thereto the jury was generally instructed that in reaching a verdict, the jury should be "governed therefore solely by the evidence introduced in this trial and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjectures, sympathy, passion or prejudice, public opinion or public feeling. * * * that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will

reach a verdict that will be just to both sides, regardless of what the consequences may be, and which will express the individual opinion of each juror."

[6] But, as has been suggested by appellant, a more serious situation was developed with respect to the question whether defendant was accorded a fair trial,—which becomes implicit from the following facts: When the child prosecutrix was on the witness stand, she testified in voluminous detail with respect to acts and conduct of defendant on an occasion when not only the said child, but also her friend Janet (who, like the prosecutrix, was 5 years of age), was an asserted victim of defendant's misconduct. No complaint respecting the admissibility of such testimony has been registered by appellant. However, it appears that when Janet was called as a witness, she was unable to qualify as such. In consequence of that situation, defendant offered for the guidance of the jury—but the trial court refused to give to it—the following instruction: "That you are not to draw any inference whatsoever from the fact that the Court ruled as a matter of law that the witness Janet * * * was not competent to testify in this case. This fact has no place whatsoever in your deliberations as to the guilt or innocence of the defendant, and you shall not surmise as to whether what the child's testimony might have been had she been allowed to testify in the case."

It is clear that the jury should have been so instructed. A review of the questions that were propounded to Janet on her voir dire examination to test her qualifications as a witness, and the answers thereto, leaves no doubt as to the correctness of the conclusion by the trial court regarding her eligibility as a witness. Moreover, with respect to such little knowledge of pertinent facts as she did display, it was most apparent that she had been "coached". Considering the patent inability of the child to grasp, intelligently, the purport of simple qualifying questions and appropriately to respond thereto, together with the assumed fact that the deputy district attorney must have been aware of that situation before the child was called as a proposed witness,—the fact that, in such circumstances, the child was deliberately offered as a witness borders on prejudicial misconduct. However, whether dereliction of duty on the part of the deputy district attorney is a proper question for consid-

eration herein is not essential to a determination of this case. But, at any rate, the appearance of the child on the witness stand constituted in itself an implied assurance on the part of the prosecution that if permitted to testify, in some measure she would corroborate the testimony which already had been given by Cornelia respecting the particular misconduct of defendant; at least such an inference was readily deducible by the jury, and its conclusion may have been influenced thereby. In such circumstances, the refusal of the trial court to give the proffered instruction to the jury, and thus to disabuse the minds of the respective jurors with respect to any detrimental inference regarding the testimony which the child might have given, was in disregard of the rights of defendant and prevented him from having a fair trial.

From all that may be discerned in the record regarding the question of whether defendant had been accorded the fair trial impliedly guaranteed to him by constitutional provision, taken as a whole, the trial was unsatisfactory. On the one hand, the child prosecutrix displayed an intelligence far beyond her years. However, her testimony to the effect that she had "talked a good deal with her mamma and daddy about it"; also "to Mr. Ferguson here about it"; and that her mother wanted her "to remember good", and that the reason she thought her mother wanted her to remember it well was because her mother kept telling it "over and over" to her,—suggests the conclusion that the child had been carefully "coached" in her entire story. Notwithstanding the superior intelligence which was possessed by the child, it is beyond question that at the age of five years, or thereabouts, most children are particularly and peculiarly impressionable. The effect and influence upon them at that age by the conduct and conversation of their elders are most marked. In the instant matter, therefore, the fact that the mother—undoubtedly with proper or even laudable motives—repeated the details of the story to the child "over and over", in some probability at least, may have had the effect of substituting in the child's mind the mother's version for that of the incidents which actually occurred. And although as a matter of law it cannot be declared that the story, as told, in its essentials is inherently untrue, nevertheless, in performance or ex-

ecution, some of its more sordid details are most improbable of occurrence.

[7-9] With respect to this kind of case, when it is remembered that "There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance," and that "In such cases the accused is almost defenseless," it certainly behooves the courts of last resort rigorously to insist upon the observance of those salutary rules regarding the admission of evidence and the trial of actions in general, which for centuries have been in practice to the end that an accused may be assured of a fair trial. As frequently has been said regarding cases of the instant character, "No charge can be more easily made, and none more difficult to disprove." As a matter of practical observation to many judges who have presided over trials of this nature, it is plainly recognized that, notwithstanding the salutary rule that an accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt, nevertheless, to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of "guilty"; and that—instead of its being necessary for the prosecution to prove his guilt beyond a reasonable doubt—in order to secure an acquittal of the charge, it becomes incumbent upon the accused to completely establish his innocence, and to accomplish that result not only by a preponderance of the evidence but beyond a reasonable doubt. In such a situation, the only defense available, ordinarily, to the accused is his own denial of any asserted misconduct, together with evidence of a former good reputation; otherwise, he is utterly defenseless and at the mercy of a jury which probably is very much prejudiced. In at least a majority of such prosecutions, over the emphatic and categorical denial by the defendant of the incident or incidents testified to by the prosecutrix, the accused is found "guilty" on evidence that, because of the nature of the asserted offense, rarely is possible of corroboration; and it is not at all improbable that at the instigation of either over-suspicious or misinformed mothers, who may entertain malice or personal prejudice toward the accused, miscarriages of justice often result,—with the consequence that

innocent men are or have been humiliated, ruined in character and good reputation, and caused to suffer ignominiously for the alleged commission by them of offenses of which they were or are not guilty. It is because of the recognized existence of the ease with which convictions of men, even those of unblemished reputation, may be secured in cases of the instant kind that courts are at pains to insist upon fair trials in all respects being accorded to the accused. Errors committed either by the prosecution or by the court in the course of the trial, which ordinarily might be considered trivial and as of no material consequence from a standpoint of adverse effect upon the rights of a defendant, may become of great importance when committed in a case of the character of that here involved.

It is ordered that the judgments, and the order by which the motion for a new trial was denied, be, and they are, reversed and the cause remanded for new trial.

We concur: SHENK, J.; PULLEN, Justice pro tem.; CURTIS, J.

I concur in the judgment: EDMONDS, J.



34 Cal.App.2d 55

PEOPLE v. WEST et al.

Cr. 3208.

District Court of Appeal, Second District,
Division 1, California.

Aug. 3, 1939.

1. Criminal law $\S$ 1144(13)

In determining whether evidence justified conviction, reviewing court must view facts in light most favorable to prosecution.

2. Indictment and information $\S$ 129(3)

Three counts of information charging accused with grand theft of radios and forgery of checks were properly joined where evidence clearly and conclusively showed that three offenses charged were closely connected in their commission and that fictitious checks constituting forgery charges were is-

sued to facilitate commission of grand theft. Pen.Code, $\S$ 954.

3. Criminal law $\S$ 564(1)

Forgery $\S$ 44

Larceny $\S$ 65

Evidence justified conviction for grand theft of two radios and forgery of two checks in connection with transaction on ground that accused signed and uttered checks and that crimes were committed in county in which accused was prosecuted.

4. Criminal law $\S$ 862

In prosecution for grand theft of radios and for forgery which was brought in Los Angeles county wherein there was evidence that checks were drawn on Los Angeles bank, that one of them was written in that city, and that store from which radios were obtained was located in that city, jury were justified in concluding as jury what they knew as individuals that streets named by some of witnesses meant certain well-known and so named streets in city and county of Los Angeles.

5. Criminal law $\S$ 564(2)

The doctrine of proof beyond reasonable doubt applies only to issue of guilt and not to proof of venue.

6. Forgery $\S$ 44

Evidence was sufficient to establish defendant's guilt of forgery of checks notwithstanding that one of checks was not presented for payment and that no damage or injury resulted from its issuance.

7. Forgery $\S$ 14

In prosecution for forgery, it is not required that actual damage ensue, but it is sufficient to show that the instrument was prepared in an attempt to deceive and defraud another.

8. Forgery $\S$ 14

Although the intent to defraud is of the essence of the crime of forgery, it is not essential that any person be actually defrauded or that any act be done toward the attainment of the fruits of the crime other than the making of the instrument and the very fact of the forgery will be sufficient to imply an intent to defraud at least if from circumstances of the case the jury can fairly infer that it was the intention of the party to utter the forged instrument, or if there is proof that he did utter it.

9. Forgery $\Rightarrow$ 12(1)

The forging of an instrument which on its face is void is not indictable.

10. Forgery $\Rightarrow$ 12(4)

To support prosecution for forgery, it is sufficient if instrument alleged to have been forged is of such character that consequences of forgery would necessarily or possibly be to defraud some person.

11. Criminal law $\Rightarrow$ 406(3)

In prosecution for grand theft of radios and for forgery of checks, evidence as to conversation with police officers in which accused agreed to disclose where radios could be found which took place after another conversation in which defendant admitted that he knew reason for his arrest and that he knew where radios were but declined to reveal where radios could be found, was properly admitted even if statement was not voluntary, since accused did not in such second statement admit that he stole radios or issued or uttered fictitious checks in question.

12. Criminal law $\Rightarrow$ 406(3)

A statement or admission which amounts to less than a confession is admissible without showing absence of promises, inducements or coercion notwithstanding that admitted facts when connected with other facts tend to prove guilt of accused.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Robert K. West and Ivan C. Rinehart were convicted of forgery and grand theft, and defendant Ivan C. Rinehart appeals.

Affirmed.

Ivan C. Rinehart, in pro. per.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for the People.

WHITE, Justice.

By respective counts in an information filed against him, appellant was accused jointly with one Robert K. West of two charges of forgery and one charge of grand theft. Appellant admitted the commission of two prior felonies, as alleged in the information, and also admitted the service of penitentiary sentences therefor. Following a jury trial resulting in the conviction of both defendants on all counts and the pronouncement of judgment, defendant Rinehart alone prosecutes this appeal.

[1] Epitomizing the facts most favorable to the prosecution, as we are required to do when the verdict is against appellant, we find in the record testimony that on the evening of October 31, 1938, appellant and his wife appeared in a radio store in the city of Los Angeles, where they examined two radios of different makes and discussed the relative merits thereof with a salesman, George Myers. Appellant favored one type of radio, while his wife preferred the other model. After about an hour's discussion with the salesman, appellant and his wife departed, appellant remarking, "We always think it over and we will let you know." On the afternoon of November 5, about 2 o'clock, appellant reappeared at the radio store, at this time accompanied by his codefendant, West, whom he introduced to the salesman as his brother-in-law. There was further discussion concerning the two radios, and the salesman finally offered to sell either machine for \$213, with a down payment of \$75. Appellant requested that both radios be sent to his home on approval, so that his wife might have a further opportunity to compare the two models. He suggested that delivery be made at 8 o'clock that evening, but the salesman objected, saying that it was impossible to make delivery after 5 o'clock that afternoon. Both defendants then left the store for the ostensible purpose of communicating with appellant's wife regarding the possibility of accepting delivery at an earlier hour. The evidence indicates, however, that they proceeded to 2048 West Seventy-fourth street in Los Angeles, arriving there about 4 o'clock in the afternoon. They had previously inspected the house next door, at 2042 West Seventy-fourth street, with a view toward renting the premises. On that occasion they met Miss Barbara Mae Crawford at the first-named address and told her they desired to rent the last-mentioned house immediately. Miss Crawford explained that she had no authority to rent the house, and that her mother was in complete charge of such matters. Appellant, however, represented that they had some furniture in storage which had to be out by 5 o'clock, and prevailed upon the daughter to rent the house immediately, subject to her mother's approval. Appellant thereupon, in the presence of Miss Crawford, wrote out the check described in count III, signing thereto the fictitious name "E. A. Mason", and handed the check to her.

Having obtained possession of the key, appellant called Mr. Myers, the radio salesman, on the telephone, and directed him to send the radios to 2042 West Seventy-fourth street. In response to a question by the radio salesman, appellant represented that he owned the furniture at the last-named address, which house he had rented completely furnished. In addition, appellant promised to make the agreed down payment that day; to sign a contract for the payment of the balance of the purchase price on the following Monday, and to return one of the radios at the same time. The radios were delivered at the Seventy-fourth street address between 4:30 and 5 o'clock on Saturday afternoon. Appellant was not present when the delivery was made, but his codefendant accepted the radios, signing the delivery slip with the name "B. Raleigh". The same defendant also handed to Sam Slyman, one of the deliverymen who made the delivery for the radio firm, a check in the sum of \$75, bearing the fictitious signature "E. A. Mason". Count II of the information is based upon the issuance of this check.

Shortly thereafter appellant returned to the house. Between 5:30 and 6 o'clock the defendants had some conversation with Mrs. A. S. Crawford, mother of Miss Barbara Mae Crawford, regarding the rental of the premises. About 6 o'clock they loaded the radios into an automobile belonging to defendant West and took one of the radios to appellant's home, delivering the other to defendant West's home. Appellant was arrested November 17, and his codefendant, West, was taken into custody the following day. One of the radios was found in West's home and the other in his garage.

Appellant offered no evidence in his defense, nor did he himself take the witness stand to deny any of the foregoing facts, many of which were established by the testimony of his codefendant when the latter was a witness in his own behalf.

[2] Appellant first urges the point that in permitting the single information to charge him with both the crimes of grand theft and forgery, the trial court committed error which was prejudicial to the substantial rights of appellant and violative of the provisions of section 954 of the Penal Code. This claim is without merit. The cited section authorizes the charging of two or more different offenses in the

same information when the different offenses are "connected together in their commission". The evidence herein narrated clearly and conclusively shows not only that the three offenses charged were closely connected in their commission, but that the fictitious checks constituting the forgery charges were issued to facilitate the commission of the grand theft. *People v. Holmes*, 130 Cal.App. 507, 509, 20 P.2d 67. The three counts were properly joined. The case of *People v. Frank*, 130 Cal. App. 212, 19 P.2d 850, relied upon by appellant, has no application to the facts of the instant case.

[3-5] It is next contended by appellant that the evidence is insufficient to support the guilty verdicts for the reason that the record is barren of any evidence to show that appellant either signed or uttered any of the checks. Recourse to the record, however, indicates that the witness Barbara Mae Crawford testified positively and directly that appellant in her presence wrote, signed and delivered to her one of the checks. Her testimony in this regard was corroborated by appellant's codefendant; and a handwriting expert, whose qualifications were stipulated, testified that in his opinion both checks were written by the same hand. Appellant did not himself deny, or offer any testimony in contravention of, the foregoing.

Appellant also urges insufficiency of the evidence for the reason, as stated by him, "No evidence has been introduced by the prosecution to establish venue." This claim is untenable. For example, there is evidence that both checks were drawn on a Los Angeles city bank; that one of them was written in that city; that the radio store was located in the same city; and these were all circumstances not to be ignored. Without going into further detail, suffice it to say that the evidence unerringly and logically points to the single inference that the crimes were committed in Los Angeles county. Under the facts of this case the jury were justified in concluding, as jurors, what they well knew as men and women, that the streets named by some of the witnesses meant certain well known and so named streets in the City of and County of Los Angeles. *People v. McGregar*, 88 Cal. 140, 143, 26 P. 97. Furthermore, as was said by this court in *People v. Carter*, 10 Cal.App.2d 387, 389, 52 P.2d 294, 295, "The state gives no assurance to its feloniously insubor-

minate citizens that the venue of their crimes will be fixed beyond a reasonable doubt; that doctrine applies only to the issue of guilt. *People v. McGill* [10 Cal. App.2d 155] 51 P.2d 433; *Underhill on Criminal Evidence*, vol. I, § 36, p. 45. The defendant and appellant, therefore, is in no position to complain because the location of the offense was not established to a degree of certainty more to his liking."

[6-10] Appellant next asserts that since one of the checks was not presented for payment and that no damage or injury resulted from its issuance, that the crime of forgery predicated upon such check was not proven. In a prosecution for forgery it is not required that actual damage ensue; it is sufficient to show, as was done in the case at bar, that the instrument was prepared with the intent to deceive and defraud another. *People v. Turner*, 113 Cal. 278, 45 P. 331; *People v. Baender*, 68 Cal.App. 49, 59, 228 P. 536; *People v. Kuhn*, 33 Cal.App. 319, 165 P. 26; In *Henderson v. State*, 14 Tex. 503, it was said:

"The intent to defraud, it is true, is of the essence of the crime. But it is not essential that any person be actually defrauded; or that any act be done towards the attainment of the fruits of the crime, other than the making of the instrument. And the very fact of the forgery itself, will be sufficient to imply an intention to defraud; or at least, it will be sufficient, if, from the circumstances of the case, the jury can fairly infer that it was the intention of the party to utter the forged instrument (3 *Greenl.Ev. Sec. 103*; 3 *Arch.Cr.Pl. 546*; 2 *Russ. on Cr. 361*, 7th Am. from 3rd London ed.) and, a fortiori, if, as in this case, there is proof that he did utter it. It is well settled, it is true, as held in a case cited by counsel (*People v. Shall*, 9 *Cow. [N.Y.] 788*), that the forging of an instrument which, on its face, is void, is not indictable. But that is not this case. The deed, on its face, appears to be a valid, legal conveyance of land. And it is sufficient, that it is such a character of instrument, as that, the consequences of the forgery would necessarily or possibly be to defraud some person. It is sufficient if it appear that by possibility, either the State, or some person, might be defrauded. (Act above cited; 3 *Greenl. Sec. 103*; 2 *Russ. on Cr. 361*, n.; 2 *N.J. 212*.)"

That the spurious checks here in question did actually deceive George Myers, the radio salesman, and Barbara Mae Crawford, who rented to appellant and his codefendant the house to which delivery of the radios was made, is obvious.

[11, 12] Finally, appellant earnestly insists that the court committed prejudicial error during the trial of the case by admitting in evidence certain statements and confessions purported to have been made to one of the police officers by appellant; the objection being that they were not freely and voluntarily made. The record indicates that appellant made two statements to the officers. On the first occasion appellant stated that he knew why he had been arrested and that he knew where the radios were; but he declined to say where the radios could be found. The second conversation took place in the presence of appellant, his wife, and the officer, at which time the officer threatened to arrest appellant's wife as an accomplice unless appellant agreed to disclose where the property could be found. Thereupon appellant furnished the requested information. There is no claim of any threat or intimidation at the time appellant made the first and only really incriminating statement to the effect that he was aware of the reason for his arrest and that he had knowledge of the location of the stolen property. In connection with the second statement, if there be any doubt as to the voluntary nature thereof, the conversation was nevertheless properly admitted. Whatever of an incriminatory nature there might be in the last made statement to the officer, nowhere in it did appellant admit that he either stole the radios or issued or uttered the fictitious checks in question. A statement or an admission which amounts to less than a confession is admissible without the necessity of showing the absence of promises, inducements or coercion. *People v. Le Roy*, 65 Cal. 613, 4 P. 649; *People v. Johnson*, 203 Cal. 153, 164, 263 P. 524. Where, as here, appellant admitted facts that did not amount to a confession, but which when connected with other facts tended to prove his guilt, the rule is not altered. Proof of such admissions is competent without preliminary proof. *People v. Ammerman*, 118 Cal. 23, 32, 50 P. 15.

The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

34 Cal.App.2d 119

Maurice E. ATKINSON, Petitioner, v. Earl WARREN, Atty. Gen. of the State of California, Respondent.
Civ. 12396.

District Court of Appeal, Second District,
Division 1, California.
Aug. 15, 1939.

Smith, Peek & Aspey and Bartlett & Kearney, all of Los Angeles, for petitioner.

PER CURIAM.

The petition is denied for the reason that the facts alleged therein are insufficient to justify the issuance of a writ of mandate in accordance with the prayer of the petition.

Mr. Justice WHITE was in favor of the issuance of said writ.

either under old practice or new statute requiring action to be brought within three months from date of sale. Code Civ.Proc. § 580a.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Louis C. Drapeau, as building and loan commissioner of the state of California, in the liquidation of the California Mutual Building & Loan Association, against Nicol Smith and others to recover a deficiency judgment after sale under a deed of trust. From a judgment entered upon the sustaining of a demurrer to his complaint, plaintiff appeals.

Reversed.

Walter Carrington, of Oakland, and Louis Oneal and C. E. Luckhardt, both of San Jose, for appellant.

John E. Manders and Bullock & Manders, all of Redwood City, for respondents.



PETERS, Presiding Justice.

Plaintiff appeals from a judgment entered upon the sustaining of a demurrer to his complaint to recover a deficiency judgment after sale under a deed of trust.

[1] So far as pertinent here, the complaint alleges that on September 20, 1932, defendants made, executed and delivered to plaintiff their promissory note in the sum of \$19,800, and a deed of trust securing the same; that on November 12, 1936, the note and deed of trust being in default, and after recordation of a notice of breach and election to sell, a trustee's sale of the real property covered by the deed of trust was had for \$16,000; that after applying the sale price to the various charges then due there remained a deficiency of \$7,304.27. The defendants demurred to this complaint. The trial court sustained the demurrer on the ground the complaint failed to allege compliance with sections 580a and 580b of the Code of Civil Procedure as amended in 1933, St.1933, pp. 1672, 1673. On this appeal respondents concede that section 580b of the Code of Civil Procedure has no application, but contend that compliance with section 580a was necessary as a condition precedent to instituting the present action. Section 580a provides generally that in an action for a deficiency judgment, the complaint must allege the amount of the indebtedness secured by the deed of trust at the time of sale, the amount for

34 Cal.App.2d 84

DRAPEAU v. SMITH et al.
Civ. 10529.

District Court of Appeal, First District,
Division 1, California.
Aug. 11, 1939.

1. Mortgages — 330

In action to recover deficiency judgment after trustee's sale in 1936 under deed of trust executed in 1932, statute enacted in 1933 requiring complaint to allege among other things fair market value of realty at date of sale was inapplicable in absence of indication in statute that it should operate retroactively, since parties' rights are fixed on date of execution of deed, and to give retroactive effect to statute would invade obligee's constitutional rights. Code Civ. Proc. § 580a.

2. Mortgages — 375

Where complaint in action to recover deficiency judgment after sale under a deed of trust alleged that sale took place on November 12, 1936, and clerk's transcript showed that complaint was filed on November 19, 1936, action was commenced in time

which the real property was sold, and the fair market value thereof at the date of sale, and the date of such sale. The section then limits recovery to the difference between the amount of the indebtedness and the fair market value of the property on the day of sale. The present complaint fails to allege the fair market value of the property on the day of the sale, and it was for this defect that the trial court sustained the demurrer.

Respondents concede that where the deed of trust and the sale thereunder both antedate the enactment of section 580a, that the section has no application. This is in accordance with the decided cases. *Central Bank of Oakland v. Proctor*, 5 Cal. 2d 237, 54 P.2d 718; *Bennett v. Superior Court*, 5 Cal.App.2d 13, 42 P.2d 80; *Bank of America, etc., Ass'n v. Dennison*, 8 Cal.App.2d 173, 47 P.2d 296; *Bechtel v. Nelson*, 10 Cal.App.2d 66, 51 P.2d 99; *Smith v. Davis*, 10 Cal.App.2d 487, 52 P.2d 515; *Rosenberg v. Janssen*, 11 Cal. App.2d 15, 52 P.2d 952, 54 P.2d 721. It is respondents' theory, however, that where the deed of trust was executed prior to 1933, but the sale takes place thereafter, that section 580a is applicable, on the theory that the cause of action for the deficiency does not arise until the time of sale. At the time this cause was before the trial court this point had not been passed upon by the appellate courts of this state. Subsequently, the appellate courts in several cases, definitely held that section 580a has no application to any mortgage or deed of trust executed prior to its passage regardless of whether the sale is had before or after 1933. *Birkhofer v. Krumm*, 27 Cal.App.2d 513, 81 P.2d 609; *Bank of America Nat. Trust & Savings Ass'n v. Burg Bros.*, Cal.App., 88 P.2d 196; *Craemer v. Norton Realty Corp.*, Cal.App., 91 P.2d 644. These cases are based on two theories: (1) That the rights of the parties are fixed on the date of the deed of trust or mortgage is executed, and that to give retroactive effect to the section would invade the constitutional rights of the obligee; and (2) that there is nothing in section 580a to indicate that the legislature intended the section to operate retroactively, and, therefore, it should be interpreted to operate prospectively. Both theories are sound. These cases also thoroughly distinguish the case of *Richmond Mtg. & L. Corp. v. Wachovia B. & T. Co.*, 300 U.S. 124, 57 S.

Ct. 338, 81 L.Ed. 552, 108 A.L.R. 886, relied upon by respondents. It would serve no useful purpose to repeat the discussion found in these cases. Upon the authority of the three cases cited supra, it must be held that section 580a has no application to this case.

[2] It should be mentioned that this case does not involve the question as to whether the provision of section 580a requiring any action for a deficiency to be brought within three months from the date of sale, is applicable. Here, the complaint alleges that the sale took place on November 12, 1936, and the clerk's transcript shows that the complaint was filed on November 19, 1936. Under either the old or new statute of limitations the action was commenced in time.

For the foregoing reasons, the judgment appealed from is reversed.

We concur: KNIGHT, J.; WARD, J.



PEOPLE v. BECKHARD. *
Cr. 3217.

District Court of Appeal, Second District,
Division 2, California.

Aug. 11, 1939.

Hearing Granted Sept. 8, 1939.

1. Homicide ⇨34

It is not necessary to prove criminal negligence to establish the offense of negligent homicide. St.1935, p. 173, § 500.

2. Automobiles ⇨353

In prosecution for negligent homicide, it was only necessary to prove, besides jurisdictional facts of time and place, that defendant was driving a motor vehicle in a negligent manner and that such driving resulted in death of named person. St.1935, p. 173, § 500.

3. Homicide ⇨329, 340(3)

In prosecution for negligent homicide, defendant could not complain of alleged conflict between instruction defining ordinary negligence and instructions defining criminal

*For subsequent opinion see 96 P.2d 794.

negligence, which were given at defendant's request and were unduly favorable to defendant inasmuch as criminal negligence was not required to be shown.

Appeal from Superior Court, Los Angeles; Frank M. Smith, Judge.

Arthur J. Beckhard was convicted of negligent homicide by causing death while negligently driving an automobile, and he appeals.

Affirmed.

Jerry Giesler and Ward Sullivan, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., of Los Angeles County and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

WOOD, Acting Presiding Justice.

Defendant was charged in count I of the information with the crime of negligent homicide, in violation of section 500 of the Vehicle Code, St.1935, p. 173, in that he caused the death of Frank Coleman Joyce while negligently driving an automobile. In count II the same charge was made except that defendant was accused of causing the death of Patricia Marian Kelly. Verdicts of guilty were returned on both counts and defendant appeals from the order denying his motion for a new trial.

It was established at the trial that on August 27, 1938, defendant was driving an automobile on Sunset boulevard in Los Angeles and struck the two decedents when they were walking across the boulevard in the pedestrian's marked crosswalk. Two or three cars were ahead of the car driven by defendant and the two pedestrians stopped to let them pass and as they proceeded defendant's car struck them. Since no claim is made that the evidence is insufficient to support the verdict finding defendant guilty of the offense set forth in section 500 of the Vehicle Code, it will be unnecessary to set forth the circumstances in detail.

Defendant contends that the court erred in giving to the jury the following instruction: "Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which

ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person." At the request of defendant the court gave to the jury a number of instructions defining criminal negligence, among them the following: "Criminal negligence in degree goes so far beyond that negligence merely which suffices to impose a civil liability for damages as to constitute it criminal negligence for which the party guilty of it may be held criminally liable. In other words, in order to constitute criminal negligence there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others, or wilful indifference, and if no one of these elements enters into the act the person charged cannot be held guilty of criminal negligence." It is argued that these instructions are conflicting, that the instruction given at the request of defendant states the rule applicable correctly and that a reversal should be ordered since it cannot be determined which instruction the jury followed.

[1,2] The section of the Vehicle Code under which defendant was convicted provides: "When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to felony, the person so operating such vehicle shall be guilty of negligent homicide * * *." By the enactment of this section the legislature defined a crime different from any of the crimes which had been defined in any of the various provisions of the Penal Code. The contention now presented by defendant was made to the District Court of Appeal, Third District, in *People v. Warner*, 27 Cal.App.2d 190, 80 P.2d 737, 739, and the court held in that case: "It is not necessary, however, to prove criminal negligence to establish the offense of negligent homicide. * * * Under the information here filed against this appellant it was only necessary to prove, other than the jurisdictional facts as to time and place, that the appellant was driving a motor vehicle in a negligent manner and that such driving resulted in the death of the person therein named." We are in agreement with the conclusions reached in the *Warner* case.

[3] Defendant is not in position to complain of the fact that the instructions ac-

tually given may have been conflicting, for the condition was brought about by his own request. Moreover, he did not suffer prejudice by reason of the giving of any of the instructions, some of which were more favorable to him than he could legally demand. *People v. Suesser*, 142 Cal. 354, 75 P. 1093.

The order is affirmed.

I concur: McCOMB, J.



SCOTT v. KENYON. *

Civ. 2312.

District Court of Appeal, Fourth District,
California.

Aug. 9, 1939.

Rehearing Granted Aug. 24, 1939.

1. Elections ⇨305(6)

Every presumption on appeal was in favor of court's finding that all nine of absentee voters cast their ballots for contestant, in absence of the evidence.

2. Elections ⇨298(2)

Ordinarily, in an election contest, the courts are reluctant to throw out votes where it can be told for whom the vote was intended and where the irregularity complained of is that of one of the election officials for which the voter is not to blame. Pol.Code, § 1364.

3. Elections ⇨298(2)

The rights of voters in general and the purity of the elections may demand that certain votes be not counted even where the intention of the voters can be determined. Pol.Code, § 1364.

4. Elections ⇨298(3)

A violation of a mandatory provision in election laws vitiates the election where as a departure from a directory provision does not render the election void, if there is a substantial observance of the law and no showing that the result of the election has been changed, or rights of voters injuriously affected. Pol.Code, § 1364.

5. Elections ⇨241

A substantial compliance with the essential requirements of the absent voters' law with respect to the counting of votes is necessary. Pol.Code, §§ 1357-1364.

6. Elections ⇨244

The opening of absent voters' ballots by inspector in election for councilman of city of the sixth class, returning of such ballots to respective envelopes and depositing of such ballots in ballot box with other election supplies under clerk's custody, following which, and prior to canvass of votes by city council, the ballot box was tampered with, and certain ballots removed, was not a substantial compliance with absent voters' law, in that secrecy of the ballot was violated and opportunity for fraud was presented, and hence finding that absent voters' ballots should not be counted was proper. Pol.Code, §§ 1357-1364.

MARKS, J., dissenting.

Appeal from Superior Court, San Diego County; Frank McComber, Judge.

Election contest by Asa E. Scott against Claud H. Kenyon. Judgment for defendant, and plaintiff appeals.

Affirmed.

Lindley & Higgins, of San Diego, for appellant.

Thomas Whelan, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying any relief to the contestant in an election contest. Both parties hereto were candidates for the office of councilman in an election held in El Cajon, a city of the sixth class, on April 12, 1938. The only question raised is whether or not the absent voters ballots, nine in number, should be counted for the plaintiff.

This appeal was taken on the judgment roll alone and the only facts before us are those appearing in the findings. The court found that on the night of April 12, 1938, the election board counted the regular ballots cast, and then opened and counted the absent voters ballots adding the result to the official tally sheet; that nine persons had cast absentee ballots; that said absent voters' ballots were in the possession of the city clerk up to April 12, 1938, at which time they were turned over by him to the in-

*For subsequent opinion see 105 P.2d 291.

spector of the election; that thereupon the inspector of the election opened each of said ballots without permitting the spectators or other election officers to find out the name of the absent voter whose ballot was being read; that the inspector then and there removed the number on each of said ballots and announced for whom it was cast; that as each vote was announced it was entered on the official tally sheet; that after these votes were thus added the official tally sheet showed that the plaintiff had received 226 votes and the defendant 222 votes.

The court also found that at about 11 o'clock p. m. upon said date the inspector put into the ballot box all of the regular ballots voted at said election and all of the election supplies, and then placed in said box the nine absent voters' ballots, each in its own envelope, together with the numbers which had been removed therefrom; that he then locked the box and delivered it with the key in the lock thereof to the city clerk at about 1 o'clock a. m. on April 13, 1938; that said ballot box was retained by the city clerk in an office which was a part of his residence some distance from the city hall; that at all times while the ballot box remained there the key remained in the lock thereof; that there was an opportunity for unauthorized persons to open said ballot box and to tamper with its contents; and that the numbers which had been removed from the absent voters' ballots and placed in said ballot box were not there when it was opened by the city council on April 18, 1938, for the purpose of canvassing the result of the election.

It was further found that on April 18, 1938, the city council canvassed the votes cast at said election, determined and declared that the plaintiff had received 217 votes and the defendant 222 votes, and declared that the defendant was elected; that in making said canvass the city council counted the votes cast by the nine absent voters and deducted these from the total results set forth by the election board on the official tally list; that the city council found as a fact that when it opened the ballot box for the purpose of canvassing the vote at said election, the nine absent voters' ballots were each contained in its own envelope and not sealed; that the city council refused to count said absent voters' ballots for the reasons that said ballots had previously had the numbers removed, that they were not in individual sealed envelopes, and that they had been opened; that immediately after said canvass by the city

council all of the ballots voted at said election, including the ballots cast by the nine absent voters, together with the envelopes in which these votes had been placed, and all of the election supplies, including the roster of voters and the official tally list, were placed by the city clerk in the ballot box and the same was locked with a padlock.

The court found that between the date of the election and the time the ballot box was opened in court the same had been tampered with and certain ballots had been removed; that when it was opened in court ten of the regular ballots cast at said election were missing and four of the absent voters' ballots, together with the envelopes in which each was contained, had also been removed therefrom.

The court then found that there was no evidence from which it could find that said absent ballots had been changed between the time when the same were delivered by the absentee voters to the city clerk and the time when the same were placed in the ballot box immediately following the canvass of the returns by the city council on April 18, 1938; that all nine of said absentee voters had cast their ballots for the plaintiff; that said absent voters' ballots had been opened and in the possession of unauthorized persons prior to the official canvass thereof by the city council; that an opportunity existed during said time for said absentee ballots to have been tampered with and changed but that there is no evidence from which the court could find that said absentee ballots were tampered with or changed during said time; that there was no evidence as to the identity of the person or persons who had tampered with said ballot box and who had removed therefrom the ten regular ballots and the four absent voters' ballots and their envelopes; that there was no evidence as to the time said ten regular ballots were removed from the ballot box; that "there had been an opportunity for unlawful interference with both said ballots voted at said polls and said absent voters' ballots, and that the same had in fact been removed sometime subsequent to April 12, 1938". It was then found that said absent voters' ballots could not be counted for anyone and that the plaintiff did not receive as many legal votes at said election as did the defendant.

The casting of ballots by absent voters, the method of voting and the manner in

which the ballots shall be counted are provided for in sections 1357 to 1364 of the Political Code. Section 1361 makes it the duty of the legislative body of a city to canvass and count the absent voters' ballots as soon as all those issued have been returned or accounted for and not later than seven days after the election. Section 1362 provides that in counting the same the legislative body shall take up the return envelopes containing such ballots, separately, in the presence of a majority of the council and of the public who may be present, and compare the signature of the voter on each such envelope with that on the registration affidavit of such voter. When the board is satisfied that the signature on the envelope is the signature of the voter, it shall announce the name of such voter, whereupon anyone may challenge the counting of such ballot. If such challenge is overruled the board shall then open the identification envelope without unfolding the ballot, remove the number therefrom, destroy such number, and deposit the ballot in the ballot box provided for the purpose. After all such ballots are thus deposited in the box, the box shall be thoroughly shaken. The ballots shall then be taken out, one at a time, and the votes counted in the usual manner and the result tabulated under a special heading, regardless of the precincts from which the votes came. The total vote thus cast for any candidate shall then be added to the previous total for that candidate.

It will be observed that these statutes are designed to carefully protect the absent voter in his right to a secret ballot, which is the very foundation of our election system. Great care is taken to provide that, in handling and counting the absent voters' ballots, the same secrecy which surrounds the casting of regular ballots at the polls shall be preserved and maintained. In handling and counting the absent voters' ballots with which we are here concerned, practically every applicable provision of the law, including every provision designed to preserve the secrecy of the ballot, was broken. Not only did the inspector who opened these ballots know for whom each of such voters cast his ballot, but each ballot was returned to its original envelope, upon which was the voter's name, and which was left unsealed. Not only is it apparent that an opportunity for fraud existed, but it clearly appears that the secrecy of these particular ballots was destroyed.

[1] The court found that all nine of these absentee voters cast their ballots for the plaintiff. Every presumption is in favor of this finding, in the absence of the evidence. However, it does appear that the ballots themselves could not have supported this finding since four of them had disappeared. The ballot box had actually been opened before the canvass of the votes on April 18. Ten of the ballots cast at the polls were also missing and the court found that it could not be determined when they were taken. It is possible that some of those ballots were substituted for some of those in the open envelopes supposed to contain absent voters' ballots. Whatever the facts, great doubt and uncertainty surround the entire matter. Assuming, in support of the court's finding, that the nine absent voters personally appeared in court and testified that they voted for the plaintiff, the very necessity of such evidence destroys the secrecy of ballot which the statute was designed to preserve. Moreover, it does not certainly appear that the plaintiff received a majority of the votes, in any event, since ten of the votes cast at the polls were missing and it could not be determined when they disappeared. With the evidence in that condition, it could not be told whether or not the votes cast were correctly canvassed and counted by the canvassing board on April 18th.

We have then an unfortunate situation where no attempt was made to substantially follow the law, where an opportunity for fraud existed, where it appears that the ballots were actually tampered with, and where the secrecy of the ballot was actually destroyed. It is insisted, however, that section 1364 of the Political Code provides that the provisions of that chapter shall be liberally construed in favor of the absent voter and that these nine absent voters should not be disenfranchised when it can be told for whom they voted.

[2-4] Ordinarily, courts are reluctant to throw out votes where it can be told for whom the vote was intended and where the irregularity complained of is that of one of the election officials for which the voter is not to blame. At times, however, irregularities on the part of election officials are of such a kind that broader considerations, such as the rights of voters in general and the purity of elections may demand that certain votes be not counted even where the intention of the voters can be

determined. In many cases the votes of an entire precinct have been thrown out for such reasons although this has resulted in the disenfranchisement of such voters.

The general rule is thus set forth in *Rideout v. City of Los Angeles*, 185 Cal. 426, 197 P. 74, 75:

"* * * A distinction has been developed between mandatory and directory provisions in election laws; a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation."

In *Knowles v. Yates*, 31 Cal. 82, the court said:

"We are aware that courts have been very indulgent respecting the omissions, inadvertencies and mistakes of officers of elections, lest by exacting of them a technical compliance with the requirements of the law the citizen might be deprived of a sacred right. We are not disposed to be less indulgent in respect to the observance of forms and methods than have been the courts to which counsel have referred; but we deem it of the highest importance to the protection of the elective franchise that the law should be complied with in substance, and that those intrusted with the discharge of the duties pertaining to elections should be required so to perform them as to preserve the ballot-box pure. Others besides those who may lose their votes by the misconduct of officers of elections are concerned; and while seeking upon just principles to save to the elector his vote offered and given in good faith, we are not to forget that he himself, as well as all honest people, are vitally interested in the protection of the right of suffrage, against the fraudulent machinations and devices of men whose partisan moral code bears upon its title-page the infamous maxim, 'All is fair in politics.' These observations are made to show the importance of so far adhering to the substantial requirements of the law, as to protect and preserve elections from abuses subversive of the inherent and constitutional rights of the people."

[5,6] Similar principles are applicable here, where there was not only opportunity for fraud, but such actual tampering with the ballots as prevented a complete review and recount, and where the rights of the

voters to a secret ballot were "injuriously affected by the deviation". If the absent voters' law is to achieve its purpose, it is of the utmost importance that its terms be substantially complied with. In the long run this is important to all voters, including any who might lose their votes in a particular case. With respect to the votes of absentee voters, it is not only important to be able to tell how they actually voted, but it is of equal importance that the provisions of law be so carried out that it cannot be told how a particular individual voted. The law permitting absent voting is carefully drawn to protect the voter in the secrecy of his ballot, and it would be largely useless if such secrecy is not maintained. If the opening of envelopes containing such ballots by unauthorized persons, and the returning of the ballots to their original envelopes so that election officers, canvassing boards, and even outsiders and spectators may see how the individual voted, is to be permitted, the inevitable result will be that many voters will refrain from voting rather than run the risk of such a possibility. While it is unfortunate that any voter should lose his vote when it can be told for whom he intended to vote, it would be equally or more unfortunate to deprive many others of their vote by holding that a substantial compliance with this law is unnecessary. To so hold would be to destroy, by judicial decision, the secrecy with which the law has surrounded the casting of such ballots. Assuming that slight variations from the procedure provided for in the statutes ought not to prevent the counting of such votes, that is not the situation here where practically every provision of the statute was violated, and where, in fact, secrecy was not maintained. We therefore hold that there must be a substantial compliance with the essential requirements of the absent voters' law with respect to the counting of the votes, and that such a substantial compliance does not here appear. It follows that the trial court correctly found and concluded that these absent voters' ballots should not be counted for anyone.

The judgment is affirmed.

I concur: GRIFFIN, J.

MARKS, Justice.

I dissent. It must be admitted that the election officials and other officers having duties to perform in connection with counting the nine absent voters' ballots, disobey-

ed about all of the provisions of the statutes which provide for the preservation of the secrecy of such ballots that it was possible for them to violate. Those mistakes arose from ignorance on the part of the members of the election board and the city clerk. There was no evil design on their part.

The trial judge found the number of votes cast by the electors voting at the polls. This finding corresponds with the tally of those ballots by the election board, with the possible exception of one vote which did not affect the result. He also found that while there was opportunity for fraud to have been committed there was no evidence of such fraud in handling the ballots and in counting the votes either before or after the ballots left the possession of the election board. The finding of the exact number of votes cast for the several candidates by electors voting at the polls, and a like finding as to the votes of the absent electors shows rather conclusively that the trial judge was of the opinion that there was an entire absence of fraud or mistake in counting both classes of ballots. If he was not of that opinion he should not have made those findings. He based his conclusion that Kenyon had been elected on the count of the ballots that had been cast at the polls and refused to count the ballots of the absent voters.

It must be admitted that all of the ballots cast by the absent voters were legally cast by qualified voters, and, if counted, would elect Scott and defeat Kenyon.

It is equally true that the trial judge found no difficulty in determining for just which candidates those nine electors cast their votes. He so found in detail. There was no error in the count and no evidence of any fraud. The legal ballots, legally cast, actually elected Scott and defeated Kenyon.

I believe that in the absence of any evidence of fraud or dishonesty in the election the absent voters' ballots should have been counted. Where there has been no illegal voting and no illegal votes counted; where the failure on the part of election officials to conform to law did not result in illegal voting; where no fraud, mistake or dishonesty was shown in either the voting or tallying of the ballots, the will of the people clearly and honestly expressed should not be defeated because of a failure of officials to observe the requirements of the law in counting the votes. I cannot presume fraud

or mistake where none was shown and where the findings negative the existence of either.

Under the facts disclosed I cannot permit a fear (which to me seems more fanciful than real) that future election and canvassing boards might violate the secrecy of absent voters' ballots and thus keep absent electors from voting, to counterbalance my fear of the greater dangers which may follow from establishing a precedent under which the honestly expressed and clearly determined choice of legal voters in a free and fair election may be defeated through no fault of the voters.

I cannot agree with a decision which disfranchises legal voters who legally voted and elected a candidate in a fair election. The body politic should not be punished because of the ignorance and mistakes of the members of the election board and the city clerk.

In my opinion the people, not the courts, should elect officials.



34 Cal.App.2d 102

**BLOOM et al. v. OROVILLE-WYANDOTTE
IRRIGATION DIST. et al.**

Civ. 6126.

District Court of Appeal, Third District,
California.

Aug. 11, 1939.

1. Venue ⇐36

A proceeding in mandamus is subject to the same right to a change of place of trial as any other civil action. Code Civ.Proc. § 395, subd. (1); §§ 1085, 1090, 1094.

2. Venue ⇐41

In mandamus proceeding to compel officers of irrigation district to pay moneys due on obligations of district or to levy assessment for such payment, where all of defendants resided in the county of Butte, superior court of Stanislaus county properly granted defendants' motion for transfer of case to Butte county. Code Civ.Proc. § 395, subd. (1); §§ 1085, 1090, 1094.

3. Venue 77

The defendants in mandamus proceeding did not waive their right to a change of venue by filing with their notice of motion therefor a motion to dissolve the temporary restraining order and a motion to quash the writ of mandamus. Code Civ.Proc. § 395, subd. (1); §§ 1085, 1090, 1094.

4. Venue 77

While the privilege to have the place of trial changed may be waived impliedly as well as expressly, in order to do so there must be some act of the moving party tending to show his intent to invoke the jurisdiction of the court of first instance for the trial of the questions of fact or law.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Proceeding on the petition by James B. Bloom, as surviving trustee of the Bloom Company, a trust estate, and others against the Oroville-Wyandotte Irrigation District and others for a writ of mandate commanding respondents to pay certain moneys due on bond obligations of the Oroville-Wyandotte Irrigation District, or to levy an assessment for such payment. The defendants served and filed a motion to dissolve the restraining order and to dismiss the order to show cause, demand and notice of motion for change of venue, demurrer to the petition for writ of mandamus, and a motion to quash the alternative writ. From an order granting the motion for change of venue, and taking no action on the demurrer or other motions, the petitioners appeal.

Affirmed.

W. Coburn Cook, of Turlock, for petitioners.

Hankins & Hankins, of San Francisco, for respondents.

BRUTON, Justice pro tem., delivered the opinion of the court.

On April 18, 1938, the superior court of Stanislaus county granted its alternative writ of mandate commanding respondents to pay certain monies due on bond obligations of the Oroville-Wyandotte Irrigation District, or to levy an assessment for such payment. The court also issued its temporary restraining order and order to show cause why respondents should not be enjoined from proceeding under the Bank-

ruptcy Act of the United States. The respondents served and filed a motion to dissolve the restraining order and to dismiss the order to show cause; demand and notice of motion for change of venue; demurrer to the petition for writ of mandamus, and motion to quash the alternative writ.

The court thereafter heard and granted the motion for change of venue, taking no action on the demurrer or other motions.

Appellants (petitioners) urge two reasons for the reversal of the court's order changing the place of trial. They are:

1. The court was without authority to grant a change of venue.

2. The respondents waived their right to a change of venue by filing a motion to dissolve the temporary restraining order and a motion to quash the writ of mandamus.

[1] Appellants urge that under a reasonable construction of sections 1085, 1090 and 1094 of the Code of Civil Procedure in a mandamus proceeding where no answer has been filed, and hence no issue of fact raised, the court where the action is filed must proceed to try the questions of law. However, this view completely ignores the provisions of paragraph (1) of section 395 of the Code of Civil Procedure which is the section applicable here. A proceeding in mandamus is subject to the same right to a change of place of trial as any other civil action.

[2] All of the respondents reside in the county of Butte, and under the facts as here presented it would have been error for the court to have denied their motion to transfer the case to that county. State Commission in *Lunacy v. Welch*, 154 Cal. 775, 99 P. 181.

[3] We do not think that respondents waived their right to a change of venue by filing with their notice of motion therefor, a motion to dissolve the temporary restraining order and a motion to quash the writ of mandamus. The filing of these motions no more indicated an intention to invoke the jurisdiction of the court than would the filing of a demurrer or answer.

[4] "It is true that the privilege (to have the place of trial changed) may be waived impliedly as well as expressly, but in order to do so there must be some act of the moving party tending to show his

intent to invoke the jurisdiction of the court of first instance for the trial of the questions of fact or of law." *Goss v. Brown*, 64 Cal.App. 381, 221 P. 683.

The order is affirmed.

We concur: THOMPSON, Acting P. J.; TUTTLE, J.



34 Cal.App.2d 323

LOVELL v. PARRISH et al.
Civ. 2326.

District Court of Appeal, Fourth District,
California.

Aug. 24, 1939.

Hearing Denied Oct. 23, 1939.

1. Municipal corporations ⇐200

Under charter provision of city of San Diego stating that a widow of a deceased retired fireman is not entitled to a pension unless married to fireman three years before his retirement, a widow seeking a pension must show that she was in fact fireman's wife for three years prior to his retirement, and compliance with provision is not shown solely by proof that widow went through a valid marriage ceremony at some date three years prior to fireman's retirement.

2. Divorce ⇐316

On dissolution of marriage contract by a judgment decreeing a divorce, obligations arising from marriage are completely discharged, and parties stand in same position as though such marriage had never been contracted. Civ.Code, §§ 91, 132.

3. Municipal corporations ⇐200

Under charter provisions of city of San Diego providing that widow of a deceased retired fireman is entitled to a pension if she was married three years prior to fireman's retirement, a woman who was married to a fireman for more than three years prior to his retirement and who subsequent to his retirement divorced him and married another and on death of second husband, remarried fireman eight months before his death was not entitled to a pension. Civ. Code, §§ 91, 132.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceedings by Lillian Lovell to secure a writ of mandate to compel J. E. Parrish, chief of the fire department of the city of San Diego, Cal., R. C. Lindsay, city treasurer of the city of San Diego, Cal., and Bert Shankland, as the Board of Trustees of the Firemen's Relief and Pension Fund of the city of San Diego, to pay the petitioner a pension. From a judgment for petitioner, defendants appeal.

Reversed.

D. L. Ault, City Atty., and J. H. McKinney and Harry S. Clark, Deputy City Atty., all of San Diego, for appellants.

C. H. Van Winkle and R. F. Gusweiler, both of San Diego, for respondent.

HAINES, Justice pro tem.

The following statement of the facts involved in this proceeding is conceded by the respective parties to be correct: Rolfe Lovell, a fireman of the San Diego fire department, married the petitioner and respondent herein in the year 1903. In 1919 said Rolfe Lovell was retired on a pension from the fire department. On February 18, 1929, petitioner and respondent was granted a final and absolute decree of divorce from the said Rolfe Lovell at Reno, Nevada; and on the same day that her final decree of divorce was granted, she was married to a man by the name of McAndrews and lived with him as his wife until the time of his death on April 21, 1937. After the death of McAndrews, petitioner and respondent herein, on July 19, 1937, again married Rolfe Lovell and lived with him as his wife until the time of his death on March 12, 1938. All of these facts were stipulated to be true by the petitioner and defendants herein.

Section 184, article XI of the city charter of San Diego relating to the administration of a trust fund in the city treasury "for the benefit of the members of the San Diego Fire Department and to be known as the 'Firemen's Relief and Pension Fund,'" in so far as it need be here considered, has at all of the times with which we are here concerned, provided as follows:

"(a) Whenever any person who shall have been duly appointed, selected or sworn, and shall have served for twenty years or more in the aggregate as a member in any rank or capacity of the regu-

larly constituted force, or any department of said force provided for by this Article, the Board of Trustees shall upon the written request of any person, or his guardian, or without such request if it deem it for the good of the service, retire such person from further service in the Fire Department; and from the date of making such order, the service of such person shall cease, and the person so retired shall thereafter during his lifetime be paid from the regular funds of the Firemen's Relief and Pension Fund a yearly pension equal to one-half the amount attached to the rank held by him for one year or more previous to the time of his retirement.

"(b) Upon the death of said pensioner, one-third of the amount of his annual salary shall be paid to his widow until she remarries * * * ; provided, however, if such pensioner was pensioned under subdivision (a) of this section * * * the widow shall not be entitled to any pension unless she was married to said pensioner three years previous to the time of such retirement."

Appellants, who are under the charter the board of trustees in charge of said fund, declined to recognize respondent as entitled under the charter provisions quoted to a pension out of said fund and refused to pay her such pension as Lovell's widow, whereupon she applied to the trial court for a writ of mandate requiring them so to do and, after issue joined and trial had, obtained judgment peremptorily awarding her such writ. From this judgment the members of the said board prosecute the present appeal.

[1] Manifestly, in order to establish her right to a pension, respondent must, under the terms of the charter, show that "she was married to said petitioner 3 years previous to the time of his retirement." We do not think that this provision could reasonably be so construed as to be satisfied by proof that she merely went through some valid marriage ceremony with the petitioner at some date 3 years or more prior to the date of his retirement. Manifestly, it requires her to have been his wife over a period of not less than three years prior to that time. Thus far, we presume that there will be no disagreement. The question is whether the charter contemplates that the period of married life of not less than three years must have been a continuous one up to and including the date of the petitioner's

death. We have no hesitation in answering that question in the affirmative. There can be no doubt that had Lovell died at any time between the date of his retirement in 1919 and the date at which respondent secured her divorce from him, respondent would, under the charter, have been entitled to the pension. In fact, however, she secured the divorce which became absolute. "The effect of a judgment decreeing a divorce, is to restore the parties to the state of unmarried persons." Civ.Code, sec. 91. Again, in section 132 of the Civil Code it is provided that a "final judgment shall restore them" (that is the spouses) "to the status of single persons, and permit either to marry after the entry thereof". As was said by Chief Justice Field in *Barber v. Barber*, 16 Cal. 378:

[2] "With the dissolution, the obligations arising from the marriage are completely discharged, and the parties stand in the same position as though such marriage had never been contracted."

[3] If these enactments and this language mean anything at all, they mean that there remains no legal relation between the former husband and the former wife whatever; that all relation between them has been completely severed and terminated and not merely suspended. What is wholly non-existent is not susceptible of being revived. If the pensioner had died after respondent divorced him, even while she still remained unmarried, it is too plain for discussion that respondent would not have been his widow and could not possibly have claimed to be one of the class of persons entitled under the above-quoted language of the charter to pensions. Even if she could, in these circumstances, have claimed to have been Lovell's widow, however, her right to the pension would, under the express language of the charter, have continued only "until she remarries", and have been instantly terminated by her marriage to McAndrews. In our opinion, therefore, no vestige of her claim to a pension in the event of Lovell's death at that time remained to her. All possibility of such a claim based on her original marriage to the pensioner and the continuance of such marriage status for three years prior to the time of his retirement had by her own acts been utterly extinguished beyond all possibility of revival.

What then shall we say was the effect of her remarriage to Lovell after McAn-

draws' death and her continuance in such remarried state from that time until his death somewhat less than eight months thereafter? We think it clear that so far as investing her with any rightful pension is concerned it had no effect whatever. Inasmuch as her rights resulting from her original marriage status are wholly gone she could only found any new rights that she might claim upon her remarriage to Lovell if followed by a continuance of such remarriage status for a period of three years prior to his retirement, followed by his death while such remarriage status still persisted. This, however, is impossible for two reasons: first, because he had already retired before her remarriage to him occurred; and second, because his death occurred within eight months after such remarriage. It seems clear to us that she has no claim to any pension.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIF-FIN, J.



JOHNSON v. FONTANA COUNTY FIRE PROTECTION DIST. et al. *

Civ. 2175.

District Court of Appeal, Fourth District,
California.

Aug. 9, 1939.

Hearing Granted Oct. 6, 1939.

1. Mandamus ☞159

Generally, a petitioner for a writ of mandate is concluded by the terms of the alternative writ.

2. Mandamus ☞180

Where an alternative writ of mandate is issued for a purpose partly proper and partly improper, the court will generally not enforce it by a peremptory writ covering that part which is proper.

3. Mandamus ☞182

Though it may be deemed that a peremptory writ of mandate covering a part of the relief included within the terms of the

alternative writ and omitting another portion is proper, the relief granted may not be entirely different from that covered by the alternative writ and entirely different from the relief prayed for in the petition.

4. Mandamus ☞180

Where alternative writ of mandate to compel payment of judgment recovered by petitioner against fire protection district ordered board of fire commissioners to include amount of judgment in their next recommendation to the supervisors, specifying amount of taxes to be levied, and that supervisors include that amount in tax levy, but no board of fire commissioners existed, and supervisors were not authorized by law to receive a recommendation from such a board, a peremptory writ of mandate would not issue.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Mandamus proceeding by Rolland J. Johnson against the Fontana County Fire Protection District and others to compel the payment of a judgment which the petitioner had theretofore recovered against the Fontana County Fire Protection District and against one George Calkins. From a judgment denying the application, the petitioner appeals.

Judgment affirmed.

Prior opinion, 87 P.2d 426.

A. J. Getz, of Los Angeles, for appellant.

Jerome B. Kavanaugh and Swing & Swing, all of San Bernardino, for respondents.

Lasher B. Gallagher, of Los Angeles, amicus curiæ.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying petitioner's application for a writ of mandamus. The proceeding was instituted for the purpose of compelling the payment of a judgment which the petitioner had theretofore recovered against the Fontana County Fire Protection District and against one George Calkins.

The respondent Fire Protection District, which will hereinafter be referred to as the district, was organized on April 16, 1928, under the act of 1923 (Stats.1923, p. 431). Section 5 of that act originally provided that the board of supervisors of any county

*For subsequent opinion see 101 P.2d 1092.

wherein such a district should be established should be the governing body of such district, with power to appoint agents and employees sufficient to maintain and operate any property acquired for the use and purposes of the district. Section 7 provided that the board of supervisors should levy taxes upon the real property in the district sufficient to defray the cost of maintenance of the district and to meet other expenditures authorized by the act. In 1925 section 5 was amended by adding a provision that the board of supervisors might appoint five commissioners as its agents to manage the affairs of the district, and section 7 was amended by providing that in case such commissioners were appointed they should recommend to the supervisors the amount of taxes to be levied. St.1925, pp. 671, 672. Shortly after the formation of this district and on April 30, 1928, the board of supervisors appointed five persons as commissioners for this district. Thereafter, by an amendment adopted in 1931, St.1931, p. 1601, § 5, the provision permitting the supervisors to appoint five commissioners was eliminated from the statute.

On October 3, 1935, the petitioner, as plaintiff, commenced an action in the superior court of San Bernardino county against "George Calkins; The Fontana County Fire Protection District, a body politic; The Fontana Union Water Company, a corporation; and the County of San Bernardino, California, a body politic and corporate". The complaint alleged, among other things, that the plaintiff was injured on June 8, 1935, in a collision between an automobile driven by him and another automobile owned and driven by George Calkins; that the collision occurred as the result of negligence on the part of Calkins; and that Calkins was then an officer, agent and employee of the district and driving his automobile within the scope of his agency and employment. The board of supervisors were not made parties to that action, either as the governing board of the district or otherwise. Before trial, the action was dismissed as against the county of San Bernardino. The trial resulted in a judgment in favor of the Fontana Union Water Company, and a judgment for \$3,500 and costs against Calkins and the district.

In his petition for a writ the petitioner alleged, among other things, that five of the respondents were "and now are the

duly qualified and acting members of the Board of Fire Commissioners" of the district; that he had recovered a judgment against Calkins and the district; that Calkins is insolvent; that he had demanded payment of the judgment and had demanded that a requisition be drawn for a warrant payable to him in the amount of the judgment; that his request had been refused; and that pursuant to the act of 1923 permitting the formation of this district there is a fund in the county treasury upon which the said warrant should be drawn.

In exact accordance with the prayer of the petition an alternative writ of mandate was issued requiring the board of supervisors or the board of fire commissioners of this district to requisition the auditor to draw a warrant upon this fund in the amount of the judgment, requiring the auditor to draw the warrant and the county treasurer to pay the same, "if there be sufficient money in said fund" to the credit of the district. It is then ordered, "if it be found that there be not sufficient money in said fund to pay said warrant", that the board of fire commissioners "is required and ordered to include the unpaid amount of said judgment in their next recommendation to the board of supervisors, specifying the amount of taxes to be levied on the taxable real property within" the district, "for the purpose of defraying the expenses of operating and maintaining" the district, and that the board of supervisors "include said amounts so recommended in their next tax levy upon the taxable real property within the said district", and that the county treasurer be ordered to pay the said warrant when such tax, so levied, is collected.

At the hearing it was stipulated, among other things, that "said George Calkins was, at the time of said collision, acting as a volunteer fireman for said Fontana County Fire Protection District, by appointment of one Earl Reeves, who was then and there acting in the capacity of Fire Chief of the Fontana Volunteer Fire Department; that said Earl Reeves was acting as such Fire Chief under appointment by the aforementioned Fire Commissioners". In this regard the court found that the said Calkins was never appointed to the position of volunteer fireman by the board of supervisors; that the board of supervisors had never taken any action authorizing the formation of

a volunteer fire department within or for the district; that at the time of the accident in question the said Calkins was purporting to act as a volunteer fireman under appointment of one Earl Reeves who was then acting in the capacity of fire chief of the Fontana Volunteer Fire Department; that said Earl Reeves was never appointed to such position by the board of supervisors; that neither Earl Reeves nor Calkins was ever employed by the board of supervisors; and that their employment was never authorized by said board.

Among the questions raised on this appeal are whether the prior judgment is binding upon the district since the board of supervisors, its governing body, were not served and did not appear in the original action; whether that judgment is conclusive upon the question of whether or not Calkins was an agent or employee of the district; and whether the district is an entity which may be sued or a "district established by law" within the meaning of section 1714½ of the Civil Code, now section 400 of the Vehicle Code, St.1935, p. 152. However, a preliminary question is whether a peremptory writ should issue since it cannot follow the terms of the alternative writ.

The court found that there was no fund in the county treasury belonging to this district which could be made available for the payment of this judgment. No contention to the contrary is here made and the judgment cannot be reversed in so far as it constitutes a refusal to order certain officers to draw a warrant upon this fund and to pay the same. The remaining provisions of the alternative writ were drawn upon the theory that there was a board of commissioners for the district charged with the duty of determining the amount of taxes necessary for the purposes of the district, and of making a recommendation in this matter, upon which the board of supervisors should act and proceed to levy the appropriate tax. This portion of the alternative writ accordingly orders the individuals alleged to constitute the fire commissioners of the district to include the amount of said judgment "in their next recommendation to the board of supervisors, specifying the amount of taxes to be levied upon the taxable real property within the limits" of said district, and orders the individuals constituting the board of supervisors to

include "said amount so recommended" in their next tax levy for the district. That part of section 5 of the act of 1923 which permitted the board of supervisors to appoint five commissioners as its agents for the purpose of managing the affairs of the district was repealed in 1931, and thereafter no such board of fire commissioners was in existence nor was such a board authorized to make any recommendation with respect to taxes or to otherwise act for the district.

[1, 2] The general rule is that a petitioner for a writ of mandate is concluded by the terms of the alternative writ and that where an alternative writ is issued for a purpose partly proper and partly improper the court will not enforce it by a peremptory writ covering that part which is proper. *Larkin v. Superior Court*, 171 Cal. 719, 154 P. 841, Ann.Cas.1917D, 670; *Gay v. Torrance*, 145 Cal. 144, 78 P. 540, 544. In the latter case, the court said:

"It is well settled that a petitioner for a writ of mandate is concluded by the terms of the alternative writ, and that, where the alternative writ is awarded for a purpose partly proper and partly improper, the court will not enforce it by a peremptory mandamus as to that which is proper, but will give judgment for the respondent. It is incumbent upon the petitioner in such a proceeding to establish his right to the performance of the very act or acts commanded by the alternative writ, and, unless he so does, he must fail entirely."

[3] An exception to the general rule has been recognized where an alternative writ was directed to several respondents and it finally appeared that the writ could not issue as to certain of the respondents but might properly issue as to the others. *Holtum v. Greif*, 144 Cal. 521, 78 P. 11; *Larkin v. Superior Court*, supra. Assuming that this exception might be so extended in a proper case as to permit the issuance of a peremptory writ covering a part of the relief included within the terms of an alternative writ and omitting another portion, it could hardly be extended to a point where the relief granted was entirely different from that covered by the alternative writ and entirely different from the relief prayed for in the petition.

[4] If it be assumed that the amount of petitioner's judgment should be includ-

ed in a tax levy on property within the district, the power to determine the total amount necessary to be raised by taxation was vested in the board of supervisors as the governing body of the district. No part of the alternative writ required the supervisors to perform any act which they were authorized to perform, and they could not be ordered to accept and act upon an unauthorized recommendation. It is obvious that the trial court could not have issued a peremptory writ in accordance with the terms of the alternative writ. It would have been an idle thing to have ordered a non-existent board to perform acts which it was not authorized to perform and which, in law, it could not perform. The only order directed to the supervisors, in the alternative writ, is that they accept and act upon a recommendation which they were not authorized to receive and which could not legally be made. None of the relief represented by the terms of the alternative writ could be granted and no part thereof could be complied with if the same were ordered. To be effective or useful for any purpose any writ issued herein would necessarily have to depart entirely from the terms of the alternative writ. It follows from established rules that a peremptory writ should not issue under such circumstances.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



34 Cal.App.2d 97

DIETERLE et al. v. YELLOW CAB
CO. et al.
Civ. 12219.

District Court of Appeal, Second District,
Division 2, California.

Aug. 11, 1939.

Hearing Denied Oct. 9, 1939.

1. Trial  142

A trial court may direct a verdict only when, disregarding conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn

therefrom, no evidence of sufficient substantiality to support verdict for plaintiffs may be found.

2. Appeal and error  927(7)

On appeal from judgment entered after direction of verdict for defendants, reviewing court was required to consider evidence in light most favorable to plaintiffs.

3. Carriers  325

Passengers for hire riding in taxicab were entitled to rely upon obligation of driver to use utmost care and diligence for their safety.

4. Carriers  316(4)

Passengers for hire injured when taxicab in which they were riding was struck by automobile at intersection were entitled, in action against owner and driver of taxicab, to rely upon presumption embodied in doctrine of *res ipsa loquitur*.

5. Appeal and error  1003 Trial  178

The trial court in passing upon motion for directed verdict, and reviewing court in considering trial court's order, could not weigh evidence for purpose of determining where preponderance of evidence rested.

6. Trial  139(1)

The question of where preponderance of evidence rests is ordinarily one for jury, and may not be taken from jury unless no substantial evidence is presented which, viewed in light most favorable to plaintiffs, would support verdict in their favor.

7. Carriers  320(17, 21)

In passengers' action against owner and driver of taxicab for injuries sustained when taxicab, while traveling on a through street, was struck by automobile at intersection, evidence relating to negligence of taxicab driver in driving at an excessive speed, and in failing to avoid collision with automobile which he claimed to have seen while approaching and crossing intersection, was sufficient for jury.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by William Dieterle and others against the Yellow Cab Company, Merle J. Nave, Agnes Whelan, and another, to recover for injuries sustained in an automobile collision. From a judgment in favor of the named defendants, plaintiffs appeal.

Judgment as to the defendant Agnes Whelan affirmed and judgment as to the other two named defendants reversed.

A. Ronald Button, of Hollywood, and Samuel V. Cornell, of Modesto, for appellants.

Harry B. Ellison, J. L. Ronnow, and Harry B. Ellison, all of Los Angeles (Reginald I. Bauder, of Los Angeles, of counsel), for respondents.

PER CURIAM.

In the evening of December 9, 1937, plaintiffs were passengers in a taxicab driven by defendant Nave and owned by defendant corporation, which collided with a Plymouth automobile driven by defendant La Force. They seek to recover damages for injuries received in the collision. Defendant Agnes Whelan was made a defendant under allegations that she was the owner of the Plymouth car. When both sides rested the trial court granted a motion for a directed verdict as to defendant Nave and the taxicab company. The jury returned verdicts in favor of defendant Whelan and against defendant La Force in the sums of \$13,922.67 for plaintiff William Dieterle, \$13,875.86 for plaintiff Charlotte Dieterle, \$1,556.17 for plaintiff Hagenbruch and \$570 for plaintiff Zeisler. Plaintiffs have appealed from the judgments in favor of defendants Whelan, Nave and the taxicab company. The briefs contain no arguments as to the appeal from the judgment in favor of defendant Whelan and therefore it will not be discussed herein.

[1,2] The power of the trial court to direct a verdict is limited and has been well defined. It may direct a verdict only when, disregarding conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn therefrom, no evidence of sufficient substantiality to support a verdict in favor of plaintiffs, if given, may be found. *Mairo v. Yellow Cab Co.*, 208 Cal. 350, 281 P. 66. Although the evidence was conflicting and would doubtless have supported a verdict in favor of Nave if the jury had rendered such a verdict upon proper instructions of the court, we must, nevertheless, in view of the nature of this appeal and in accordance with the rule above set forth, consider the evidence in the light most favorable to plaintiffs.

The accident occurred at about 8 o'clock in the evening at the intersection of Beverly

boulevard and Lucerne street in the city of Los Angeles. A drizzling rain was falling and the surface of the street was wet. The night was dark but the street was lighted. Beverly boulevard is what is known as a "through street". A stop sign had been placed at the intersection requiring cars approaching Beverly boulevard from Lucerne street to stop before entering the intersection. Defendant Nave was driving the taxicab in an easterly direction on Beverly boulevard and defendant La Force was driving the Plymouth car in a northerly direction on Lucerne street. The collision occurred in the southeasterly quarter of the intersection, about midway between the northerly and southerly lines of the quarter of the intersection and about 6 or 8 feet from its easterly line. The taxicab was struck on its right rear side. Defendant La Force testified that he made a complete boulevard stop and as he was making the stop the taxicab was approximately 100 feet west of the westerly line of the intersection. Thereupon La Force according to his testimony, proceeded in low gear into the intersection driving at from 8 to 10 miles per hour. While the Plymouth was standing still the taxicab traveled about 40 feet and when the Plymouth was put in motion the taxicab was from 50 to 60 feet from the intersection. La Force estimated the speed at which the taxicab was traveling at from 30 to 35 miles per hour. Defendant Nave testified that when he approached the intersection at 20 miles per hour he slowed his car slightly for a "dip" and went straight across the intersection without applying his brakes; that his right window was down and that he could see the Plymouth car; that he did in fact keep his eyes upon the Plymouth car as he crossed the intersection except for a second; that the Plymouth car was back of the stop signal when he, Nave, was in the intersection. Other witnesses testified that the Plymouth car did not make the required boulevard stop.

Plaintiffs contend that if the jury had been given the opportunity to pass upon the issues as to respondents and had believed the testimony which was most favorable to plaintiffs, a finding that the taxicab was driven at an excessive and negligent speed would have been supported. They also contend that since testimony was received that the Plymouth car did not make the boulevard stop but "came through very fast", and since Nave testified that he observed the Plymouth as he approached and was crossing the intersection, a finding by

the jury that he could have avoided the collision by the exercise of due caution would have been supported by the evidence.

[3, 4] Since plaintiffs were being transported as passengers for a reward by respondents, they could rely upon the obligation of the driver of the taxicab to use the utmost care and diligence for their safety. In presenting their case to the trial court they were entitled to the presumption embodied in the doctrine of *res ipsa loquitur*. A case strikingly similar to the one under review is that of *St. Clair v. McAlister*, 216 Cal. 95, 13 P.2d 924, 925. In that case the plaintiff was a passenger on a bus which stopped at a corner of an intersection and then proceeded slowly across the intersection. A Ford car driven across the intersection at an excessive rate of speed collided with the bus. The plaintiff sued both the driver of the Ford car and the owner of the bus. In affirming the judgment against both of the defendants, Mr. Justice Shenk, speaking for the court and referring to the doctrine of *res ipsa loquitur*, uses language which bears so clearly upon the case now before us that a quotation therefrom is especially appropriate:

"It was the duty of the carrier to exercise 'the utmost care and diligence for their safe carriage' of the plaintiff (section 2100, Civ.Code), and upon showing that she was a passenger and was injured while being carried as such, a presumption of negligence arose, as to which it was incumbent on the carrier to show that it was free from negligence. *Scarborough v. Urgo*, 191 Cal. 341, 216 P. 584. We have no hesitancy in saying that the plaintiff produced proof entitling her to invoke the doctrine contended for by her.

"The evidence offered by the defendant corporation to rebut the presumption consisted in the main in proving the negligence of the driver of the Ford car as to which all parties have agreed. As noted, the driver of the bus was not a witness and his employer offered no proof the effect of which would show that the driver could not have avoided the collision by the exercise of due caution. In the presence of the presumption it cannot be said as a matter of law that the trial court erroneously applied the doctrine.

"But the defendant corporation insists that the evidence of the conduct in detail of the driver of the Ford car, and particularly that produced by the plaintiff re-

moved the case from the application of the doctrine of *res ipsa loquitur*, and that such proof showed the collision to be due solely to the negligence of the driver of the Ford car. We cannot agree. The plaintiff was confronted with a situation where, in charging concurrent negligence, she was entitled to the application of the doctrine upon proof of her status as a passenger on the bus while the same was being operated by the bus company and the resultant injury from such operation. But as to *McAlister*, she was bound to prove his negligence by a preponderance of the evidence without the aid of the presumption. This, she could not do except by proving the particular acts which constituted such negligence. By producing such proof it should not be held that she waived or forfeited her right to invoke the doctrine as to the defendant's carrying her as a passenger."

It will be noted that in the case from which quotation is made, as well as in our own case, the plaintiff offered proof showing in detail the circumstances of the collision. It is pointed out in the *St. Clair* case that defendant "offered no proof the effect of which would show that the driver could not have avoided the collision by the exercise of due caution". Although defendant Nave was sworn as a witness, he did not claim that he applied his brakes or attempted to swerve the taxicab in order to avoid the collision.

[5-7] The trial court in passing upon the motion for a directed verdict could not, and this court in reviewing the order of the trial court cannot, weigh the evidence for the purpose of determining wherein rests the preponderance of the evidence. That question ordinarily is one for the jury and may not be taken from the jury unless no substantial evidence be presented which, viewed in the light most favorable to plaintiffs, would support a verdict in their favor. Plaintiffs were not bound by the testimony of *La Force* in toto nor were they bound by the testimony of *Nave* in toto. They had the right to depend upon the most favorable portions of the testimony of these and other witnesses together with all fair and reasonable inferences which could be deduced therefrom. The court erred in directing the verdict.

The judgment as to defendant *Agnes Whelan* is affirmed. The judgment as to defendants *Nave* and *Yellow Cab Company* is reversed.

34 Cal.App.2d 284

PEOPLE v. BACA.

Cr. 3210.

District Court of Appeal, Second District,
Division 1, California.

Aug. 22, 1939.

1. Criminal law ☞564(1)

Evidence held not to authorize conviction of receiving stolen property where information charged defendant with receiving property on a certain date in Los Angeles county, and record showed neither direct evidence of venue of alleged offense in Los Angeles county, nor evidence of any fact from which it could reasonably be inferred that defendant had possession of property on alleged date in county in question.

2. Criminal law ☞564(2)

In prosecution for receiving stolen goods, evidence supporting conclusion that defendant knowingly had possession of property at a time and place other than that alleged in information did not authorize conviction, where such evidence merely raised a suspicion that defendant might have had the property in question on date and in county alleged in information.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Juan Jose Baca was convicted of receiving stolen property and he appeals.

Reversed.

L. J. Seay, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

DORAN, Justice.

Appellant, Juan Jose Baca, was adjudged guilty of the crime of receiving stolen property, as alleged in count III of an information filed by the district attorney which charged the defendant with receiving the property "on or about the 10th day of November, 1936, at and in the County of Los Angeles".

Defendant appealed from the judgment and from the order denying a motion for a new trial.

The securities, which were the subject-matter of the crime, were stolen in Los Angeles on November 10, 1936. Two years

later, namely on November 20, 1938, defendant Baca was arrested in the city of Denver, Colorado, while attempting to hypothecate about three thousand dollars worth of these securities.

The record reveals that at the trial, Mrs. Erma Burns, the manager of the Atlas Hotel in Los Angeles, testified to the fact that Baca, who gave his address as Socorro, New Mexico, registered at the hotel and was the occupant of a room there from May 9 to May 21, 1938.

A file of correspondence which was admitted in evidence, most of which was addressed to the defendant at Socorro, was taken from him at the time of his arrest; among these letters were several signed "X Y FOUREX XY XXXX." A few excerpts from these are pertinent. The first letter to the defendant was dated May 26, 1938, which was some five days after the defendant had left Los Angeles for New Mexico. This letter read in part as follows: "* * * and I think you should be able to do something for Mr. Brown which I think he is in your city now. I am sure he will give you a letter authorizing you to use his security and that is all you need." (Letter dated June 20, 1938): "The only way is to use it as collateral and put it away for six months. You cannot change it to your name and you do not have to unless you do not pay the loan back, then they can change it to their own name * * * but do not notify the company under any circumstances as the merchandise is good as it is and it is transferable and it can only be used as collateral on a loan, so if you cannot do it right, do not do it at all. You *understand*." (Letter dated July 18, 1938): "As far as getting quotations on the prices they can wire any broker who will be glad to send it to them, but be *sure not* to wire any of the companies. I am sending you today's quotations and I will send you a list from the newspapers tomorrow, as a few are unlisted stock * * * Do the best you can and be very cautious." (Letter of July 26, 1938): "B. B. Robinson & Co., at your request sent a quotation of the following stocks which you ask about." (Following this were quotations on the same issues as the stolen certificates.) Defendant acknowledged having received these letters.

There were also admitted in evidence some sheets of paper found in the defendant's possession at the time of his arrest,

on one of which appeared the name and address of a "John Leon, 933 West 6th St., L. A." and upon another sheet the name of "Charles Mallaby" at the same address. Defendant testified that he had met a Charles Mallaby at the time he was in Los Angeles in May of 1938, through a Mr. Cox; that Cox and Mallaby later came to the hotel to see him; that he was told by Mallaby to write to a "John Leon" at Mallaby's address whenever he had "any correspondence to write to him, or information"; that when he wrote to "Leon" he received an answer from him signed "XY XXXX" but that he did not know the identity of the person who sent the letters signed in that fashion.

Defendant's explanation of the manner in which he came into possession of the securities was substantially as follows: that he met a "fellow by the name of Bruce Brown" in El Paso, Juarez, in May of 1938; that Brown talked to him about some valuable papers that he (Brown) had, which the latter brought to Socorro, New Mexico, shortly afterwards; that Brown produced a "conditional sales agreement of stock" which Baca and Brown were purported to have acknowledged before a notary public on May 17, 1938, at Socorro; that defendant later met Brown in El Paso, Juarez, at which time Brown turned the securities in question over to Baca, and the latter gave to Brown a "turtle of gold" in exchange for the securities, which "turtle" the defendant had obtained from the Indians.

Dr. Bruce Brown, the owner of the securities, testified that he did not know the defendant and had never seen him prior to the time of defendant's arrest.

[1,2] The sole question raised on appeal is, whether the evidence is sufficient to sustain the verdict and judgment, in which connection appellant argues that "in addition to the proof that the defendant received the stolen property knowing the same to be stolen, it is incumbent upon the people to prove the venue of a crime". It is urged in this regard that evidence of venue is wholly lacking. Appellant is entitled to be sustained. A careful review of the record reveals neither direct evidence of the venue of the alleged crime in Los Angeles county, nor evidence of any fact from which it can reasonably be inferred that defendant received possession, or ever had possession of the stolen property, on or about November 10, 1936, or at any other

time, in said county. That there is evidence to support the conclusion that defendant knowingly had possession of such property elsewhere, there can be no question, but such evidence, in the light of the record, raises no more than a suspicion that the property in question was possessed by defendant in Los Angeles county. Such a showing is insufficient.

For the foregoing reasons the judgment and the order denying defendant's motion for a new trial are, and each of them is, reversed.

We concur: YORK, P. J.; WHITE, J.



34 Cal.App.2d 115
ROBERTSON v. ROBERTSON.
Civ. 10851.

District Court of Appeal, First District,
Division 1, California.

Aug. 15, 1939.

Hearing Denied Oct. 13, 1939.

1. Divorce ☞245(1)

A divorce decree awarding alimony could be modified without consideration of terms of property settlement agreement, notwithstanding that agreement may have been used as general basis for decree, where agreement was not merged in decree and decree did not formally approve or disapprove the agreement.

2. Divorce ☞255

The subsequent modification of divorce decree by reducing amount of alimony to be paid wife from \$300 to \$250 a month was not res judicata of wife's cause of action on property settlement agreement providing for payment of \$300 a month to wife.

3. Divorce ☞249(2)

Each action on property settlement agreement between husband and wife must be determined upon the facts and circumstances presented.

4. Husband and wife ☞30

In California, subject to general rules controlling acts of persons occupying confi-

dential relationships, husband and wife can enter into agreement, with mutual consent as the consideration, respecting property. Civ.Code, §§ 158, 160.

5. Divorce Ⓒ249(2)

A property settlement agreement between husband and wife is not invalid when made after the separation of the parties in contemplation of a divorce, and is not abrogated thereby.

6. Divorce Ⓒ249(2)

The terms of a property settlement agreement made after separation of husband and wife in contemplation of divorce need not be adopted in divorce decree, and court retains equitable power to determine, irrespective of contract, whether the terms are fair and just, and the power to increase or diminish an award after a property settlement.

7. Divorce Ⓒ249(2)

A property settlement agreement made after separation of parties in contemplation of divorce stands and may be treated as an independent contract subject to such construction and judicial disposition as the terms, facts and circumstances warrant, unless the court specifically declares the agreement to be illegal and against public policy.

8. Divorce Ⓒ249(2), 261

Where divorce decree modifies or supercedes some provision of property settlement agreement, one party may have concurrent remedies, but a defaulting party may be bound by both the decree and the agreement.

9. Divorce Ⓒ258

Where divorced wife has concurrent remedies under property settlement agreement and divorce decree, payments made under one should be credited to amount due under the other.

10. Accord and satisfaction Ⓒ10(1)

Where a dispute having the ring of truthfulness on each side arises concerning an amount due under an obligation, as in a case where the parties concur on amount and agreement is later made to accept a lesser sum in full satisfaction of amount due, obligation is canceled by tender and acceptance of lesser sum in full payment.

11. Accord and satisfaction Ⓒ11(3)

Where divorced husband asserted that only \$250 per month was payable, under

modified divorce decree, to divorced wife who honestly believed that she was entitled to \$300 per month under property settlement agreement, a valid "accord and satisfaction" was consummated by wife's acceptance and cashing of \$250 monthly checks on which were indorsed the words "in full payment," and the dispute was determined and the obligation extinguished in relation to each monthly payment so made, notwithstanding that wife indorsed on each check the words "received in conformity with court's order made in final decree, same being in part payment of payment due."

[Ed. Note.—For other definitions of "Accord and Satisfaction," see Words & Phrases.]

12. Accord and satisfaction Ⓒ11(3)

Where dispute exists as to amount due on obligation and check is tendered containing words "in full payment," creditor cannot accept benefit of check by cashing it, without consenting to the condition indorsed thereon.

13. Accord and satisfaction Ⓒ25(2)

In divorced wife's action on property settlement for arrears in monthly payments made by divorced husband for her support and maintenance, a pleading prepared to cover defense of accord and satisfaction was sufficient, notwithstanding that pleading may have been vulnerable to an attack by special demurrer, in absence of such objection.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Frances Robertson against Charles H. Robertson to recover the sum of \$2,050, representing an accumulation of \$50 a month arising from a reduction from \$300 to \$250 in the monthly payments made by defendant to plaintiff for her support and maintenance following their divorce. From the judgment, both parties appeal.

Affirmed.

James F. Brennan, of San Francisco, for defendant, respondent and appellant.

Nathan C. Coghlan and Walter C. Frame, both of San Francisco, for plaintiff, appellant and respondent.

WARD, Justice.

This is an action by plaintiff to recover the sum of \$2,050, representing an accum-

ulation of \$50 a month arising from a reduction from \$300 to \$250 in the monthly payments made by defendant to plaintiff for her support and maintenance following their divorce. The trial court decreed that the property settlement agreement sued upon, providing for the payment to plaintiff of the sum of \$300 a month, is a valid, existing and enforceable contract between the parties but that, while entitled to the payment of such amount each month, she is estopped from collecting the unpaid portions thereof, aggregating \$2,050, by reason of her acceptance of the monthly checks for a lesser amount. Plaintiff appeals from that part of the judgment denying her the unpaid balance claimed to be due. Defendant appeals from that part of the judgment decreeing the property settlement agreement to be a valid, existing and enforceable contract between the parties, permitting plaintiff to thereafter collect the sum of \$300 a month according to the terms of the agreement. For the purpose of clarity, the parties hereto will be referred to as plaintiff and defendant.

[1,2] Upon the divorce hearing, September 18, 1929, counsel for the respective parties informed the court of the general terms of a suggested property settlement agreement, and of the basis of a proposed decree, subject to the approval of the court, relative to a property settlement. No reference was made at that time as to the disposition of certain personal property, including furniture, stocks, an automobile, etc. A week later, by stipulation, findings of fact and conclusions of law were waived, and an interlocutory decree signed listing items of personal property and stock, and making provision for plaintiff's support in the amount agreed upon, \$300 a month, but no mention was made therein of the contract of property settlement. During the interim between September 18th and the date of the signing of the interlocutory decree, the property settlement agreement had been reduced to writing. It provided that plaintiff was to receive various articles of personal property and corporate stock, together with the sum of \$300 a month for her support. The agreement may have been used as the general basis for the decree, but it was not merged in the decree and the latter document did not formally approve or disapprove the agreement; hence in this proceeding the power to modify the decree, without consideration of the terms of the agreement, cannot be

questioned. *Armstrong v. Armstrong*, 132 Cal.App. 609, 23 P.2d 50; *Hughes v. Hughes*, 68 Cal.App. 195, 228 P. 675; *Johnson v. Johnson*, 104 Cal.App. 283, 285 P. 902. Several years subsequent to the entry of the decree, after hearing, during the course of which plaintiff introduced her contract of property settlement, the decree of divorce was modified by reducing the monthly alimony payments to \$250, after which time, defendant, in tendering the monthly checks, wrote upon each of them: "In full payment to [date]." Plaintiff cashed each one, endorsing thereon: "Received in conformity with court's order contained in final decree, same being in part payment of payment due." The subsequent modification of the decree by reduction of the amount to be paid plaintiff from \$300 to \$250 a month was not res judicata of the cause of action on the contract. *Sanborn v. Sanborn*, 3 Cal.App.2d 437, 39 P.2d 830; *Gummerson v. Gummerson*, 14 Cal.App.2d 450, 58 P.2d 394.

[3] Defendant contends that the interlocutory decree was a consent decree covering the provisions of alimony; that it was a complete adjudication of the property and support rights of the parties; that entry in the minutes constitutes the rendition of a judgment and that the agreement was an attempt to modify the decree; that the agreement was merged in and superseded by the decree, and that the subsequent order of modification of the decree was an adjudication of the agreement. So far as we have been able to ascertain, the numerous authorities cited in support of these contentions set forth correct legal principles, but the facts in such cases are not identical and in some instances not even similar to the facts and circumstances in the instant case. Each case must be determined upon the facts and circumstances presented. *Waack v. Maxwell Hardware Co.*, 210 Cal. 636, 640, 292 P. 966.

[4-9] In California, subject to the general rules controlling acts of persons occupying confidential relationships, a husband and wife may enter into an agreement, with mutual consent as the consideration, respecting property. Civ.Code, secs. 158, 160. Such a contract is not invalid when made after the separation of the parties in contemplation of a divorce, and it is not abrogated thereby. *Cookinham v. Cookinham*, 219 Cal. 723, 28 P.2d 1045; *Huntsberger v. Huntsberger*, 2 Cal.2d 655, 43 P.2d 258; *Brown v. Brown*, 83 Cal.App.

74, 256 P. 595; *Boland v. Boland*, 7 Cal. App.2d 401, 46 P.2d 238, and cited cases. The terms of the agreement need not be adopted in the decree of divorce, and the court retains unto itself the equitable power to determine, irrespective of the contract of the parties, whether or not the terms are fair and just, and the power to increase or diminish an award after a property settlement. *Moog v. Moog*, 203 Cal. 406, 264 P. 490. Unless the court specifically declares the agreement to be illegal and against public policy, the agreement stands and may be treated as an independent contract subject to such construction and judicial disposition as the terms, facts and circumstances warrant. *Roberts v. Roberts*, 83 Cal.App. 345, 256 P. 826; *Gummerson v. Gummerson*, supra; *Armstrong v. Armstrong*, supra. If the decree modifies or supersedes some provision of the agreement, one party may have concurrent remedies, but a defaulting party may be bound by both the decree and the agreement. Payment, however, is a satisfaction of the decree and of the agreement and should be credited upon each obligation. *Newell v. Newell*, 28 Cal.App. 784, 154 P. 32; *Roberts v. Roberts*, supra.

[10] In plaintiff's appeal the contention is made that the trial court erred in finding that she was estopped from collecting the moneys sued for pursuant to the terms of the agreement. When a dispute, having the ring of truthfulness on each side, arises, concerning an amount due under an obligation, as in a case where the parties concur on the amount and an agreement is later made to accept a lesser sum in full satisfaction of the amount due, the obligation is cancelled by a tender and acceptance of the lesser sum in full payment. Upon each of the checks delivered by the defendant to the plaintiff for a less amount than the sum set forth in the agreement there appeared in the handwriting of the defendant and of the plaintiff the words heretofore noted.

The trial court found: "That solely by reason of her acceptance of said checks so endorsed by said defendant the plaintiff is estopped from collecting any of the moneys unpaid since November 15, 1933."

[11,12] The defendant asserted that under the terms of the modified decree of divorce only \$250 a month was payable.

The plaintiff believed that she was entitled to \$300 under the provisions of the agreement. We can reach no other conclusion than that there was a bona fide controversy between the parties relative to their respective legal rights. In *Berger v. Lane*, 190 Cal. 443, 447, 213 P. 45, 47, the court said: "The general rule, which is but an amplification of our Code sections (Civ. Code, §§ 1521, 1523) defining satisfaction and accord, is—'That where the amount due is in dispute, and a check less than that claimed is sent to the creditor with a statement that it is sent in full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that if the check is accepted at all it is accepted in full satisfaction of the disputed claim, and the creditor so understands, its acceptance by the creditor constitutes an accord and satisfaction even though the creditor states at the time that the amount tendered is not accepted in full satisfaction.' *Lapp-Gifford Co. v. Muscoy Water Co.*, 166 Cal. 25, 134 P. 989; *B. & W. Engineering Co. v. Beam*, 23 Cal.App. 164, 137 P. 624." By acceptance of the checks a valid accord and satisfaction was consummated. Plaintiff could not accept the benefit of the checks by cashing them, without consenting to the conditions endorsed thereon. *Johnston v. Burnett*, 17 Cal.App. 497, 501, 120 P. 436. The words written by the plaintiff do not constitute a rejection of the condition, but rather a statement of acceptance, but only in conformity with the court's order. The consideration for the tender and acceptance of each check in a less amount was the determination of dispute, and the extinction of obligation in relation to each monthly payment so made.

[13] At the time of oral argument, some mention was made of the insufficiency of the second affirmative defense, namely accord and satisfaction. The pleading was evidently prepared to cover such defense; likewise upon the theory that a written agreement may be modified by a subsequent oral agreement if the same is fully executed. While the pleading may have been vulnerable to an attack by special demurrer, it is sufficient in the absence of such objection.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

34 Cal.App.2d 62

PEOPLE v. LOUVIERE.

Cr. 2040.

District Court of Appeal, First District,
Division 1, California.

Aug. 8, 1939.

1. Rape ☞52(1)

Evidence warranted conviction of rape on ground that an act or acts of sexual intercourse had been performed upon accused's 10-year-old stepdaughter.

2. Criminal law ☞730(1)

Where there was no prejudicial misconduct in district attorney's statements to the jury, there was no error in the refusal of the court to admonish the jury to disregard such statements.

3. Criminal law ☞795(1)

Where accused was either guilty of rape or not guilty, refusal to give a requested instruction covering lesser offenses was not error.

4. Criminal law ☞1184

Indictment and Information ☞161(5)

Where, after jury had returned verdict of guilty, there was filed by order of court an amended information charging prior conviction, trial court erred in ordering information filed, but such error did not require reversal of judgment which would be modified by deleting all reference to the prior conviction. Pen.Code, § 1260.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Offey Louviere was convicted of rape, and he appeals.

Modified and, as modified, affirmed.

Fred D. Goss, of San Rafael, for appellant.

U. S. Webb, former Atty. Gen., Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

WARD, Justice.

Appellant was convicted by a jury of the crime of rape upon his ten-year-old stepdaughter. The appeal is upon the insufficiency of the evidence to justify the verdict, and upon errors of law, namely, the misconduct of the district attorney in the

making of certain remarks during the presentation of the evidence and the argument, the refusal of the trial court to instruct the jury to disregard the alleged prejudicial statements, the refusal to give an instruction covering lesser offenses, and the order, after the verdict of the jury, directing the filing of an amended information containing a prior conviction.

[1] The transcript of evidence contains a detailed recitation by the stepdaughter of the first act of sexual intercourse with the appellant and references to many subsequent repetitions of the act, plus an admission by appellant that "he was not the first one" who had had sexual intercourse with the child. The defense consisted of a denial of the act, a statement that the minor was a masturbator, and statements that the mother of the girl had originally persuaded the child to communicate the story by mail to a grandmother in Texas, who reported the facts to the authorities. Subsequently the mother was adjudged insane and during the trial was confined in a state hospital. Certain medical testimony was introduced indicating that an act or acts of sexual intercourse had been performed upon the child. The evidence presented by the state was sufficient to justify a conviction. The case of *People v. Hamilton*, 46 Cal. 540, citing *People v. Benson*, 6 Cal. 221, 65 Am.Dec. 506, stressed by appellant, is not evidentially a counterpart of the instant case. In the present case an admission against interest supported the theory of the prosecution.

[2] The district attorney, after eliciting the facts from the child, asked whether she had told the truth, and in substance inquired whether she knew that, regardless of her telling or not telling "all this" about her stepfather she would go back to her grandmother in Texas, where she was particularly anxious to be. At another point the district attorney made the statement that "a great deal of what the defendant has injected into this is hearsay". During the argument the district attorney seems to have veered slightly from the record, but we can find nothing indicating that the statements prejudiced the jury against the defendant, or even that the district attorney was appealing to the passion of any individual juror or to that of the jury collectively. If there was no prejudicial misconduct in the statements, there was no error in the refusal of the court to ad-

monish the jury to disregard such statements.

[3] Appellant complains of the refusal to give a requested instruction covering lesser offenses. In *People v. Chavez*, 103 Cal. 407, 408, 37 P. 389, cited by appellant, the court said: "For while it may be conceded that an assault with intent to commit rape, as well as a simple assault, are included in the offense here charged, still, if there was no evidence tending to reduce the offense from that charged in the information, the court was entirely justified in refusing to give the instruction requested." In that opinion the court also said, and we adopt such language as applicable to this case: "Upon an examination of the record we think the court committed no error in refusing the instruction asked." Appellant was, under the evidence in this case, either guilty of the crime charged or not guilty.

[4] After the jury had returned the verdict, there was filed by order of the court an amended information charging a prior conviction. The trial court erred in ordering this information filed (*People v. Houston*, 24 Cal.App.2d 170, 74 P.2d 517), but this does not require a reversal of the judgment.

The judgment is hereby modified by deleting all reference to such prior conviction (Pen.Code, sec. 1260), and the trial court is directed to change its records to conform to the modified judgment. As modified, the judgment is affirmed.

We concur: PETERS, P. J., KNIGHT, J.



34 Cal.App.2d 104

PEOPLE v. EDLAND.

Cr. 388.

District Court of Appeal, Fourth District,
California.

Aug. 12, 1939.

I. Parent and child ☞17(7)

In prosecution for failure to provide for a minor child, evidence held to make jury question on whether defendant was the child's father.

2. Criminal law ☞1170(1)

In prosecution for failure to support minor child, wherein defendant testified directly that he had married the child's mother with the belief that he was responsible for her pregnancy, alleged error, in excluding evidence of antenuptial agreement that defendant would not be called upon to live with the mother nor support the child if he would marry her, was not prejudicial, since such evidence would not operate to rebut the inference of an admission of paternity.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Rowden Edland was convicted of failure to provide for a minor child, and he appeals.

Affirmed.

A. D. Mitchell, of Ontario, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with failure to provide for a minor child. A jury found him guilty and judgment was pronounced sentencing him to confinement in the county jail. Execution of the sentence was suspended on the condition that he pay \$12.50 per month toward the support of the child. He has appealed from the judgment and from an order denying his motion for a new trial.

The appellant's first contention is that the evidence is not sufficient to support the implied finding that he was the father of the child in question. It appears that the child was born on March 1, 1939, and that the appellant was married to the mother of the child on December 8, 1938. He testified that he first met the mother of the child on August 23, 1938. He relies upon a portion of her evidence to the effect that sexual intercourse between them began within two weeks after they met. From this he argues that conception took place on September 5, 1938, and that only 176 days elapsed between that time and the birth of the child. From the testimony of a physician to the effect that the child looked like a "full-time" child the appellant argues that conception must have taken place the latter part of May, 1938, and that it follows that it was biologically impossible for him to have been the father of the child.

The theory thus advanced overlooks certain other evidence which was before the jury, only a part of which need be mentioned. The mother of the child testified that she first met the appellant on July 29, 1938, and that she first had sexual intercourse with him within a week of that time. If her testimony is believed, approximately seven months elapsed before the child was born. A physician testified that the birth of a baby in approximately seven months after conception is not uncommon. He also testified that a fall suffered by a woman, if severe enough, could cause a premature birth. There is evidence that on the morning before this child was born the mother fell from a porch which was about three feet high, that she immediately began to feel the effects of the fall, and that she was then taken to the hospital. While the physician who attended her when the child was born testified that the child looked like a "full-time" baby, when asked whether it was a "seven months" or a "nine months" baby, he replied that he could not answer the question. Another physician testified that he examined the mother of the child on November 25, 1938, and concluded that she was "between two and three months pregnant," which tends to support the mother's testimony. If, as the appellant contends, this child was conceived the latter part of May, 1938, the mother would have been about six months pregnant at the time of the examination and it seems unreasonable that an experienced doctor would have mistaken a six months pregnancy for one of two or three months.

The appellant talked to the father of the girl on November 1, 1938, and asked his permission to have something done to procure an abortion. The appellant admitted at the trial that his testimony at the preliminary hearing, with respect to when he first met the mother of the child, was not the truth.

[1] The testimony of the appellant and the testimony of the mother of the child, with respect to the date on which they first met, are each corroborated by the testimony of several witnesses. The question of whether the appellant was the father of the child was a question of fact for the jury, and a portion of the evidence amply sustains the finding in that regard.

The only other point raised is that the court erred in excluding evidence offered by the appellant to the effect that, prior

to the marriage, it was agreed between him and the mother of the child and her parents that if he would marry her he would not be called upon to live with her, nor to support the expected child. The appellant relies upon *People v. Swiggy*, 69 Cal.App. 574, 232 P. 174, 178, where a judgment against the defendant was reversed because of the court's refusal to admit evidence substantially the same as that here offered. In denying a hearing in that case the Supreme Court said: "The prosecution had proved the fact of defendant's marriage to the child's mother as an implied admission of paternity by the defendant. He should have been permitted to prove the circumstances of the marriage to rebut, if he could, this inference." An inference of paternity arising from such a marriage would seem to be based on the supposition that ordinarily a man would not marry a woman under such circumstances, unless he believed that he was the father of the expected child. The real inference to be drawn is that he so believed. In the case cited, evidence of the marriage had been introduced for the purpose of raising such an inference. It does not appear that there was any evidence of the defendant's state of mind in that regard other than this inference. It was, therefore, held that evidence of an agreement that the defendant was not to be called upon to support the child should have been received for its effect in rebutting such an inference.

In the instant case, we have a somewhat different situation. The record shows the following while the appellant was being cross-examined with respect to his testimony at the preliminary hearing:

"Q. Now I will ask you if this question was asked you and if you made this answer at that time and place: 'Q. You knew this girl expected to be a mother when you took her over there and married her, didn't you? A. Yes sir.' You made that answer to that question? A. Yes sir. 'Q. And you knew you were responsible for her condition? A. No, I did not know that. Q. You married her with the assumption you were? A. Yes sir.' Q. Did you make that answer? A. Yes."

[2] This is direct testimony by the appellant that at the time of the marriage he believed he was the father of the child. It was not necessary for the jury to infer from the fact of marriage that the appellant believed himself to be the father

of the child for he directly testified to that effect. In the absence of other evidence, the excluded evidence would have supported an inference contrary to the one to be drawn from the fact of marriage. But in the instant case the former inference was overcome by the direct evidence. Not only was the appellant not entitled to have an inference drawn for the purpose of rebutting his direct testimony, but it is unreasonable to believe that the jury could or would have drawn the inference from the excluded evidence that he did not believe himself to be the father of the child, in the face of his positive testimony that at the time of the marriage he did so believe. While it might have been better to have admitted the evidence in question we think it appears, under the circumstances of this case, that it could not have affected the result and that its exclusion was not prejudicial error. After reading the entire evidence we are far from convinced that a miscarriage of justice has resulted.

The judgment and the order denying a new trial are affirmed.

We concur: GRIFFIN, J.; HAINES, Justice pro tem.



34 Cal.App.2d 96

REX, Inc. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 12389.

District Court of Appeal, Second District,
Division 1, California.

Aug. 11, 1939.

1. Courts ⇨89

The authority of a decision of the District Court of Appeal was suspended while such decision was under consideration by Supreme Court upon a petition for hearing therein.

2. States ⇨12(2)

The territorial limits of the state of California at Santa Monica is the Pacific Ocean and extending therein three English miles.

3. Courts ⇨29

State courts have no jurisdiction beyond the state boundaries.

4. Prohibition ⇨3(5)

The writ of prohibition does not lie to restrain an inferior court, having original jurisdiction, from rendering a judgment the validity of which may be disputed, where a remedy by appeal from such judgment appears to be adequate.

Petition for a writ of prohibition by Rex, Inc., a corporation under the laws of the state of Nevada, against the Superior Court of the state of California, in and for Los Angeles County.

Petition denied.

Louis P. Pink, of Los Angeles, for petitioner.

PER CURIAM.

Petitioner relies upon the case of *People v. Stralla et al.*, Cal.App., 88 P.2d 736, to support its contention that the S. S. Rex is situated in the waters of the Pacific Ocean outside the territorial limits of the state of California. The sole question determined by the Stralla decision was, in substance, to the effect that the westerly territorial limit of the state of California, at the location along the shore there considered, was the Pacific Ocean and extending therein three English miles.

[1,2] Although the authority of the decision in the Stralla case is suspended while under consideration by the Supreme Court upon a petition for a hearing therein, we hold again that the territorial limit of the state of California at Santa Monica, for the reasons set forth in the Stralla decision, is the Pacific Ocean and extending therein three English miles.

[3,4] It is well settled that state courts have no jurisdiction beyond the state boundaries; but it is equally well settled that the writ of prohibition does not lie to restrain an inferior court, having original jurisdiction, from rendering a decision, the validity of which may be disputed, and where a remedy by appeal from such judgment appears to be adequate.

The petition for a writ of prohibition is therefore denied.

YORK, P. J., being absent, did not participate herein.

34 Cal.App.2d 730

Frank HASKELL, doing business under the fictitious name of **X-Water Taxi**; **William Hoss**, **Ed. Burrington**, **W. J. Jerris**, **William Clark**, **Ed. Johns**, **K. D. Perrin**, **Leonard Smith**, **A. W. Freeland**, **Joseph J. Hoss**, Petitioners, v. **SUPERIOR COURT of State of California IN AND FOR LOS ANGELES COUNTY**, Respondent.

Civ. 12390.

District Court of Appeal, Second District,
Division 1, California.
Aug. 11, 1939.

James J. McCarthy, of Santa Monica, for petitioner.

PER CURIAM.

We have this day filed a memorandum in the case of **Rex, Inc., v. Superior Court**, Cal.App., 93 P.2d 182. For the reasons therein given, the petition for a writ of prohibition is denied.

YORK, P. J., being absent, did not participate herein.



34 Cal.App.2d 730

Jack LAUDER, Petitioner, v. **SUPERIOR COURT of State of California IN AND FOR LOS ANGELES COUNTY**, Respondent.

Civ. 12393.

District Court of Appeal, Second District,
Division 1, California.
Aug. 11, 1939.

Orloff & Katz, of Los Angeles (**Abraham Gorenfeld**, of Los Angeles, of counsel), for petitioner.

PER CURIAM.

We have this day filed a memorandum in the case of **Rex, Inc., v. Superior Court**, Cal.App., 93 P.2d 182. For the reasons therein given, the petition for a writ of prohibition is denied.

YORK, P. J., being absent, did not participate herein.

34 Cal.App.2d 301

PEOPLE v. SOFFER et al.

Cr. 3205.

District Court of Appeal, Second District,
Division 1, California.
Aug. 23, 1939.

1. Criminal law ⇨1159(2)

Before an appellate court can set aside a judgment on ground of insufficiency of evidence, it must clearly appear that upon no hypothesis is there sufficient substantial evidence to support conclusion of trial court.

2. Criminal law ⇨1159(2)

The presence in record of some competent evidence, however slight, is sufficient to sustain a judgment of conviction.

3. Criminal law ⇨260(11)

In a criminal prosecution, it is within province of trial court to adjudge weight of evidence and credibility of witnesses, including defendant.

4. Criminal law ⇨1159(2)

When evidence which discredits defendant's testimony has been accepted as true and such evidence sufficiently supports a conviction, findings to that effect are conclusive on reviewing court.

5. Robbery ⇨24(1)

Evidence sustained conviction for robbery in the first degree.

Appeal from Superior Court, Los Angeles County; **Thomas L. Ambrose**, Judge.

Max Soffer, **Mason Burrough**, and **Jack Hollis** were charged with robbery. The cause was dismissed as to defendants **Mason Burrough** and **Jack Hollis**. **Max Soffer** was convicted of robbery in the first degree, and he appeals.

Affirmed.

Joseph W. Ryan, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and **Bayard Rhone**, Deputy Atty. Gen., for the People.

YORK, Presiding Justice.

Appellant **Soffer** was charged in an information jointly with the defendants **Burrough** and **Hollis** with the commission of the crime of robbery accomplished by means of a deadly weapon. On motion of the district attorney the cause was dismissed as to the defendants **Burrough** and **Hol-**

lis, appellant was tried before the court without a jury and was found guilty of robbery in the first degree. This appeal is prosecuted from the judgment of conviction which was thereafter entered.

It is here contended that the evidence is insufficient to sustain a conviction in that construed in its entirety it presents no more than a suspicion of appellant's guilt.

It is disclosed by the record that on October 18, 1938, one Adam Simon, Jr., owned and operated a liquor store at 5111 Whittier boulevard in the county of Los Angeles; that he and his father were present in said store at 9 o'clock on the evening of that date when defendants Burrough and Hollis entered and Burrough sought to purchase some liquor; that said Adam Simon, Jr., turned to get the liquor and when he again faced said Burrough, the latter, who was then pointing a .32 caliber revolver at him, said: "Never mind, this is a stick-up; don't say anything and keep quiet." It also appears that defendant Hollis had a gun trained on Mr. Simon, Sr. The defendants then rifled the cash drawer of \$30 and ordered the Simons to walk to the rear of the store, which direction was complied with. When they heard the door close upon the departure of the defendants, the Simons rushed to the front door and watched the defendants enter an automobile which was double parked on the opposite side of the street at a distance of about 30 feet from the place where the Simons observed it. It was the impression of Adam Simon, Jr., that the machine was a Dodge and that it was a two-door sedan, dark in color with two rear lights and an out-of-state license plate with orange colored numerals on a dark blue background; also that a third man was sitting behind the steering wheel. The witness Simon on cross-examination testified that he did not see the features of the third man clearly enough to identify him, and that the reason he thought the car was a Dodge was because the license plates were in the center of the back and it was his impression that was the way the Dodge license plates were attached.

On the day following the robbery, two radio officers were cruising east on Whittier boulevard in the vicinity of Brede street and observed a car passing them which seemed to answer a teletype broadcast of the previous day, whereupon they gave chase and caught the car at 6th and

Soto streets. Appellant was the sole occupant of the car which was a Ford V8 sedan, dark maroon in color and bearing 1938 Georgia license plates with orange numerals on a dark blue background, one of which was attached to the center of the trunk door on the rear.

Two or three weeks after the robbery the witness Adam Simon, Jr., saw appellant at the police station and was taken to a garage nearby to look at appellant's automobile. He testified that it had a Georgia license and that the automobile and license plates were similar in appearance to the one he observed on the night of the robbery.

One of the investigating officers testified that he questioned appellant at the Hollenbeck Police Station about ten days after the robbery as follows: "I asked him if he was on that job on Whittier boulevard close to Atlantic, and he says 'You mean at 5111 Whittier boulevard?' I said 'Yes.' He said, 'Yes, I was on that job and that was my car.'" This conversation was corroborated by another officer who was present at the time, but appellant denied it.

Defendant Burrough testified on behalf of appellant and denied that appellant was with him on the night of the robbery and said that a third party was present whose name he would not mention; also that they used a vehicle which defendant Hollis had stolen on Sixth street between Figueroa and Broadway, and that it was a 1937 Ford V8 of dark color. He further stated that he had known appellant for two years; that he and defendant Hollis had lived with appellant for a week previous to the date of the robbery and that said appellant had a 1938 Ford V8 automobile which was dark maroon in color and bore Georgia license plates.

On rebuttal another deputy sheriff testified that he had a conversation with defendants Burrough and Hollis and that Burrough stated that he and Hollis had gone to a liquor store on Whittier boulevard and robbed the place, and that appellant was the driver of the car upon that occasion.

From the foregoing résumé of the evidence, it appears that the robbery in question was consummated by three persons, two of whom entered the liquor store and robbed the proprietor with the use of revolvers, the third remaining in the car and driving it away immediately when his two

companions rejoined him. While the victim was unable to identify the third member of the gang, it was shown in evidence that appellant owned a car which was similar to the one used in the perpetration of the crime, and that he was arrested on the day following the robbery while driving this car. It was also shown that the three men were living together at the time of the robbery, and that in discussing various robberies which these persons had committed, the appellant admitted to police officers that he was "on the job" at 5111 Whittier boulevard.

One of his codefendants testified on behalf of appellant to the effect that appellant did not assist in this particular robbery, but that a third unnamed person assisted. In rebuttal, however, it was shown that previous to the trial the same defendant had stated to police officers that appellant helped in the robbery of the liquor store at 5111 Whittier boulevard.

When on the witness stand, appellant denied that he made the admission or confession to the officers and also denied that he had anything to do with this particular robbery, but he offered no evidence in support of his defense. He was arrested the day after the crime was committed, but made no attempt to account for his activities of the night before.

[1, 2] Before an appellate court can set aside a judgment on the ground of insufficiency of the evidence, it must clearly appear that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached in the trial court. *People v. Tom Woo*, 181 Cal. 315, 326, 184 P. 389. It is well-settled that the presence in the record of some competent evidence, however slight, is sufficient to sustain a judgment of conviction on the ground of alleged insufficiency of the evidence. *People v. Tedesco*, 1 Cal.2d 211, 219, 34 P.2d 467; *People v. Marble*, 8 Cal. 2d 139, 64 P.2d 135; *People v. Tom Woo*, supra.

[3, 4] As was stated in *People v. Marble*, supra, 8 Cal.2d at page 141, 64 P.2d at page 136: "It was the province of the trial court to adjudge the weight of the evidence and the credibility of the witnesses, including the defendant. When evidence which discredits the defendant's testimony has been accepted as true and such evidence sufficiently supports a conviction, the findings to that effect are conclusive

on this court. *People v. Tedesco*, 1 Cal. 2d 211, 219, 34 P.2d 467."

[5] It is the conclusion of this court that the evidence adduced at the trial is sufficient to sustain the judgment of conviction, and for that reason the judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.



34 Cal.App.2d 77

Ex parte JONES et al.

Cr. 2077.

District Court of Appeal, First District,
Division 1, California.

Aug. 10, 1939.

1. Habeas corpus ☞30(1)

Where juvenile court conformed to all procedural requirements of juvenile court law, and judgment adjudging children wards of court was in legal form, and the necessary jurisdictional steps were taken, the District Court of Appeal could not on habeas corpus go behind the judgment to review evidence or errors or irregularities allegedly occurring before juvenile court. *St.1937*, pp. 1026, 1027, §§ 638-640; p. 1030, § 700(c).

2. Habeas corpus ☞4

An appeal from judgment of juvenile court adjudging children wards of court, and not habeas corpus proceeding for release of children from custody of court, provides adequate remedy for review of evidence or errors or irregularities which are alleged to have occurred before the juvenile court. *St. 1937*, p. 1022, § 580.

3. Infants ☞16

Proceedings of the juvenile court in dealing with cases of dependent children are not of a criminal nature, and juvenile court hearings need not be conducted with all the strict formality of a criminal proceeding.

4. Infants ☞16

The juvenile court is not a trial court in the ordinary sense, and its method of operation is different from that governing the trial of criminal cases, mainly because tech-

nicalities and formalities are largely eliminated.

5. Infants ☞16

The juvenile court's denial of petitioner's request for permission to withdraw his petition that orphans be adjudged wards of court as destitute persons without means of support was within court's discretion, where it affirmatively appeared that court acquired jurisdiction of proceeding and parties in conformity with requirements of welfare and institutions code. St.1937, pp. 1026, 1027, §§ 638, 639.

6. Habeas corpus ☞92(1)

The petitioner's unawareness that woman to whom he was referred when he applied to department of social welfare agency for allowance for care of orphans was an assistant probation officer, and woman's failure to explain nature of petition which petitioner signed and verified, and his lack of knowledge of legal effect thereof until he consulted an attorney three months later, were not proper subjects of inquiry in habeas corpus proceeding for release of orphans who were adjudged wards of court.

7. Habeas corpus ☞85(1)

In habeas corpus proceeding for release of orphans who were adjudged wards of court, it would be assumed that ample evidence was presented to justify the juvenile court's findings and judgment.

Proceeding in the matter of the application of Dorothy Jones and Bernard Jones, minors, for a writ of habeas corpus to secure their release from the custody of the juvenile court authorities of the City and County of San Francisco.

Writ discharged and proceeding dismissed, and children remanded to custody of juvenile court.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for petitioners.

Edward M. Leonard, of San Francisco, for respondent.

KNIGHT, Justice.

This proceeding in habeas corpus was instituted by the petitioner John Savage to secure the release from the custody of the juvenile court authorities of the city and county of San Francisco of two children, namely, Dorothy and Bernard Jones, aged fourteen and ten years re-

spectively. They are full orphans, and were adjudged wards of said court by the judgment thereof pursuant to proceedings initiated by the filing of a verified petition by the said John Savage, their guardian, wherein he alleged that the children were destitute and without means of support. Two hearings were had before the juvenile court; petitioner and his attorney were personally present at both, and at the final hearing petitioner requested permission to withdraw the petition. His request was denied, and at the conclusion of the hearing the court found that the status of the children fell within the provisions of subdivision (c) of section 700 of the Welfare and Institutions Code, St.1937, p. 1030, and accordingly adjudged them to be wards of the court and committed them to the custody of the probation officer. Shortly afterwards they were placed temporarily in private homes, its being the intention of the court ultimately, as expressed at the final hearing, to award permanent custody to relatives in England. Approximately two weeks after the entry of said judgment petitioner instituted the present proceeding in habeas corpus for their release.

It appears from the record produced in support of the return to the writ that the father of the children died in 1935, and the mother in May, 1937. They were residents of Contra Costa county; and following the death of her husband Mrs. Jones received state and county aid. The father was survived by a sister, Mrs. Lewis Oliver, a resident of Los Angeles, and several brothers and sisters in England; and Mrs. Jones was survived by relatives residing in this state, among them being an uncle, Peter Benson. The petitioner, John Savage, and his wife are residents of San Francisco, and were close friends of many years' standing of the parents of the children. At the time Mrs. Jones died, Mrs. Oliver was visiting her relatives in England; and the Contra Costa county authorities consented that petitioner and his wife take the children to live with them at their home in San Francisco. Mrs. Jones left insurance money and a small savings account, amounting in all to \$1,400; and Peter Benson applied for and was granted letters of guardianship of the children. In November, 1937, Mrs. Oliver returned from England and applied to the court in Contra Costa county to be appointed guardian in the place of

Benson, with the view of taking the children to England to live with their father's relatives. The following month, December, 1937, Benson was stricken with a fatal illness and died soon afterwards; thereupon petitioner filed an application to be appointed guardian in opposition to the pending petition of Mrs. Oliver. His petition was granted, and later at his request the guardianship proceeding was transferred to San Francisco. Approximately \$1,174 of the guardianship funds were expended, \$600 or thereabouts having been used to pay the funeral expenses of Mrs. Jones, \$180 to reimburse petitioner and his wife for the money they had expended in behalf of the children during the year and a half or more they had cared for them, and the remainder for attorney's fees and court costs; so that only \$226 remained in the hands of the guardian. Thereupon petitioner made an application to the department of social welfare agency in San Francisco for the \$20 a month allowance for each child provided by law for the care of full orphans. He was referred to Miss Leete (assistant probation officer) who, after making an investigation of the case, caused to be prepared a petition to the juvenile court, which petitioner verified, wherein he asked that the children be made wards of the court. Said verified petition was filed on January 24, 1939; and thereafter, as stated, two court hearings were had, which resulted in the rendition of the judgment petitioner now claims is void.

The writ of habeas corpus was issued upon the strength of certain allegations in the petition to the effect that no evidence whatever was taken at any time "in behalf of any person"; that petitioner sought to introduce testimony at the final hearing of the matter but was not permitted to do so; that consequently the judgment is without evidentiary support. But the record produced at the hearing in support of the return to the writ clearly negatives such allegations and shows a substantial compliance with all necessary jurisdictional requirements. It appears therefrom that when petitioner made application to have the children adjudged wards of the court the probation officer, in conformity with the provisions of sections 638 and 639 of the Welfare and Institutions Code, St.1937, pp. 1026, 1027, caused a full and complete investigation to be made of the case, including an in-

quiry into the antecedents, character, family history and environment of said children, and made a written report thereof to the judge of the juvenile court. This written report was presented to the court in accordance with section 640 of said code at the first hearing of the matter, held on January 25, 1939, and was at all times open to the inspection of petitioner and his attorney. Present at said hearing were Miss Leete, the children, petitioner and his wife and their attorney, and Mrs. Oliver. In presenting the matter to the court Miss Leete supplemented the facts set forth in the report with a statement covering all of the circumstances of the case; whereupon, to the end that appropriate orders might be made concerning the custody and future welfare of the children, the court interrogated all interested parties, especially as to the family history, the chief question at issue being whether it would be to the best interests of the children to place them with their relatives in England as requested by Mrs. Oliver, or to allow them to remain with petitioner and his wife. Petitioner and his attorney, Mrs. Oliver and Miss Leete all took part in laying the facts before the court, and finally, in order to ascertain definitely whether the relatives in England would give the children a home with them, and if so whether they were financially able to care for them, further hearing of the matter was continued for six weeks. On March 29, 1939, the matter came on for the second and final hearing before the court, among those present besides the juvenile court officers and the children being petitioner and his attorney. At that time Miss Leete presented a supplemental written report to the court and amplified it with an oral statement; and the important facts developed at said hearing were these: that petitioner had informed the probation officer it would not be possible for him to take care of the children without state and county aid; that satisfactory assurance had been given to the juvenile court authorities by Richard Jones, one of the uncles living in London, that he would be pleased to give the children a permanent home with his family, and that with the assistance of other members of the Jones family (one of his brothers being a major in the British army) ample provision would be made for their support and education; furthermore, that Mrs. Oliver intended to return to England soon,

and would take the children with her; and that whatever additional sum of money was necessary over the amount remaining in the guardianship funds to cover the transportation expenses would be supplied by the juvenile court out of the "Maintenance of Minor" funds. Thereupon, and after the court had expressed the conviction that the children should be reared by their kinsfolk, petitioner asked permission to withdraw his petition; but the judge replied that inasmuch as the relatives had come forward and offered the children a permanent home, he felt that petitioner's request to withdraw the petition should be denied. The court then granted the motion of the probation officer that the children be declared wards of the court and indicated that whenever definite arrangements were perfected to transport them to their relatives in England, an order would be made to that effect.

[1,2] In thus disposing of the proceeding the juvenile court conformed to all procedural requirements of the juvenile court law; and admittedly the judgment itself is in legal form. The recitals therein show that the necessary jurisdictional steps were taken and it contains all the essential findings of fact and conclusions of law demanded by the statute. Such being the case, it is beyond the power of this court on habeas corpus to go behind the judgment to review either the evidence or any errors or irregularities which are alleged to have occurred before the juvenile court. 14 Cal.Jur. 148. Adequate remedy is made therefor by way of appeal from the judgment. Sec. 580, Welf. & Inst.Code, St.1937, p. 1022.

[3,4] It is true the hearing was not conducted with all the strict formality of a criminal proceeding; but it was not necessary to do so because as frequently pointed out by the courts, proceedings of the juvenile court in dealing with cases of dependent children are not of a criminal nature. In re Edwards, 99 Cal.App. 541, 278 P. 910, 290 P. 591, citing earlier cases. Such court operates under special powers, in conformity with procedure prescribed therefor by the juvenile court law, which authorize the consideration by the juvenile court, in cases of this kind, of the written reports and recommendations of the probation officer, which under said law are open to inspection of the interested parties. Secs. 638, 639 and 640, Welf. & Inst. Code. In other words, from its very

nature and because of necessary qualifications for doing the work for which it is intended, the juvenile court was not designed as a trial court in the ordinary sense; and its method of operation is very different from the one governing in the trial of criminal cases, mainly because technicalities and formalities are largely eliminated. People v. Superior Court, 104 Cal.App. 276, 285 P. 871.

[5] Petitioner cites In re Hill, 78 Cal. App. 23, 247 P. 591, but obviously there is no analogy between that case and the present one. In the first place, unlike the case before us, the proceeding therein was instituted against the parents to deprive them of the custody of their child, based on allegations to the effect that the mother was cruel to the child; secondly, the cause was brought before the appellate court by the parents on an appeal from the judgment, which permitted a review of the evidence on the merits; third, the record showed that the juvenile court made no findings of fact whatever, which are essential under the statute; fourth, the attorney representing the parents was excluded from the hearing by order of the court; and lastly it appears from the decision therein that the judgment depriving the parents of the custody of their child was based on apparently nothing more than secret information imparted privately to the judge by undisclosed persons; and that neither the parents of the child nor their attorney were afforded any opportunity to ascertain the identity of those persons or what specific charges they had made; nor were they allowed to question any of those persons for any purpose. Whereas here the record reveals no ground upon which it may be held that petitioner was deprived of any legal right granted by the juvenile law; and since it affirmatively appears that the court acquired jurisdiction of the proceeding and of the parties in conformity with the requirements of the statute, it was entirely within the discretion of the court to deny petitioner's request for permission to withdraw his petition.

[6,7] The application for the writ also contains certain allegations to the effect that when petitioner first consulted Miss Leete he was unaware of the fact that she was an assistant probation officer; that she did not explain to him the nature or the purpose of the petition he signed and verified, and that he did not learn of

the legal effect thereof until some three months later when he consulted his attorney. It is quite evident, however, that the allegations mentioned involve matters of fact which are not the proper subject of inquiry on habeas corpus. Quite to the contrary, it must be assumed that ample evidence was presented to justify the findings and the judgment. 14 Cal.Jur., p. 148.

The writ is discharged, the proceeding is dismissed, and the children are remanded to the custody of the juvenile court.

We concur: PETERS, P. J.; WARD, J.



KNAPP v. KNAPP et ux. *
Civ. 2324.

District Court of Appeal, Fourth District,
California.

Aug. 24, 1939.

Hearing Granted Oct. 23, 1939.

1. Trusts $\Rightarrow$ 62, 91

The difference between a "resulting trust" and a "constructive trust" is that the former merely arises by operation of law from taking of title to property in name of some one other than he who has paid the consideration for it, whereas the latter is a relation having its origin *ex maleficio*. Civ. Code, §§ 853, 2224.

[Ed. Note.—For other definitions of "Constructive Trust" and "Resulting Trust," see Words & Phrases.]

2. Trusts $\Rightarrow$ 371(2)

In action for an accounting of moneys realized from sale of interest in land allegedly held in trust for plaintiff, where allegations of complaint indicated plaintiff's alleged interest arose out of a resulting or an express trust, in considering a demurrer to complaint, that it could not be ascertained from complaint whether interest was a resulting or an express trust, was immaterial.

3. Trusts $\Rightarrow$ 102(1)

Secret profits made out of sale of interest in land allegedly held in trust would be held, not on any "resulting" or "express

trust," but on a "constructive trust." Civ. Code, §§ 853, 2224.

[Ed. Note.—For other definitions of "Express Trust," see Words & Phrases.]

4. Equity $\Rightarrow$ 71(1)

The mere lapse of time, however extended, does not necessarily establish laches, though extent of the time that has elapsed is element to be considered.

5. Equity $\Rightarrow$ 84

The existence or nonexistence of laches in cases where long periods of time have intervened since origin of cause of action depends on circumstances peculiar to each case.

6. Trusts $\Rightarrow$ 365(5)

Where trustee sold land in parcels, wrote absent beneficiary that land was sold in one lot, and executed note for beneficiary's alleged portion of proceeds and later failed to pay note, trustee's conduct was hostile, as respects whether beneficiary was guilty of laches in failing for a long period of time to bring action for an accounting.

7. Equity $\Rightarrow$ 70

Means of knowledge are equivalent to knowledge, where plaintiff had notice or information of circumstances which would put him on inquiry which, if followed, would lead to knowledge, or facts were presumptively within his knowledge, and he will be deemed to have had knowledge of such facts, in determining whether he has been guilty of laches in failing to bring an action.

8. Trusts $\Rightarrow$ 365(5)

Where trustee sold land in parcels for cash, other lands, and a store business, and executed note for beneficiary's share, beneficiary after lapse of more than 20 years was barred by laches from action for accounting, notwithstanding trustee was brother of beneficiary in whom beneficiary reposed confidence, and beneficiary was absent from state and was misled by trustee. Code Civ.Proc. § 338, subd. 4; § 339, subd. 1; § 343.

9. Trusts $\Rightarrow$ 365(5)

Where defendant in action for accounting had held land in trust for brother and after selling land in parcels wrote brother that land was sold in one lot for much less than the amount received, and executed note for brother's alleged share, and brother for almost 20 years after defendant failed to pay note did nothing relative to note or land, defendant was not estopped to rely on

*For subsequent opinion see 100 P.2d 759.

laches on ground of defendant's alleged misrepresentations for purpose of misleading brother and avoiding an inquiry.

10. Trusts ☞365(5)

Fact that beneficiary of proceeds of interest in land held in trust was absent from state, was no excuse, as respects defense of laches in action for an accounting, for failure to learn that he was entitled to larger amount than trustee had paid him.

11. Appeal and error ☞1144

Where demurrer to complaint was sustained without leave to amend and plaintiff disclaimed desire to further amend, appellate court, in deciding complaint was insufficient, would assume plaintiff had stated case in strongest terms, and would affirm judgment.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by John H. Knapp against Charles W. Knapp and Florence R. Knapp, his wife, for an accounting and exemplary damages and costs, wherein an injunction was asked against dissipation by respondents pendente lite of any moneys or assets involved. From a judgment sustaining a demurrer to the amended complaint, without leave to amend, plaintiff appeals.

Judgment affirmed.

Ray D. Johnson, of El Centro, and Cyril F. Marelia and Wm. T. Eckhoff, both of San Francisco, for appellant.

Childers & Roberts, of El Centro, for respondents.

HAINES, Justice pro tem.

The action involved in the present appeal was commenced by appellant in Imperial county on October 11, 1938. An amended complaint was filed on November 28 of that year. In this pleading, appellant John H. Knapp sets out that he is a brother of respondent Charles W. Knapp and that respondents Charles W. Knapp and Florence R. Knapp are and at all of the times involved have been husband and wife; that on or about February 14, 1911, the two brothers became sole owners in undivided shares of certain described land in San Bernardino county, the record title to which was, however, by deed, recorded in that county on that date, taken in the name of respondents; that thereafter appellant departed from the state of California and

has ever since been absent therefrom; that about January 1, 1917, respondents stated and represented to appellant, who then resided in Illinois, that they had sold said land to one Michaels and had realized a total of \$4,000 therefor and that \$2,000 represented one-half of the whole amount realized therefrom and was the entire amount accruing to appellant from his interest therein held in trust by them. It is alleged that, in confirmation of said representations, respondents forwarded to appellant the promissory note of Charles W. Knapp for \$2,000, dated January 1, 1917, and payable on or before two years from its date with interest at 5 per cent per annum, payable annually, and that the note contained a provision as follows: "And we, and each of us, do hereby agree that the holder of this note may extend the time of payment thereon without notifying us and that we will remain sureties thereon." Since the note has been alleged to have been signed by one person only, the presence of the language quoted must have resulted from the use of a form. The amended complaint alleges that the note, as so forwarded, carried, across its face, an endorsement in the words following: "This note not negotiable. In full settlement for John H. Knapp's interest in the Cucamonga, California, orange grove which was owned by payor and payee hereto."

It is alleged that because of the blood and family relationship existing between appellant on the one hand and respondents on the other, and because of appellant's trust and confidence reposed in respondents and because of the fiduciary nature of the relation existing between them in connection with said land, appellant believed and relied upon said representations and continued to do so until just prior to the commencement of this action; but that in fact the representations so made were each and all untrue from the time they were made and then and ever since known to respondents to be untrue; that said representations were made and said note forwarded to appellant with the deliberate intention on respondents' part of betraying their trust, absconding with moneys derived from appellant's interest in said land and cheating appellant out of his share of the profits and proceeds arising out of said land; that the forwarding of said note was a device to mislead appellant and convince him of the bona fides of the representations and that he was misled and defrauded thereby.

The amended complaint goes on to allege the fact to be that respondents sold the land in divers parcels at divers times and realized therefrom, between the time that appellant departed from California and the time that the note was forwarded, amounts in excess of \$10,000. Various particulars of these transactions are specified. It is alleged that between February 14, 1911, and July 15, 1914, in appellant's absence, and without his knowledge or consent, respondents granted an option for the purchase of part of the land for which they received \$500, but that the option was never exercised and that they retained the money. It is alleged that on July 15, 1914, while appellant was absent, and without his knowledge or consent, respondents sold and conveyed to one Chambers the east half of said land for \$2,000 in cash plus certain lots in Pasadena, worth \$1,500, which consideration respondents received. It is alleged that on or about January 14, 1916, in appellant's absence, and without his knowledge or consent, respondents sold and conveyed to one Michaels the west half of said land for more than \$6,000, part of which consideration they received in the form of real property situated in the city of El Centro in Imperial county, California, and a further part of which consideration they received by taking title to a shoe store and a stock of shoes; that as respects this last sale appellant does not know the value of the consideration received by respondents for the property sold, so far as it is in excess of such \$6,000. It is further stated that at all times respondents have deliberately and wilfully concealed from appellant the conduct complained of and have never informed him of any part thereof nor accounted to him for one-half of the things of value received by them out of said land nor any part thereof; nor for any income or profit realized by them therefrom, nor for any part thereof; that in further pursuance of respondents' scheme to defraud appellant, respondent Charles W. Knapp has refused to honor or pay his said note and that respondents have appropriated to their own use all of the income of said property and the whole of the selling prices thereof, and that appellant has received no part thereof.

It is alleged that appellant, on or about October 1, 1938, for the first time discovered the facts constituting the fraud so perpetrated against him and the untruth of said representations under circumstances as follows: That he, on or about November

12, 1937, brought suit against respondent Charles W. Knapp on said note and immediately before the date for which such action was set for trial, as a part of his preparation for such trial, caused an investigation to be made in California, as a result of which he, on or about October 1, 1938, learned the truth.

In his amended complaint appellant asks judgment that respondents be required to account to him for his half of all income, profit, moneys and things of value received by them from the disposition of said land, and also for his half of everything derived by respondents from the possession and use of the income of said land and of the profits from its disposition, whatever may be the form which such assets have now taken. An injunction is asked against the dissipation by respondents pendente lite of any moneys or assets derived by them from the transactions recited, and appellant asks that upon the completion of the accounting he have judgment against them for such sums as shall be found due him, together with \$20,000 exemplary damages and costs.

To this amended complaint the respondents interposed a demurrer, both general and special, pleading, *inter alia*, in bar of the cause of action attempted to be stated, subdivision 4 of section 338, section 343 and subdivision 1 of section 339 of the Code of Civil Procedure, and generally, that appellant appears on the face of the amended complaint to have been guilty of laches, and that it appears therefrom that there is another action pending between the same parties for the same cause, also, that there is a misjoinder of parties defendant in that respondent Florence R. Knapp never had any interest in the land claimed to have been jointly owned by appellant and her husband. This demurrer having been sustained by the trial court without leave to amend, and judgment entered accordingly, the appeal now before us is taken.

[1-3] Counsel for appellant say that the trust here to be enforced is rather a constructive than a resulting trust. The difference between these, of course, is that the latter merely arises by operation of law from the taking of title to property in the name of some one other than he who has paid the consideration for it (Civ.Code, sec. 853), whereas the former is a relation having its origin *ex maleficio*. Civ.Code, sec. 2224; *Fulton v. Jansen*, 99 Cal. 587, 591, 34 P. 331. While it cannot be ascertained from the amended complaint wheth-

er the beneficial interest alleged to have been vested in appellant in 1911 in the San Bernardino county land arose out of a resulting or an express trust in his favor, it is wholly immaterial which it was, since the allegations of the amended complaint indicate that it was one or the other. But, assuming, for the purpose of considering the demurrer, that the allegations of the amended complaint are true, after the San Bernardino county land was sold, respondents, as appellant's counsel correctly say, held any secret profits made out of the sale, as far as appellant's half interest was concerned, not on any resulting trust nor yet on any express trust for him, but rather on what was strictly a constructive trust in his favor.

[4, 5] The question mainly discussed in the briefs is whether or not appellant appears on the face of the amended complaint to have been guilty of such laches as to bar his present effort to enforce such constructive trust. The mere lapse of time, however extended, does not necessarily establish laches though the extent of the time that has elapsed is one element to be considered in that connection, but the existence or non-existence of laches in cases where long periods of time have intervened since the origin of the cause of action depends on the circumstances peculiar to each particular case. *Cahill v. Superior Court*, 145 Cal. 42, 47, 78 P. 467; *Miller v. Ash*, 156 Cal. 544, 557, 105 P. 600; *McGibbon v. Schmidt*, 172 Cal. 70, 74, 155 P. 460; *Goodfellow v. Barritt*, 130 Cal.App. 548, 560, 561, 20 P.2d 740. We find it laid down in 25 California Jurisprudence, page 262, that, where the action involved is against a trustee, it is necessary, in order to make out the defense of laches, the following facts must appear: "1. Hostile conduct on the part of the trustee; 2. Knowledge of such conduct on the part of the plaintiff; 3. Lapse of time before institution of the suit; and 4. Prejudice resulting from an enforcement of the trust."

[6, 7] In the instant case, as far as the conduct of the respondents is concerned, there is, of course, no doubt that, according to the allegations of the amended complaint, it was hostile to appellant. As respects the second requirement specified in this quotation from California Jurisprudence, it is said in *Lady Washington Consol. Co. v. Wood*, 113 Cal. 482, 487, 45 P. 809, 810, that, "As the means of knowledge are equivalent to knowledge, if it ap-

pears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts. These principles are so fully recognized that mere reference to some of the cases in which they have been enforced will be sufficient." Citing *Martin v. Smith*, 1 Dill. 85, Fed.Cas.No.9,164; *Wood v. Carpenter*, 101 U.S. 135, 25 L.Ed. 807; *Hecht v. Slaney*, 72 Cal. 363, 14 P. 88; *Moore v. Boyd*, 74 Cal. 167, 15 P. 670; *Lataillade v. Orena*, 91 Cal. 565, 27 P. 924, 25 Am.St.Rep. 219. The same doctrine has been laid down in later cases. *Bancroft v. Woodward*, 183 Cal. 99, 108, 190 P. 445; *First National Bank v. Thompson*, 212 Cal. 388, 401, 298 P. 808.

The bearing of the third requirement laid down in California Jurisprudence, as above quoted, to the maintenance of the defense of laches, namely, lapse of time, may, as we just saw, be considered in its relation to the second requirement, that the plaintiff have knowledge, or what amounts in legal effect to knowledge, on the one hand; and with relation to the fourth of the specified requirements, on the other hand, that is, prejudice resulting from such lapse of time to the party against whom the relief is sought. In the case before us the lapse of time admitted was far from inconsiderable. From the time that the beneficial ownership of the land in San Bernardino county is stated in the amended complaint to have vested in the two brothers in 1911 to the time when the action before us was commenced in 1938, more than 27 years elapsed. From the time that, according to the amended complaint, respondents sold the last parcel of the property in 1916 to the time when the action was commenced, more than 22 years elapsed. From the time when appellant received the note for the amount claimed to represent his share of the sales proceeds to the time when this action was commenced, more than 21 years elapsed. The amended complaint contains no suggestion that during the time between 1911 and 1917, when appellant said he was notified that the land had been sold, he ever took any interest in it, either by assisting in the payment of taxes, or asking his share of any rent which may have been collected, or asking any accounting; neither does he claim to have asked any accounting of receipts or to have offered to meet his share of any disbursements for such intervening

period when he was informed in 1917 that the land had been sold. He says that in view of what had been told him he was content to take his brother's note. Though the note had been in his possession since 1917 and the interest fell due on it annually, he does not, in his amended complaint, claim that he ever collected or undertook to collect any of the interest or that any interest on it was ever paid or that he ever asked payment of the principal prior to commencing suit on the note in 1937. In other words, as far as appears, he did nothing whatever about it for 20 years. While we might hesitate to say, as a matter of law, that the lapse of time in its bearing on any one of these phases of the case should, in itself alone, be treated as charging appellant with seasonable notice that respondents' whole conduct toward him required investigation, we think the trial court could not properly have done otherwise than to hold that in the circumstances recited, when all considered together, the lapse of time did have that effect.

As respects the fourth requirement laid down in the passage from California Jurisprudence, above quoted, namely, that before it can amount to laches the delay must be such as to prejudice those against whom relief is sought, should such relief be granted, we think the trial court justified if we assume it to have believed that the amended complaint does show that the delay would result in such prejudice to respondents if relief to appellant were now given. While no effort has been made in the amended complaint to fully state the disposition made by respondents of all the consideration they are said to have received from the land sold, it nevertheless there appears that a considerable part of it was not represented by money but by real property in Pasadena and in El Centro. It does not appear whether such real estate still remains in respondents' hands or not, nor whether or not, since their acquisition of it, it has yielded them any rent. Manifestly, if it did not, and respondents still have it, they must have been at no small charge in the intervening years for taxes and other carrying expenses. Part of the consideration received by them was a shoe store and its stock. The conduct of a mercantile business, if they have since conducted it, or its disposition if they have disposed of it, has presumably worked a material change in their positions and arrangements. The situation is one in which it would be practically impossible now to replace the re-

spondents in anything like the position they would have been in had they been called to account for their conduct 20 years or more ago instead of now.

[8] In fine, it appears to us that there are in considerable degree here present, all of the four elements laid down in the text cited, as necessary to substantiate the defense of laches.

[9] It is indeed claimed that respondents are, by their misrepresentations made for the purpose of misleading appellant and avoiding any inquiry on his part, estopped to rely on his laches. Citing such cases as *Mabry v. Randolph*, 7 Cal.App. 421, 94 P. 403, and *Long v. Los Altos Country Club*, 122 Cal.App. 116, 121, 9 P.2d 600. That doctrine might be persuasive under the facts alleged in the amended complaint had appellant's delay not been greater than could be deemed attributable to the deception practiced. When, however, subsequent events, such as the repudiation here of the note or even the unexplained failure to meet it, have transpired, tending to throw suspicion on the sincerity of the parties guilty of the original deceit and to put the one deceived on notice of their want of good faith; and when, as here, as far as appears, he has allowed these subsequent wrongs to go on for two decades before inquiring into their cause or seeking any redress for them, he is in no position to interpose, as against the plea of laches, the doctrine of estoppel that he might, but for such later occurrences, have been entitled to invoke. It is true, as appellant pointed out, that the repudiation of the note was in some degree a different transaction from the original fraud, yet the amended complaint itself charges that it, too, was "pursuant to said scheme to defraud plaintiff", and it is hard to see how it could have failed to put appellant on notice generally that there was, in all probability, a want of good faith on respondents' part from the beginning.

[10] As was said by the Supreme Court in *Phelps v. Grady*, 168 Cal. 73, 80, 141 P. 926, 928, with respect to the claim of certain parties, there involved, to special consideration on account of their absence: "There is an absolute failure to show not only due diligence but any diligence in seeking to discover during all this intervening time whether or not they had parted with their property at a fair valuation. The fact that they lived at a distance is, of course, no excuse. They were under no other dis-

ability. Says the Supreme Court of the United States: 'Parties cannot thus, by seclusion from the means of information, claim exemption from the laws that control human affairs and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject.' Case of Broderick's Will, 88 U.S. (21 Wall.) 503, 22 L.Ed. 599."

[11] While we cannot know upon what reasoning the trial court sustained the demurrer to the amended complaint, we think that, taken as a whole, that pleading presents what has become a stale claim and that, on the face of appellant's statement, his right to relief has become barred by laches. This conclusion makes it unnecessary to discuss the other questions raised by the demurrer. Counsel for appellant have disclaimed any desire further to amend and it must, therefore, be assumed that they have stated their case in the strongest terms that the facts can justify.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIF-FIN, J.



34 Cal.App.2d 108

PEOPLE v. CACIOPPO.

Cr. 387.

District Court of Appeal, Fourth District,
California.

Aug. 14, 1939.

1. Criminal law $\S$ 419(10), 448(7)

In prosecution for bookmaking, officer's testimony that he heard several voices in the rear of a room, behind partition from which defendant subsequently came, heard one man say he wanted to bet on a race, and heard silver money on the table, was not inadmissible as hearsay or as stating conclusion of the witness.

2. Criminal law $\S$ 407(2)

Declarations or statements made in a party's presence are admissible, not as evi-

dence in themselves, but to understand what reply the party to be affected by the statement should make, and to raise the presumption of acquiescence if such party is silent when he ought to have spoken.

3. Criminal law $\S$ 407(2)

In prosecution for bookmaking, officer's testimony that he heard several voices in the rear of a room, behind partition from which defendant subsequently came, heard one man say he wanted to bet on a race, and heard silver money on the table, was admissible to show defendant's acquiescence, though the words spoken were not to be taken as establishing the fact in issue, that defendant subsequently accepted a bet from the officer.

4. Criminal law $\S$ 1169(1)

Alleged error in prosecution for bookmaking, in admitting officer's testimony that he heard voices from behind partition referring to bets, and heard silver money on table, was not prejudicial.

5. Criminal law $\S$ 1169(1)

A judgment should not be reversed because of error in the admission of evidence not resulting in a miscarriage of justice.

6. Criminal law $\S$ 398(1)

Where evidence offered, though not of the highest degree nor of the most satisfactory kind, is otherwise competent and is the best that can be produced under the circumstances, and absence of better evidence is not attributable to the fault of the party offering the evidence, the best-evidence rule is complied with and the evidence is admissible.

7. Criminal law $\S$ 398(2)

Secondary evidence offered where primary evidence is inaccessible must be otherwise competent and admissible.

8. Criminal law $\S$ 400(4)

In prosecution for bookmaking, wherein defendant denied entirely officer's testimony that he had placed bet with defendant, and evidence showed that original paper recording the bet could not have been produced, officer's testimony concerning what appeared on the paper was admissible under the best-evidence rule.

9. Gaming $\S$ 98(3)

Evidence held to authorize conviction of bookmaking. Pen.Code, $\S$ 337a, subd. 3.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

John Cacioppo was convicted of book-making, and he appeals.

Affirmed.

Harmon C. Brown, of Riverside, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

GRIFFIN, Justice.

Appellant was charged with the violation of section 337a, subdivision 3 of the Penal Code (bookmaking—taking and receiving a bet on a horse race). After a plea of not guilty was regularly entered the appellant was tried before a jury which returned a verdict of guilty. This appeal is prosecuted from the judgment of conviction and concerns the propriety of the rulings by the court on the evidence during the course of the trial.

On the afternoon of April 8, 1938, a police officer of the Riverside police department made an investigation with reference to a place at 3528 Ninth street, Riverside, California. The room in question was about 50 feet long and about 15 feet wide, divided in the center with about a seven-foot partition. In the portion closest to the street was a marble machine, several magazine racks and two showcases containing tobacco and candy. The officer arrived there at about 3 o'clock p. m. He first played two games on the marble machine in the front room. Shortly after he finished the second game on the marble machine, the appellant came into the front part from the back of the establishment. The appellant came up behind one of the showcases in the room and the officer asked him which horse won the first race at Tanforan. The appellant told him the name of the horse and immediately thereafter asked the officer if he wanted to make a bet. The officer told him he did. The appellant then told him to come into the rear room. The appellant and the officer then went into the rear room where the officer placed a \$2 bet on a horse to win in the fourth race. He gave the appellant two \$1 bills. The appellant put this money in his trouser pocket. Later the officer made a \$1 bet on a horse in the fifth race to win. At the time the bet was placed, the appellant wrote down the number of the horse and other markings on a sheet of paper.

It appears that on these sheets there was a space for the number of the horse, the amount bet, and whether the bet was for win, place or show, and the initials or some identification of the bettor. In this case the initials "C.E." were put on the sheet of paper to identify the officer as placing the bet. Objection was made by the appellant to the introduction of this evidence as to the contents of the paper as he observed it. The sheets on which appellant made the above-mentioned notations were on a counter in the back room.

The officer also testified that after the race appellant called him by phone and informed him that he did not win either bet.

The officer returned on both Monday and Tuesday and attempted to place another bet but on both occasions the bet was refused. On the last occasion the officer served a warrant of arrest on the appellant.

This constitutes a resume of the evidence on behalf of the prosecution. The only evidence offered on behalf of the appellant was his own testimony in which he admitted practically everything testified to by the officer as to his presence on the premises except the placing and accepting of the bets. At the time appellant was arrested the officer searched the premises for the sheets but failed to find them and searched the appellant but failed to find any of the identified \$1 bills.

The appellant first objects to the introduction into evidence of a conversation that the officer testified he overheard while in the front room playing at the marble machine. His evidence is as follows: "A. Before the defendant came from the rear of the establishment, from behind the partition, I heard several voices in the rear of the room; I would say probably three or four; I am not sure. One man, I heard him say he wanted to bet a dollar on a race; and I also heard this silver money on the table in the rear of the building. That is all."

Our attention has been called to the beginning of the interrogation when the objection was first made: "Q. (Mr. Ganahl): What kind of a noise did you hear coming from behind the partition? Mr. Brown: I object to the testimony as to what he heard, unless there is a showing that the defendant was present at that time. * * * A. The only noises I heard was conversation; and the noise of money being placed on the table, silver money. Q. (Mr. Ganahl): This conversation you re-

fer to, in general, what did the conversation refer to? Mr. Brown: That is objected to as calling for the conclusion of the witness, and on the further ground it is hearsay."

[1] It will be noticed that the appellant first objected to the testimony "Unless there is a showing that the defendant was present at that time." His final objection was that the testimony called for the conclusion of the witness and that it was hearsay. It was definitely shown after the first objection that the defendant was present in the other room whence the sounds came. It is obvious that the answer did not state a conclusion of the witness. The witness did not place an interpretation upon the words or sounds. Very clearly it was not hearsay.

[2-5] It is the rule that declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to understand what reply the party to be affected by the statement should make to the same. If he is silent when he ought to have spoken, the presumption of acquiescence arises. In this sense admissions may be implied from conduct. The evidence in question was admissible for this purpose, although the words spoken were not to be taken as establishing the fact in issue (i. e., that appellant accepted a bet or wager on a horse race from the police officer). Moreover, it cannot be said that the admission of such evidence, under the circumstances related, was so prejudicial as to warrant a reversal. *People v. Estrado*, 49 Cal. 171; *Adkins v. Brett*, 184 Cal. 252, 193 P. 251; *Bidegaray v. Ormaca*, 48 Cal.App. 665, 192 P. 176; 2 Cal.Jur., sec. 607, p. 1020. A judgment should not be reversed because of error in the admission of evidence not resulting in a miscarriage of justice.

[6-9] The appellant next objects to the introduction of evidence, as not the best evidence, wherein the officer testified that the number of a horse was written on a piece of paper by appellant, the amount of the bet, whether the bet was to win, place or show, and the initials or some other identification of the bettor. The paper was not offered in evidence nor was it found on

the premises of the appellant by the officer. He testified only as to what appeared on the paper at the time he saw it. It appears from the evidence that the original sheet could not have been produced under any circumstances whatsoever, even if demand had been made therefor. It will be recalled that at the time of the arrest of the appellant a few days after the transaction, the establishment was searched but no sheet was found similar to the one concerned in the testimony. The appellant had entered a plea of not guilty. At the time the testimony in question was received, the appellant of course had not yet testified, although he had entered the plea of not guilty. When he testified, however, he denied the transaction in every detail. It cannot be assumed under such circumstances that if demand had been made upon the appellant to produce the writing, that the appellant would have thereupon produced it. The appellant has not questioned the contents of the writing. He denies that such a writing was ever made or ever existed. Obviously, the appellant would not, under such circumstances, be apt to produce the writing. Where the evidence offered, while not of the highest degree or of the most satisfactory kind, is otherwise competent, and is the best which under the circumstances of the case can be produced, and the absence of evidence of a higher degree or of a more conclusive character is not attributable to the fault of the party seeking to prove the fact in controversy, then the requirements of the best-evidence rule are complied with and the evidence is admissible. This is the underlying principle upon which secondary evidence is admitted, where the primary evidence has been lost or destroyed, or is otherwise inaccessible to the party desiring to use it. But the secondary evidence offered must of course be otherwise competent and admissible. (22 Cor.Jur., sec. 1222, p. 976.) The admitted competent evidence is ample, sufficient and adequately convincing to sustain the verdict of the jury.

Judgment affirmed.

We concur: BARNARD, P. J.; HAINES, Justice pro tem.

34 Cal.App.2d 143

TAECKER v. PARKER.
Civ. 2322.District Court of Appeal, Fourth District,
California.

Aug. 18, 1939.

Hearing Denied Oct. 16, 1939.

1. Appeal and error ☞957(1)**Judgment ☞139**

Whether relief from a default shall be granted or refused is addressed to discretion of trial court and reviewing court may not interfere with trial court's exercise of such discretion unless it has been abused. Code Civ.Proc. § 473.

2. Judgment ☞143(18)

Where plaintiff's showing in support of motion to set aside default judgment was largely based on claim of an ex parte telephone conversation between counsel and the trial judge, trial judge could have appropriately filed affidavit setting out his own recollection of what telephone conversation was in order to make his own account of it a matter of record as preliminary to passing on application to set aside the default. Code Civ.Proc. § 473.

3. Continuance ☞52

A telephone conversation between counsel for plaintiff and trial judge in which trial judge was alleged to have given assurance that an order of continuance would be made was at most a mere extrajudicial conversation which had no legal significance in the sense of amounting to actual continuance where not effectuated by any actual court order.

4. Continuance ☞51(6)

Where, after numerous continuances cause had been set for trial and defendant's counsel informed plaintiff's counsel that he would consent to no more continuances but plaintiff's counsel relied on verbal agreement with trial judge for further continuance and failed to appear on day cause was set for trial, plaintiff's counsel, on receipt of telegram on day that cause was set for trial that it had gone over to following day, should have presented themselves in court on following day and insisted on right, if any, to further continuance.

5. Evidence ☞10(6)

The Court of Appeal will take judicial notice that it is not physically impossible or difficult to go from Los Angeles to El Centro

between the middle of the afternoon of one day and 10 o'clock in the morning of the next.

6. Judgment ☞143(14)

Refusal to set aside default judgment which was entered on failure of counsel for plaintiff to appear in reliance on verbal understanding with trial judge for further continuance was not abuse of discretion where cause had been at issue for over two years, numerous continuances had been granted, defendant's counsel had given notice that he would consent to no further continuances, plaintiff's counsel failed to appear after receiving telegram on day cause was set for trial that it had gone over to following day when counsel would insist on trial or dismissal, and motion to set aside default was not filed until nearly six months from entry of default. Code Civ.Proc. § 473.

Appeal from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Action by A. T. Taecker against John L. Parker for defendant's negligence in treatment of an injury to one of the plaintiff's eyes. Judgment for defendant, and from an order denying a motion to set aside the judgment, the plaintiff appeals.

Affirmed.

A. T. Taecker, in pro. per.

Harry W. Horton and George R. Kirk, both of El Centro, for respondent.

HAINES, Justice pro tem.

The record shows that, on April 15, 1935, appellant Taecker, acting through an attorney, filed action in the superior court of Imperial county seeking damages from respondent, a physician, for alleged negligence in the treatment of an injury to one of the appellant's eyes. Respondent's answer was filed on November 16, 1935, and the case was thereafter at issue. Various attempts were made to bring it on for trial but numerous continuances and re-settings were from time to time made, always, so far as appears, at the request of appellant's counsel, at times because of appellant's own physical inability to go to the Imperial valley for trial of the case and at other times because of illness or other engagements on the part of his attorney. The cause was at length reset to be tried on April 19, 1938, of which due notice was given, and according to the affidavit of respondent's attorney he, on

March 5, 1938, wrote appellant's counsel not to count on any further continuance but that he would insist that the matter be tried and disposed of on April 19. Appellant's original attorney had meanwhile, with appellant's consent, associated an additional attorney with him who was expected in appellant's behalf to conduct the actual trial. Application had been made for a jury but no deposit of fees originally made. According to the affidavit of appellant's attorneys, whose offices are in Los Angeles, they received a wire dated April 15, 1938, from the county clerk at El Centro asking whether to summon a special jury and calling their attention to the circumstance that no jury fees had been deposited. The following day these fees were sent by wire to the clerk who, however, on the same day wired that the jury had been excused and the trial would be by the court. This wire came into the hands of appellant's counsel on April 17. According to the affidavit of appellant's original attorney, he was obliged on April 18, 1938, to be in San Bernardino for the trial of a case there and while there, received a wire from his associate stating that appellant's case had been continued to May 4. The affidavit of such associate counsel states the fact to be "as he recalls" that he, on April 18, after vainly trying to reach respondent's counsel by telephone and talking by telephone to the clerk and the other Imperial county judge, finally succeeded in getting the trial judge by telephone and was informed by him that the jury had on April 15, 1938, been dismissed, as no jury fees had been deposited. He says he told the trial judge that these had meanwhile been sent and that he did not want the case to be tried by the court. Thereupon, as he states, he was informed by the trial judge that the next time that there would be a jury in his court would be on or about May 4, 1938. The affidavit then proceeds: "Your affiant states that he then requested the court to continue said case to May 4, 1938, and said Court stated that he would continue said case to said day and that he would make an Order immediately on the Clerk of said Court to apply the fee deposited with the said Clerk as jury fees in said action. Thereupon your affiant thanked the Court and informed the Court that he would be ready for trial on the said dated."

On April 19, respondent's counsel, as is set out in his counter-affidavit, appeared

in court ready for trial but, finding appellant unrepresented, at about 11 a. m. on that day wired appellant's counsel that he had had the case continued until the following day, April 20, 1938, at 10 a. m., and would insist on dismissal of the case if not then tried. This wire was received in due course on the same day, April 19, 1938, by the associate counsel for appellant who did nothing about it except to communicate its contents to appellant's original counsel at 2 or 3 o'clock in the afternoon, and he also did nothing about it. The claim is made that the time was too short to enable appellant and his attorneys to be present in court ready for trial on April 20.

Appellant's own affidavit intimates that his case was more or less neglected by his attorneys, particularly in that in February of 1938 he had asked that the deposition of an eye specialist in Los Angeles and of two other necessary witnesses be taken but that his counsel took no steps to take any of such depositions. He says, however, that he had been notified that his case was to be tried on April 19, and was in the office of his original counsel with his associate counsel at the time that the latter was on April 18, telephoning to the trial judge at El Centro and that such associate counsel, after such telephone conversation, told him that the court had continued his case until May 4. After learning on April 21 of the court's action in dismissing his case on the preceding day, appellant says that he talked with his original counsel about having it reinstated and was informed by the latter that application might be made for that purpose at any time within six months, but that having become suspicious of his counsel, he filed with the State Bar a complaint against the one whom he had originally employed and obtained a substitution of himself in the case in *propria persona*.

[1-5] The question whether relief from a default shall under section 473 of the Code of Civil Procedure be granted or refused is addressed to the discretion of the trial court and we may not interfere with its exercise of such discretion unless it has been abused. *Seymour v. Wood*, 63 Cal. 81; *Nicoll v. Weldon*, 130 Cal. 666, 63 P. 63; *Ingrim v. Epperson*, 137 Cal. 370, 372, 70 P. 165; *Moore v. Thompson*, 138 Cal. 23, 26, 70 P. 930; *Brennan v. Weissbaum*, 77 Cal.App. 120, 124, 245 P. 1104; *Startzman v. Los Banos Cotton*

Gins, 82 Cal.App. 624, 631, 256 P. 220. In the instant case, inasmuch as the appellant's showing was so largely based on the claim of an ex parte telephone conversation between one of his counsel and the trial judge and on an assurance claimed to have been given by such judge that an order of continuance would be made, we think it would have been most appropriate for the judge himself, as a preliminary to passing on the application to set aside the default, to have filed an affidavit setting out his own recollection of what the telephone conversation was in order to make his own account of it a matter of record. In strictness, however, such conversation had no legal significance in the sense of amounting to any actual continuance of the case. It was at most a mere extrajudicial conversation, never effectuated by any actual court order. That being so, we think that upon the receipt of the wire of April 19, from respondent's counsel, who had, two weeks previously, given warning that he would consent to no further continuances, to the effect that the case had gone over to the following day, April 20, and that he would then insist that it be tried or dismissed, reasonable diligence required that appellant's counsel, if they could do no more, should on that day have presented themselves in person before the court and there insisted on any rights that they might have claimed to have to more time by reason of said alleged conversation with the trial judge. We will take judicial notice that it is not physically impossible or even difficult to go from Los Angeles to El Centro between the middle of the afternoon of one day and 10 o'clock in the morning of the next.

[6] It is true that there are circumstances in which it is just to relieve a party to an action from some disadvantage that he may have suffered from inattention or negligence on the part of his counsel. We do not think, however, that the instant situation presents a very strong case for such relief. Though but an ordinary tort action, this case had been at issue for over two years and five months. Accommodation after accommodation had been extended to appellant and his counsel in the matter of deferring the time for trial. Appellant's loss of the right to a jury was not attributable to respondent. Appellant admits having noticed some months before the dilatory conducts of his counsel in the matter of the deposi-

tions. Respondent had the right to insist on seasonable disposition of his case. In spite of the fact that the judgment was rendered on April 20, 1938, the motion to set it aside was not made until October 7, of that year, very shortly before the time allowed by law for making it would have expired.

We think on the whole, that the record shows no abuse of the trial court's discretion. The order appealed from is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



34 Cal.App.2d 120

In re DE GRAAF'S ESTATE.

VAN DELDEN et al. v. CLARK et al.

Civ. 2271.

District Court of Appeal, Fourth District,
California.

Aug. 15, 1939.

Hearing Denied Oct. 13, 1939.

1. Wills ⇨50

A testator is of "sound and disposing mind and memory" if, at the time of making will, he has sufficient mental capacity to be able to understand the nature of the act, to understand and recollect the nature and situation of his property and his relations to the persons who have claims on his bounty and whose interests are affected by the provisions of the instrument.

[Ed. Note.—For other definitions of "Sound and Disposing Mind," see Words & Phrases.]

2. Wills ⇨21, 53(2)

In proceeding for probate of will which was contested on ground of testatrix' lack of mental capacity, the mental condition of the testatrix at the time the will was executed was the question to be determined, and evidence as to her mental condition before or after that date was important only as it might throw light upon her mental condition at that time.

3. Wills ⇨31

Every mental departure from the normal will not destroy a testamentary disposi-

tion otherwise valid, but the will of a person who by reason of insanity is incapable of making a valid testamentary disposition of his estate will not be upheld.

4. Wills ⚭386

In proceeding to probate will executed by testatrix who had been judicially declared incompetent and had been adjudged insane and committed to an insane asylum, question whether testatrix had testamentary capacity at time will was executed was fact question for trial court to which proceeding was tried without a jury.

5. Wills ⚭55(1)

Evidence justified order admitting to probate will of testatrix who had been judicially declared incompetent and had been adjudged insane and committed to an insane asylum on ground that testatrix had testamentary capacity at time will was executed.

6. Wills ⚭227

The proponents of a will which had been executed by testatrix after she had been judicially declared incompetent and had been adjudged insane and committed to an insane hospital were not estopped to assert that testatrix was in fact competent to make a will because beneficiary under whom proponents claimed had secured his own appointment as guardian of her estate on ground that she was unable to properly manage and care for her property before execution of will and had not been discharged as guardian when the will was executed.

7. Wills ⚭163(4)

A presumption of undue influence arises when it appears that one who unduly profits by a will sustains a confidential relationship with the testator and actively participates in procuring the execution of the will.

8. Wills ⚭163(4)

When presumption of undue influence arises from showing that one who unduly profits by will sustained confidential relationship with testator and actively participated in procuring execution of will, the burden of proof rests on the proponents of the will to overcome the presumption.

9. Wills ⚭386

In proceeding to probate contested will by proponents claiming under beneficiary who was brother of testatrix and guardian of her estate, which was tried to court without jury, question whether there was undue

influence in making of will was fact question for court.

10. Wills ⚭166(1)

Evidence justified order admitting to probate contested will propounded by persons claiming under beneficiary who was brother of testatrix and guardian of her estate on ground that there was no undue influence in making of will.

11. Evidence ⚭474(4)

In proceeding to probate contested will, sustaining of objection to question asked witness whether witness had formed any opinion whether on date of execution of will testatrix was competent to make a will was error, notwithstanding that no attempt had been made to ascertain whether witness knew the necessary requirements of testamentary capacity.

12. Appeal and error ⚭1058(2)

In proceeding to probate contested will, error in sustaining objection to question whether witness had formed any opinion whether on date of execution of will testatrix was competent to make a will was not sufficient to justify reversal where witness had previously testified to facts which she regarded as sufficient to show that testatrix was insane as part of long line of testimony from various witnesses, many of whom were permitted to answer questions similar to that to which objection was sustained.

13. Wills ⚭337

In proceeding to probate will which was contested on ground of lack of testamentary capacity and undue influence, denial of contestants' motion for new trial on ground of newly discovered evidence of two physicians was not error where evidence could with reasonable diligence have been discovered prior to trial and practically all of such evidence was cumulative and one of physicians had not seen testatrix until 1½ years after will was executed and the other had not seen her since nearly three years prior to execution of will.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Proceeding in the matter of the estate of Martha De Graaf, deceased, wherein Katherine Clark and others filed a petition for probate of an instrument as the will of Martha De Graaf, deceased, to which Elizabeth Van Delden and others filed a

contest. From an order admitting the will to probate, the contestants appeal.

Affirmed.

Sharpless Walker, of Santa Ana, for appellants.

Rutan, Mize & Kroese, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order admitting to probate the will of Martha De Graaf. By this will, dated May 4, 1935, she devised her entire estate, consisting of a half interest in an eight-acre orange grove, to her brother Lambert De Graaf, who died before the death of the testatrix. His widow, now Katherine Clark, filed a petition for the probate of the will, which was contested by the remaining sisters and brother of the deceased.

At the time the will was drawn the testatrix lived on the orange grove with her father and her brother Lambert. Her mother was dead and her two married sisters and her other brother lived elsewhere. Her father was very sick at the time and he died on May 15, 1935. The testatrix had been committed to the Norwalk State Hospital on November 16, 1929, and had been "discharged as improved" on January 12, 1932. Her brother Lambert was appointed guardian of her estate on October 23, 1931, and this guardianship proceeding had not been terminated at the time the will was executed. The testatrix was admitted to the State Hospital at Patton on November 7, 1936, her trouble was diagnosed as dementia praecox, and she continued insane until her death on February 20, 1937.

The most important question raised is whether or not the finding that the testatrix had testamentary capacity at the time the will was executed is sustained by the evidence. The appellants largely rely upon a presumption of unsound mind, arising from the facts that the testatrix had been judicially declared incompetent and had been adjudged insane and committed to an insane asylum. The respondents contend that any such presumption, as well as any direct evidence of incapacity, were sufficiently met by evidence showing her capacity to make a will at the time in question.

[1] The general rule is thus set forth in *Estate of Sexton*, 199 Cal. 759, 251 P. 778, 780:

"The testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument."

[2,3] It is well settled that in such a case as this the mental condition of the testatrix at the time the will was executed is the question to be determined, and evidence as to her mental condition before or after that date is important only as it throws light upon her mental condition at that time. *Estate of Finkler*, 3 Cal. 2d 584, 46 P.2d 149. In *Estate of Perkins*, 195 Cal. 699, 235 P. 45, 47, the court said:

"Every mental departure from the normal will not destroy a testamentary disposition, otherwise valid, of the testatrix's estate. It is not the rule of law that no person who is insane may make a valid will. The real rule is that the will of a person, who by reason of insanity is incapable of making valid testamentary disposition of his estate, shall not be upheld. *Estate of Chevallier*, 159 Cal. 161, 113 P. 130; *Estate of Wasserman*, 170 Cal. 101, 148 P. 931."

In addition to the presumptions referred to, the appellants rely upon certain evidence. Several witnesses, including two neighbors of the testatrix, her two sisters, and the husband of one of them, testified to various peculiar actions on her part over a period of years before and after the execution of the will. Among these things were that she did not eat regularly or properly; that she did not dress warmly enough; that on one occasion she did not know how much had been received for oranges from the grove; that she would sometimes pass by the homes of friends without turning her head in that direction; that at times she would not let people in when they called; that sometimes she would leave the house and go into the orchard when callers came; that once when a friend told her that her father was sick and that she had better go and help him she replied that she was sick too; that one witness once found her lying on a mattress on the floor; that she took water with her to her bedroom and sometimes spilled it

on the bed; that she once burned a sweater which had been given her; that she would go into the grove and eat oranges and come back with her hands and face dirty and would not wash; that she was very restless at night and on one occasion she said there was a devil in the chicken house; that on one occasion after the death of her father, when she found that she was disturbing her sister's family at night, she took her bed out to the brooder house and refused to come in when it rained; and that in going to the funeral of her brother Lambert, in 1936, she took water with her and threw it out of the automobile window. Several of these witnesses expressed the opinion that on May 4, 1935, the testatrix was not competent to make a will. It is noticeable that most of this evidence refers to incidents which occurred a considerable time before or after the execution of the will, that none of it relates to that day, and that very little of it is closely associated with that day.

The superintendent of the Orange County Hospital testified that he saw the testatrix at the hospital in 1930 or 1931; that she was then insane; that he saw her at the hospital in 1936; that she had been at the hospital in the meantime at intervals of a year; that in 1936 her physical and mental condition had deteriorated; that every time she was in the hospital she was mentally unbalanced; that she had hallucinations and delusions; that her mental malady was dementia praecox; and that this was of a permanent and progressive character. In answer to a hypothetical question he expressed the opinion that on May 4, 1935, she did not have sufficient mental capacity to make a will. Two other doctors, in reply to hypothetical questions, expressed the opinion that the testatrix was insane on May 4, 1935, that she was then incompetent to make a will, and that she then did not have sufficient mental capacity to understand the nature of the act she was doing, to understand and recollect the nature and situation of her property, or to remember and understand her relations to the persons who had claims upon her bounty.

Turning to the evidence on behalf of the respondents, a witness, whose home was about two hundred feet from the house in which the testatrix resided, testified that he lived there from 1927 to 1937; that he saw and talked with the testatrix almost daily; that he talked to her frequent-

ly just prior to her father's death; that she always knew what she was talking about; that at any time he talked with her she would know what signing a will meant; and that on and about May 4, 1935, she had sufficient mental capacity to know who her relatives were and to know what property she had. Another witness, who lived across the street from the testatrix' home, testified that she was a registered nurse; that she had lived there about ten years; that she would see the testatrix at frequent intervals when the testatrix was at home; that she was in the testatrix' home occasionally during her father's illness and up to the time of his death; that during her father's sickness the testatrix talked to her about Lambert, saying she felt that he was her only friend; that she did not mention her property except to say that she and Lambert had an interest in the home place; that at her request the testatrix, in April, 1935, signed certain papers for the witness in connection with a loan the witness was getting from the Federal Land Bank; that in the spring of 1936 the testatrix was greatly grieved over the death of her brother Lambert; that she observed Martha's mental condition on the occasion she saw her during her father's illness and preceding his death; that the testatrix was nervous and did not express herself well as she had not a good command of English, but that at all times she knew what she was talking about; that in May, 1935, she would know the nature of a will, she knew that she had an interest in the home there, and knew who her relatives were; that she spoke of Lambert more often than of the others; and that in May, 1935, the witness considered her capable of making a will.

The attorney who drew the will testified that on May 4, 1935, he went into his reception room and saw the testatrix and her brother Lambert; that Lambert told him "Martha wants to see you about some business"; that he turned to Martha and asked what she wanted and she replied: "I want to make a will"; that he told Lambert to go around town and attend to his business as he would rather talk to Martha alone; and that Lambert left and he took the testatrix into his office. After talking to her for a minute or two he asked her if her people were not Dutch and she replied "yes". He then told her that he had a partner who was Dutch whom he would like to have meet her. He brought

in Mr. Kroese and introduced him to the testatrix, saying that Martha would like to make a will and that he would like to have him act as one of the witnesses. He then called in his secretary. While the four were together he asked the testatrix about her relatives and in reply to his questions she told him she had two brothers and two sisters, and told where each one lived. She also gave the names of the husbands of her sisters. When asked if her father was still living she said he was and gave his first name. When asked how she wanted to make her will she said, "Well, I want to leave everything to Lambert. Father and mother and Lambert and I bought the ranch together and seven years ago father and mother built the house and Lambert has done all the work on the ranch in bringing the trees up and it is just coming into bearing, and Lambert has put more money into the ranch than I have and he bought more of the tools than I did." The attorney then asked her where the ranch was and she said "It's on Hill Avenue". When asked where that was she said, "It is two or three miles from Garden Grove." When asked how big a ranch it was she replied: "Eight acres." When asked if she wanted to leave anything to her other brother or sisters she said: "No, I want to leave it all to Lambert."

While the will was being drawn up the attorney talked to the testatrix "a little while" and also attended to some other work. When the typing was completed Mr. Kroese and the secretary were called in and in their presence the attorney read the will to the testatrix and asked her if she wanted to sign it, to which she replied: "All right." He then told the testatrix this was her will and asked "Do you want all three of us to sign as witnesses"? She acquiesced and all three signed the will as witnesses. He further testified that he asked the testatrix "What made you think of drawing a will Martha" and she replied: "Well my father is awful sick and I want to make a will." He also asked her if she had any property except the ranch and she said "No". He further testified that in his opinion the testatrix then understood the nature of the act of making a will, that she then understood and recollected the nature and situation of her property and remembered and understood her relationship to her brothers and sisters and father and that, in his opinion, she then

had testamentary capacity and understood the manner in which she desired to leave and dispose of her property.

Mr. Kroese and the secretary who typed the will testified to the same general effect as did the attorney who drew the will. Katherine Clark, formerly the wife of Lambert, testified that on the evening of May 4, 1935, she heard the testatrix tell her father that she had been to Santa Ana and made her will, that she told him that "she had made her will out to Lambert" and that "she seemed to be well pleased over it".

[4, 5] The appellants argue that since the testatrix was adjudged insane in 1929, and a guardian was appointed for her estate in 1931, it must be presumed that her incapacity continued, and that there is no evidence that her condition had improved. Assuming that at one time she had not the capacity to make a will, the evidence last summarized indicates that her mental condition had improved at the time the will was executed. It further appears from the evidence that she was paroled from the Norwalk State Hospital on February 22, 1931, and was "discharged as improved" on January 12, 1932. While the presumptions relied upon by the appellants, and the opinions of the expert witnesses called by them, are sufficient to create a decided conflict with the evidence relied upon by the respondents, it cannot be said as a matter of law that the testatrix lacked testamentary capacity on the day the will was executed. The question was one of fact for the trial court and a part of the evidence sustains the finding thereon.

[6] The appellants argue that the respondents are estopped from contending that the testatrix was in fact competent to make a will because, in 1931, Lambert De Graaf had secured his own appointment as guardian of her estate on the ground that she was unable to properly manage and care for her property, and that he had not been discharged as guardian when the will was executed. The respondents were not parties to that proceeding, any presumption arising from the appointment of a guardian was not conclusive, and the question before the court was the actual condition of the testatrix' mind at the time the will was executed. If she was then competent, her will is valid, and no grounds for estoppel appear.

[7-10] The appellants further contend that the court's finding that there was no undue influence in the making of this will is not supported by the evidence. They rely upon the presumption which arises when it appears that one who unduly profits by a will sustains a confidential relationship with the testator and actively participates in procuring the execution of the will. It is well settled that when this presumption arises the burden of proof rests on the proponents of the will to overcome the presumption. *Estate of Lepori*, 4 Cal.App.2d 761, 41 P.2d 970; *Estate of Lances*, 216 Cal. 397, 14 P.2d 768. It is argued that such a presumption existed here since Lambert De Graaf, the brother of the testatrix and the guardian of her estate, procured the making of the will in his favor. Assuming that such a presumption existed here it cannot be said that the burden of proof resting upon the respondents was not sustained, and that the evidence was not sufficient to support the court's finding that, in fact, there was no undue influence. There is no evidence that Lambert De Graaf procured the execution of the will or participated in its execution other than the fact that he accompanied the testatrix to the office of the attorney who drew the will, who was also the attorney for Lambert as the guardian of her estate. This attorney testified that while he had acted as attorney for Lambert from the beginning of the guardianship proceedings he had not seen him on any business for two or three years prior to the date on which the will was executed. When the testatrix and her brother Lambert appeared at the office of the attorney on the day the will was drawn the attorney requested Lambert to leave, saying he desired to talk to the testatrix alone. He did this and later talked with her in the presence of his partner and his secretary, before the will was drawn. He talked with her again while the will was being typed. All of this evidence, if believed, indicates that no attempt was made to influence the testatrix with respect to the disposition of her property, and that the making of the will in favor of her brother Lambert was in accordance with her own wishes and desires. In commenting upon this evidence the trial court, after pointing out that the bringing of the testatrix to the attorney's office by the brother who was guardian of her estate was a suspicious circumstance, stated that the attorney had observed ex-

treme caution in order to satisfy his mind that the testatrix was competent, that he had taken unusual precaution to satisfy himself, his partner and his secretary that the testatrix was acting freely and voluntarily and without any influence whatsoever, and further stated that he was convinced that these things had all occurred, and that "the presumption arising from the suspicious circumstances has been repelled by those facts". This also was a question of fact for the court and the evidence sustains his finding and conclusion.

[11,12] The appellant assigns as error the sustaining of an objection to the question asked of a certain witness, "Have you formed any opinion in your mind whether on May 4th, 1935, she was competent to make a will?" While it is true that no attempt had previously been made to ascertain whether this witness knew the necessary requirements of testamentary capacity, we think the witness should have been allowed to answer the question and that the sustaining of the objection thereto was error. This error is not sufficient, however, to justify a reversal. The witness had previously testified to a number of facts which she very evidently regarded as sufficient to show that the testatrix was insane. This was a part of a long line of testimony from various witnesses, many of whom were permitted to answer questions similar to that to which the objection was sustained. There was no jury and the reasons for any such opinion on the part of the witness would weigh much more with the court than the mere expression of the opinion. In view of the entire evidence, shown by the record, it cannot reasonably be supposed that the obvious answer to the question could have added any weight to the witness' testimony or have affected the result.

[13] The appellants contend that their motion for a new trial should have been granted because it appears from the affidavits of two physicians that their testimony "would have with reasonable certainty changed the result on a new trial". The appellants concede that this evidence could, with reasonable diligence, have been discovered prior to the trial. It further appears that practically all of the evidence thus sought to be obtained on a new trial was cumulative, that one of these physicians never saw the testatrix until about November 1, 1936, a year and a half after the will was executed, and that the other

had not seen her since January, 1932. No error appears in this connection.

The order appealed from is affirmed.

We concur: GRIFFIN, J.; HAINES, J. pro tem.



34 Cal.App.2d 130

ANGELO v. ESAU et al.

Civ. 2254.

District Court of Appeal, Fourth District,
California.

Aug. 17, 1939.

Hearing Denied Oct. 16, 1939.

1. Appeal and error ⇨770(1)

Where counsel for appellant had filed no brief in support of appeal, District Court of Appeal would assume that appeal had been abandoned.

2. Automobiles ⇨245(1)

In action for injuries received in automobile collision, whether testimony of driver of truck in which plaintiff was riding was too contradictory to admit of any reliance being placed upon it was for jury.

3. Automobiles ⇨245(14)

In automobile collision case, whether motorist traveling on through highway guarded by stop signs was negligent was for jury under conflicting evidence as to time when motorist saw truck in which plaintiff was riding approaching from a side highway. Code Civ.Proc. § 2055.

4. Automobiles ⇨171(13)

A motorist traveling on a through highway guarded by stop signs had the right, so long as he was making proper use of his own powers of observation, to assume, until there was some indication to the contrary, that others likely to come within his path would act with ordinary care and observe traffic laws.

5. Automobiles ⇨171(13)

The mere circumstance that a motorist is using a through highway does not absolve him from making ordinary use of his faculties.

6. Automobiles ⇨244(11)

In action for injuries received in automobile collision occurring at intersection of highways where defendant's testimony was conflicting as to time at which he looked in direction from which truck in which plaintiff was riding approached, jury had right to believe from defendant's testimony that he was unduly slow in looking in direction from which truck approached. Code Civ.Proc. § 2055.

7. Automobiles ⇨244(11)

Evidence held to sustain verdict for plaintiff in action for injuries received in automobile collision occurring at intersection when automobile driven by defendant upon a through highway collided with truck in which plaintiff was riding when such truck crossed the through highway.

8. Automobiles ⇨246(9)

In automobile collision case, an instruction, in substance, that it was duty of a motorist to keep his automobile always under control so as to avoid collision with other automobiles and persons using highways and that a motorist had no right to assume road was clear, but under all circumstances was bound to be vigilant and anticipate and expect presence of others, was not objectionable on ground that such instruction informed jury that one rightfully driving upon a highway must under all circumstances anticipate that others will negligently and unlawfully drive upon it.

9. Negligence ⇨63

It is only while using due care himself that one may lawfully assume that others will obey the law and refrain from negligent acts that may endanger him.

10. Negligence ⇨2, 68

While a person may assume that others will exercise due care, he cannot for such reason omit any of the care which the law demands of him.

11. Automobiles ⇨150

A motorist is not at any time excusable for want of vigilance or failure to observe what may be plainly seen.

12. Automobiles ⇨246(19)

In automobile collision case, an instruction which stated, in substance, that a motorist has no right to assume that the road is clear but under all circumstances must be vigilant and anticipate and expect presence of others, went no further than to state

the proposition that no driver is at any time excusable for want of vigilance or failure to observe what may be plainly seen.

13. Trial ⇨296(3)

In automobile collision case, an instruction stating, in substance, that a motorist must keep his automobile always under control so as to avoid collision with other automobiles and persons using highways was not objectionable as, in effect, telling jury that every motorist involved in a collision must have been negligent, when such instruction was considered with instruction concerning right of one exercising ordinary care for own safety to assume that others would do likewise; the instruction being intended as meaning that a motorist must always keep his automobile under control with purpose of avoiding collisions.

14. Trial ⇨296(1)

All given instructions were to be read together in determining whether one instruction was ambiguous or in conflict with other instructions.

15. Trial ⇨243

In automobile collision case, an instruction stating, in substance, that a motorist must keep his automobile always under control so as to avoid collision with other automobiles and persons using highways did not conflict with an instruction as to the right of one exercising ordinary care for own safety to assume that others would do likewise.

16. Trial ⇨194(16)

In automobile collision case, instructing that codefendant, who was driving truck in which plaintiff was riding, so long as he was using ordinary care, could assume that persons using highway, including defendant, would obey law, was not open to objection by defendant as, in effect, instructing that jury might find that driving a truck into a blind intersection of a through highway without stopping was in accordance with law, especially where jury was instructed as to statute concerning duty of motorists to stop at stop signs and verdict was also against codefendant. St.1935, p. 190, § 577.

17. Automobiles ⇨245(24, 50)

In action for injuries received in automobile collision, questions whether codefendant's failure to stop before crossing a through highway on which defendant was traveling proximately contributed to accident and whether he had so slowed down as

to amount, in effect, to a stop were for jury. St.1935, p. 190, § 577.

18. Trial ⇨296(3)

In automobile collision case, an instruction that codefendant, who was driving truck in which plaintiff was riding, so long as he was using ordinary care had right to assume that persons using highway, including defendant, would obey law and use ordinary care for their own safety was not objectionable as omitting to give defendant benefit of doctrine embodied in such instruction, in view of further instruction.

19. Appeal and error ⇨1068(1)

On appeal by defendant in automobile collision case, defendant could not complain of failure to instruct that codefendant, who was driving truck in which plaintiff was riding, was guilty of negligence as a matter of law where jury found codefendant negligent as a matter of fact.

20. Appeal and error ⇨216(1)

On appeal by defendant in automobile collision case, defendant could not complain of failure to instruct that codefendant, who was driving truck in which plaintiff was riding, was obliged to enter intersection at 15 miles or less per hour, where defendant had not requested such an instruction in trial court.

21. Damages ⇨185(1)

In action for injuries received in automobile collision, evidence held to justify conclusion that, regardless of possible condition of epilepsy which plaintiff might have suffered before accident, plaintiff sustained injuries as result of accident in question.

22. Damages ⇨130(3)

\$8,500 for injuries consisting of a fracture of the pubic bone, two broken ribs and bruises on the head was not excessive.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Joe S. Angelo against Henry Esau and G. H. Bragg, doing business under the fictitious name and style of Braggs' Home Appliance Shop, and another for personal injuries. From a judgment for plaintiff, Henry Esau and G. H. Bragg appeal.

Affirmed.

Ray W. Hays, of Fresno, for appellant Henry Esau.

Rae B. Carter, of Fresno, and Bronson, Bronson & McKinnon, of San Francisco, for appellant Bragg.

Irvine P. Aten and Richard V. Aten, both of Fresno, for respondent.

HAINES, Justice pro tem.

This case presents the familiar picture of injuries resulting from the collision of motor vehicles within the intersection of two highways which cross each other at right angles. The accident occurred northwest of the city of Fresno in the county of that name. Madera avenue is a paved "through highway" running north and south. McKinley avenue is an oiled road which crosses it from east to west. The pavement of Madera avenue is 16 feet wide, and there is a white median traffic line along the center of it. Outside this pavement are graded shoulders on either side. These are oiled for part of the way between the pavement and their outside edges. At the point of intersection between Madera and McKinley avenues the combined width of oiled surface and pavement upon the former amounts to 60 feet. The oiled portions of the shoulder taper off, however, to the north so that on the west side of the paved strip the oiled area has narrowed to 6 feet at a point 50 feet north of the center line of the intersecting McKinley avenue and to 4 feet at a point 100 feet from that line, while on the east side of the pavement such oiled surface has, at a point 50 feet north of the said center line of McKinley avenue, already narrowed to 4 feet. From these respective points the oiled parts of the shoulders continue at such width of 4 feet, on north. The oil surface of McKinley avenue is 17 feet wide at a distance of 80 feet east from the center line of Madera avenue and outside of this oiled strip is a graded shoulder on either side. This is 6 feet wide at the north and 8 feet wide at the south. This oiled surface of McKinley avenue, however, as it nears Madera avenue, widens to 30 feet at the intersection, and the flanking dirt shoulder is there entirely overspread. These conditions on Madera avenue south of its intersection with McKinley avenue correspond generally to those on Madera avenue north of such intersection. So likewise do these conditions on McKinley avenue west of its intersection with Madera avenue correspond generally with those on McKinley avenue east of that intersection. There is a stop-sign at the north edge of the graded north shoulder of Mc-

Kinley avenue 30 feet east of the east line of pavement of Madera avenue and a sign-post just south of the graded south shoulder of McKinley avenue 30 feet west of the west line of the pavement of Madera avenue. Both stop-signs are visible to a driver proceeding westerly on McKinley avenue for the last several hundred feet of his approach to Madera avenue, and the one on the west side of Madera avenue is visible to a driver coming southward on the west side of Madera avenue for several hundred feet before the intersection is reached. The areas to the northwest and to the northeast of the intersection are occupied by vineyards. On the northwest corner and perhaps also at the northeast corner the vines reach a height of several feet. The rows of vines in these two vineyards run east and west and the southernmost row in each of them is 20 feet north of the center line of McKinley avenue and the one to the west approaches to within 35 feet of the center line of Madera avenue. On the east the vineyard rows approach within 20 feet of the east line of the Madera avenue pavement.

[1] Defendant and appellant Bragg operates stores both at Fresno and at Fowler, California, under the name "Bragg's Home Appliance Shop" and, at the time of the accident, plaintiff and respondent Joe S. Angelo and defendant N. L. Pimental were both in his employ and, while acting within the scope of their employment, had come from Fowler, stopped at Fresno and were proceeding westerly along McKinley avenue in a Dodge "pickup" car owned by Bragg but being driven by Pimental. The Dodge car while so proceeding, after it had reached the easterly line of Madera avenue, and while it was engaged in crossing the same, was struck pretty squarely at right angles on the cab and righthand side by a Chevrolet sedan, then being driven southerly along the right lane of Madera avenue by defendant and appellant Henry Esau. The collision resulted in personal injuries to respondent Angelo for which he obtained in the trial court a verdict for \$8,500 damages against the defendants. Judgment having been entered on the verdict and motions for new trial interposed by both Esau and Bragg having been denied, each of these defendants has appealed. There is no appeal on Pimental's behalf. Counsel for appellant Bragg has filed no brief in support of his appeal, so we shall assume that it has been abandoned.

We proceed, therefore, to examine the contentions made on behalf of appellant Esau. His claims are, first, that the evidence demonstrated as a matter of law that he was not guilty of negligence; and, second, that the court committed various errors in its instructions to the jury.

The Dodge "pickup" was a vehicle with a closed cab and an open body behind the cab which is about 4 feet wide and 6 feet long. There is a guard about the rear body about 12 inches high. This car, according to Pimental's testimony, was at the time of the accident three months and two weeks old and he had, during that time, been driving it. He said that with new cars the shifting of gears is apt to be difficult. Referring to the stop-sign north of McKinley avenue and east of the intersection he testified that he first learned that it was there on the day of the wreck but he is unable to say whether he learned of its presence before or after the wreck occurred. Asked how fast he had been operating on McKinley avenue he said, "Oh, I have no idea but apparently around 40 or 45." At another point he said that his speed could have been "anything from 35 up to 45." Elsewhere, when asked how fast he was traveling from the time he turned on to McKinley avenue and proceeded west he said: "well, I have no recollection of the speed I was traveling at". He had been traveling on McKinley avenue in high gear. He remembers making no change in gear until he approached Madera avenue when he changed from high into low. Then just as he was "approaching the highway on Madera Avenue" he testified to changing from low gear into second. He does not remember stopping at the stop-sign. He says that he first saw Esau's car when the front wheels of his own were on the paved part of Madera avenue. He says that he was then traveling about 15 miles per hour. He had slowed down for the intersection "but whether I made the stop or not I won't swear to it". Elsewhere he says that he "might" have come to a complete stop. This might have been at the stop-sign. He was engaged at the time he saw Esau's car "in shifting from low trying to get from low into second". His clutch was out. He does not know whether he ever completed the movement or not. He testified that the vineyards to his right and north kept him from seeing Esau's car until he himself got clear into the intersection. The corner, according to him, was "blind clear up to the intersection". On

seeing Esau's car "I tried to get mine into gear to see if I could get out of his way". Esau's car, he says, was, when he first saw it, 100 or 125 feet away. He cannot tell how fast he was coming. He doesn't think Esau slackened his speed. When the cars were only 40 to 50 feet apart he noticed that Esau was glancing off to his right. "He wasn't even looking our way." The respondent Angelo was sitting at Pimental's right as they rode west on McKinley avenue. He was along for the purpose of helping Pimental with some of Mr. Bragg's refrigerator work. He had nothing to do with the driving. He testified that they were traveling on McKinley avenue at from 40 to 50 miles per hour. He didn't see Esau's car at all. He doesn't know whether Pimental slowed his car before entering the intersection or not. He heard Pimental say "'Well, here we go, Joe' and I looked to see what it was and when I came to I was in the County General Hospital, I was told." Appellant Esau testified that in his opinion he had been going south on Madera avenue at between 30 and 35 miles per hour. When he was 390 or 400 feet from the intersection with McKinley avenue he reduced his speed. This he did by releasing the gas pedal a little but he continued to keep his foot on the pedal with enough pressure to keep his car rolling south. He thinks he was going at about 25 miles per hour when he got to the intersection. He first said on the stand that he saw the Pimental car just as he himself got to the intersection. It was then a little way beyond the stop-sign to the east and had not yet come to Madera avenue. He thinks it was going at from 40 to 45 miles per hour. As Esau approached McKinley avenue he says that he first looked to the right where the view was obstructed by some sweat boxes. Asked on examination under section 2055, Code of Civil Procedure, "Then you didn't look to the left until you came to the intersection, is that right?" he answered "yes". Later he testified that it was "just before I entered the intersection". In a deposition he had said "just when I got to the intersection, why, I noticed the car coming from the east" By "intersection", however, he explained that he meant the area indicated by the fence lines on McKinley avenue and Madera avenue respectively. He finally indicated that the place which he had reached when he first saw the Pimental car was 10 or 15 feet north of the intersection. He testified that the area to his left was occupied by high

grape vines. When he saw the Pimental car he started to set his brakes but they didn't have time to take effect before the collision occurred. He did not alter the direction of his car but went straight on.

When the Pimental car came to rest after the collision it stood against a power pole southwest of the intersection in such a position that its left side just back of the driver's seat was broken and caved in by impact with the pole. The right side of the cab and adjacent parts of the "pickup" were completely wrecked, as was the right fender. The marks on the pavement apparently indicated that the "pickup" had been carried sidewise something like 18 inches, after which they stopped, though linear marks led in the direction of the power pole and it is claimed that they indicate the continued course of the Chevrolet in that direction. Pimental claims that the "pickup" fell over on the Chevrolet, that its wheels were lifted off the ground and that it was carried along in that position by the Chevrolet until it was stopped by the power pole and deposited against the latter. The "pickup" when it came to rest against the power pole was headed northwest. The Chevrolet when it came to rest had been turned around and was off the Madera avenue pavement on the west side facing northeast with its back about 5 feet from the "pickup". The entire front of the Chevrolet was wrecked, though Esau thought the damage greater on the right side.

[2-7] We are unable to follow counsel for appellant Esau in his contention that Pimental's testimony is too contradictory to admit of any reliance being placed upon it. It was a question for the jury whether such inconsistencies as it does exhibit were greater than might be expected from a witness called on to repeat several times in minute detail his recollection of occurrences that occupied but a few moments of time. It cannot be said as a matter of law that Esau was not negligent. It is true that he was driving on a "through highway" and had the right, so long as he was making proper use of his own powers of observation, to assume until there was some indication to the contrary that others likely to come within his path would act with ordinary care and observe the traffic laws. The circumstance that a driver is using a through highway, however, does not absolve him from making ordinary use of his faculties. The jury had the right to believe from Esau's own account that

he was unduly slow in looking to the left and if it believed Pimental's testimony on that point it may have reasonably concluded that Esau was oblivious to anything on that side of the course that he was following until practically the moment of the impact itself. We think the evidence sufficient to sustain the verdict against him.

Among the instructions given by the trial court was the following: "You are instructed that it is a part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collision with other cars and other persons using the highways. He has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others."

[8-12] Objection is made to this instruction on two grounds:

(a) It is claimed that it amounted to telling the jury that one rightfully driving upon a highway must under all circumstances anticipate that others will negligently and unlawfully drive upon it. We do not think that this instruction read as a whole carries that meaning. It is only while using due care himself that one may lawfully assume that others will obey the law and refrain from negligent acts that may endanger him. As said in *Commonwealth Insurance Co. v. Cement Co.*, 69 Cal.App. 165, 168, 230 P. 995, 996, "while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him". No driver is at any time excusable for want of vigilance or failure to observe what may be plainly seen and the last sentence of the instruction quoted, which is the portion against which this criticism is directed, goes no further than to state that proposition.

[13-15] (b) A more plausible contention is that the instruction complained of was tantamount to telling the jury that a driver on a public highway must "at all times and under all circumstances avoid a collision of his car with another", or, in other words, that every driver who has been involved in a collision must necessarily have been negligent. The criticism is directed particularly to the first sentence of the instruction. That the trial court could have intended it to have the effect suggested is, of course, impossible. Manifestly, in saying that it was "part of the duty of the operator of a motor vehicle to

keep his machine always under control so as to avoid collisions with other cars and other persons using the highways", the court intended the instruction as merely another way of saying that it is the duty of such operator to keep his machine always under control with the purpose of avoiding collisions with other cars and other persons using the highways. Instructions, indeed, in substantially identical language have been frequently given. Thus in *Meyers v. Bradford*, 54 Cal.App. 157, 158, 201 P. 471, the court instructed the jury *inter alia* that "it is part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collisions with pedestrians and other persons using the highway. He has no right to assume that the road is clear, but under all circumstances [and at all times he must be vigilant and must anticipate and expect the presence of others". In affirming the judgment, the appellate court said: "That said instruction demands the proper attitude of an operator in the situation referred to can hardly admit of a doubt." In the instant case it is entirely clear that the proper construction of the language under consideration is that it is descriptive of the attitude which the law expects the driver of a motor vehicle to have, that is, the effort he is required to make to avoid collisions, and that it is not at all intended to suggest or state that he is always or necessarily responsible for results. While in its literal construction the language used in this instruction may be in some sort ambiguous, all the instructions given must, of course, be read together and the jury here was instructed that: "One who is himself exercising ordinary care has a right to assume, until the contrary becomes apparent, that all others persons using the street will obey the law and use ordinary care for their own safety". It is claimed, indeed, that the instruction complained of and the one last quoted, which latter is admittedly correct, are in conflict with each other, but we think the fact to be that the latter serves rather to make clear the proper construction of the former and that when the former is given the construction thus indicated the two are in entire harmony.

It is next claimed that the trial court in effect instructed the jury that it might find that driving a truck into a blind intersection of a through highway from an intersecting road without stopping was in accordance with the law and the act of a

prudent man. The language complained of followed that which we have last quoted and was to the effect that: "In this case defendant, N. L. Pimental, so long as he was using ordinary care had a right to assume that all persons using the highway, including the defendant Esau, would obey the law and use ordinary care for their own safety."

[16-17] We do not think the effect of this language to have been that which appellant's counsel ascribes to it. The use of the expression "so long as he was using ordinary care", in view of the connection, manifestly meant merely "if and while" he was using ordinary care. While it seems tolerably clear that Pimental did not come to a full stop before entering the intersection, the instruction by its terms excludes his right to rely on the care of others while thus negligent himself. Whether his failure to stop proximately contributed to the accident or whether, contrariwise, he had so slowed down as to amount in practical effect to the same thing as a stop, were questions for the jury. Though he were negligent in failing to stop it would not necessarily follow that the effect of such negligence continued to influence his position or action as he actually entered the intersection. By reading section 577 of the Vehicle Code, St.1935, p. 190, as in force when the accident occurred, the court fully informed the jury of Pimental's duty to make such stop. Moreover, as respects any claim that the instruction complained of tended to exonerate Pimental from responsibility, the complete answer is that, if such had been its tendency, such tendency was harmless, inasmuch as the jury included Pimental as well as his employer Bragg among those against whom it rendered its verdict. Further complaint, however, is made that while the instruction complained of is one-sided, inasmuch as it tended to exonerate Pimental, it omitted reciprocally to give Esau the benefit of the same doctrine. This complaint, however, appears to overlook the circumstance that the instruction went on in the language following, to wit: "If you should find from the evidence in this case that said Henry Esau immediately prior to and at the time of the said accident, was conducting himself while in the operation of his automobile in the same manner that any other person of ordinary care and prudence, acting under like circumstances, would have conducted himself, then said defendant was not guilty."

ty of negligence and plaintiff is not entitled to recover against Henry Esau and your verdict must be for the defendant Henry Esau."

[18] We think that the practical effect of the last quoted language, when considered with that which preceded it, was to inform the jury that the rule was the same as to both drivers, that is, that each driver if using due care himself was entitled, while doing so, to assume that the other would use it.

[19-20] It is further asserted that Pimental was shown by the evidence to have been negligent as a matter of law and we infer that the suggestion in that connection is that the court should have so instructed the jury. While we do not think that the court was called upon to go that far, a conclusive answer to this suggestion is, again, that the jury found him negligent as a matter of fact and that, therefore, no complaint on that score on the part of Esau would appear to be in order. It is also said that it was error for the court not to instruct the jury that Pimental was obliged to enter the intersection at 15 miles or less per hour. One answer to that would appear to be that if Esau wished such an instruction he should have asked for it.

It is finally claimed that the damages awarded were excessive. Angelo was, beyond doubt, gravely injured. According to the medical testimony "he had a fracture of the pubic bone, both the superior and the inferior rami". He had two ribs broken. Dr. Drake, to whom he was first taken, testified that he had a severe bruise on the left side of the head and a deep cut four inches long and a hemorrhage from the left ear. Angelo complained of the soreness of the head on the left side. He was confined to his bed from the day of the accident, October 22, 1936, until November 26 of that year, after which he was allowed to walk a little each day. He was finally discharged on January 31, 1937, as able to work again. Dr. Ehlers, who attended him and had known him about 15 years theretofore, testified that though x-rays were taken they disclosed no fracture of the skull. In his opinion, so far as the injuries to the pelvis and ribs were concerned, Angelo appeared to have made a good recovery. "His pelvis did not seem to be tipped and there was no muscular deterioration that I could find." Dr. Ehlers has, however, more lately ob-

served that for some months past Angelo has walked with a limp. He says that there is no shortening of either leg. One Smith, who says that he worked with Angelo in 1922 or 1923 at Fowler, described him as having had an epileptic seizure at that time and as having admitted carrying around with him in his automobile a water bottle and saying that when he felt such seizures coming on if he got water soon enough it would help him. Bragg, his employer, testified that in the fall of 1936 (evidently before the accident): "We was in the back of the store. Mr. Pimental was doing something or other. I was back there talking. Mr. Angelo was also along. All at once I noticed Mr. Angelo commencing to get white and he kind of stiffened, his eyes kind of got glassy. I asked Mr. Pimental what was the matter with him. He said to leave him alone, that he was having one of his spells. That is the first time I had ever seen it so I didn't know what it was."

One Migill, an employe of a telephone company, said that three or four years before the trial Angelo had collided in an automobile with one of the company's poles; that the witness went upon the scene and spoke to Angelo, who apparently did not recognize him but was very pale and looked as though something had happened to him. Angelo, he said, finally drew off and drove away. Dr. Ehlers, when asked a hypothetical question based on the observations testified to by Smith, said that the conduct recited would in his opinion indicate epilepsy. Dr. Harold F. Downing, who examined Angelo before the trial, testified that at that time he was very slow and it was difficult to get a definite accurate history from him because of his faulty memory and that he gave the impression of being dazed and spoke as though his tongue were not under control. The circumference of his right thigh was three-quarters of an inch less than that of his left thigh; the reflexes of his right leg were not as active as those of his left; in bending over and picking up objects he did so awkwardly; he couldn't see that there was any disfunction of the pelvis. Dr. Downing testified that an ear hemorrhage resulting from an injury is usually considered to indicate a skull fracture toward the basal portion. He thinks that if Angelo suffered in the accident a blow on the head it might naturally have caused a bruise to the brain from which he did not fully recover and that this may account

for his present mental condition. Various acquaintances testified that they had never noticed about Angelo any epileptic symptoms. Dr. Mitchell also examined Angelo prior to the trial and attributed his mental condition to "an injury to the higher nerve centers principally" and thought the condition permanent. He noticed no symptoms of epilepsy.

[21, 22] When we look at the situation as a whole, it appears to us that there is evidence from which the jury and the trial court could reasonably have concluded that, regardless of any condition of epilepsy from which Angelo might before the accident have suffered and may still suffer, he sustained injuries to his damage in the amount rewarded.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIF-FIN, J.



34 Cal.App.2d 182

ECKART v. BROWN et al.

Civ. 12145.

District Court of Appeal, Second District,
Division 2, California.

Aug. 21, 1939.

1. Novation ⇨1

A "novation" is the substitution of a new obligation for an existing one and is made by the substitution of a new obligation between same parties with intent to extinguish old obligation, by substitution of a new debtor in place of former debtor with intent to release latter, or by substitution of a new creditor in place of former creditor with intent to transfer rights of former creditor to new creditor. Civ.Code, § 1531.

[Ed. Note.—For other definitions of "Novation," see Words & Phrases.]

2. Novation ⇨10

The effect of a "novation" is to make the original agreement a nullity and rights of new parties are governed solely by new agreement.

3. Novation ⇨10

A "novation," in legal contemplation, gives rise to a situation which is the same as if there had never been a former agreement or obligation.

4. Novation ⇨6

Where third party, with defendant's consent, assigned to plaintiff his rights under a contract with defendant relating to transfer of stock to third party by defendant and contemporaneously defendant entered into agreement with plaintiff whereby defendant, in substance, agreed to repurchase stock mentioned in the agreement, the transaction was a "novation" whereby plaintiff was substituted in place of third party in contractual relation with defendant; and hence plaintiff could recover purchase price of stock from defendant when defendant failed to repurchase stock in accordance with agreement. Civ.Code, § 1531.

5. Corporations ⇨120

The Uniform Sales Act does not include within its provisions a contract for the repurchase of shares of stock. Civ.Code, § 1783.

6. Corporations ⇨121(4)

A complaint, in an action to recover purchase price of shares of stock in accordance with agreement to repurchase stock at a fixed price within a certain period, stated a cause of action, notwithstanding that such complaint did not allege that plaintiff had complied with conditions precedent to commencement of an action for recovery of purchase price of property as required by Uniform Sales Act. Civ.Code §§ 330 et seq., 1783.

7. Corporations ⇨121(2)

Where there is a sale of stock accompanied with a repurchase agreement of the stock at a fixed price, the vendee after tender of stock and demand that vendor repurchase the stock, may, upon making and proving such allegations, recover the amount specified in agreement.

8. Corporations ⇨121(1)

A judgment for plaintiff, in action to recover purchase price of stock which defendants had agreed to repurchase, was not prejudicially defective for failure to require plaintiff to indorse stock certificates to defendants and pay transfer tax and charges, where certificates properly indorsed had been deposited with clerk of superior court and repurchase agreement required defendants to

pay a specified sum and did not require plaintiff, as condition precedent, to pay transfer tax and charges; although it would have been better practice to require by judgment that plaintiff indorse the certificates.

9. Pleading ⇨237(6)

In action for purchase price of stock which defendants had agreed to repurchase from plaintiff, permitting plaintiff to amend complaint, after trial, to conform to proof by striking words relating to number of shares of stock and ownership thereof, was not error, especially where defendant was not prejudiced by amendment.

10. Pleading ⇨237(1)

The trial court was bound to permit an amendment to complaint to conform to proof offered by plaintiff at trial when such amendment was not prejudicial to defendants' interest.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Charles G. Eckart against Helen A. Brown, also known as H. A. Brown, and another, to recover the purchase price of shares of stock. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

George Edward Acret and Vallee, Beilenson & Kenny, all of Los Angeles, for appellants.

Frank S. Balthis, Jr., of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover the purchase price of shares of stock defendant Helen A. Brown appeals.

The essential facts are:

March 28, 1936, Helen A. Brown entered into an agreement with H. R. McClintock, which read thus:

"Los Angeles, California.
"March 28, 1936.

"Mr. H. R. McClintock,

"Los Angeles, California.

"Dear Sir:

"This will confirm our oral understanding.

"As soon as Pacific Outdoor Advertising Company issues to me 21,900 shares of its common stock, I will place the same under a voting trust agreement, a copy of which has already been submitted to you.

"In consideration of your accepting the offer of employment of Pacific Outdoor Advertising Company upon the basis set forth in Exhibit A hereto attached, I agree to transfer to you, at the end of the first year of your employment under said contract, all of my right, title and interest in and to 1,875 shares of common stock of Pacific Outdoor Advertising Company, to be held under said voting trust agreement, and agree to transfer to you a like amount at the end of the second year and a like amount at the end of the third year of such contract.

"If said contract of employment is terminated by you or by Pacific Outdoor Advertising Company at the end of the first or second year, my liability to transfer my interest in said shares of common stock shall cease, except with respect to the year or years you have rendered service under such contract. In the event such contract is terminated prior to the expiration of the three-year period, without fault on your part, other than at the end of the first or second year of the term thereof, I agree to transfer to you, for the portion of year you rendered services, all of my right, title and interest in such number of shares of said common stock as is in the same proportion to 1,875 as the number of full months you have rendered services in such portion of a year bears to twelve.

"As provided in said voting trust agreement, you shall be entitled to receive, upon the termination of your employment by Pacific Outdoor Advertising Company free and clear from said voting trust agreement, the number of common shares which the undersigned hereby agrees to transfer to you.

"You agree that you will not transfer or sell your interest in said shares of common stock to any person or corporation in competition with Pacific Outdoor Advertising Company in the same territory in which it is operating. You also agree that you will not transfer or sell to anyone else all or any part of your interest in said shares, without first giving me a thirty (30) day option to purchase your interest in such shares at the same price and upon the same terms and conditions

as those upon which you propose to sell to someone else.

"Yours very truly,

"(H. A. Brown)

"The terms of the foregoing letter are hereby accepted and agreed to.

"H. R. McClintock."

September 10, 1936, H. R. McClintock with defendant Helen A. Brown's consent assigned his rights under the foregoing agreement to plaintiff by a document reading as follows:

"Assignment.

"Know all men by these presents:

"Whereas, under date of March 28, 1936, the undersigned entered into an agreement with H. A. Brown, a copy of which is attached hereto, marked Exhibit A:

"Now, therefore, for and in consideration of the sum of five thousand dollars (\$5,000.00) paid to the undersigned by Charles G. Eckart, receipt of which is hereby acknowledged, the undersigned does hereby sell, transfer, assign and set over to Charles G. Eckart all of his right, title and interest in and to the above mentioned agreement between the undersigned and H. A. Brown in and to any and all shares of stock of Pacific Outdoor Advertising Company to which the undersigned is or hereafter may be entitled by virtue of said contract, and particularly certificate number 5 representing 1875 shares of common stock.

"This assignment is made without representation or warranty and without recourse upon the undersigned.

"In witness whereof, the undersigned has executed this assignment this 10th day of September, 1936.

"(Signed) H. R. McClintock.

"The foregoing is hereby approved.

"(Signed) H. A. Brown."

At the same time defendants executed a contract with plaintiff reading as follows:

"Los Angeles, Calif.

"September 10, 1936

"Mr. Charles G. Eckart,

"Russ Building,

"San Francisco, California.

"Dear Sir:

"Concurrently with the delivery of this letter to you, you have entered into an agreement with Pacific Outdoor Advertising Company whereby said corporation has employed you at a salary of \$500.00

per month for a period beginning today and ending April 1, 1937; you have also acquired 1875 shares of the common capital stock of Pacific Outdoor Advertising Company, delivery of the certificate representing such shares, however, is not to be made to you until March 28, 1937. The undersigned jointly and severally agree that at any time between April 1, 1937, and April 1, 1940, at your written request, they will purchase from you for the aggregate purchase price of \$3250 said 1875 shares of the common capital stock of Pacific Outdoor Advertising Company.

"Yours very truly,

"(Signed) H. A. Brown,

" Hal W. Brown."

February 9, 1938, plaintiff made written demand that defendant repurchase the 1875 shares of stock referred to in the agreements of March 28, 1936, and September 10, 1936. A portion of the written demand, which was delivered to defendants read as follows:

"With the delivery of this letter, I am personally tendering you herewith stock certificate for 1875 shares of the Common Capital Stock of Pacific Outdoor Advertising Co., and I hereby offer to transfer, deliver and endorse said stock certificate to you upon the payment to me of the sum of \$3250.00; and I further offer to pay the transfer taxes or charges involved in this transfer of said certificate from me to you."

This demand defendants failed to comply with.

The questions necessary to be determined are:

First: Did the transaction of September 10, 1936, constitute a novation?

Second: Did the complaint state a cause of action, since it did not allege that the plaintiff had complied with the conditions precedent to the commencement of an action for the recovery of the purchase price of property as required by section 1783, subdivision 3 of the Civil Code (Uniform Sales Act)?

Third: Was the judgment prejudicially defective, because it did not require the plaintiff to endorse the stock certificate to defendants and also pay the transfer tax and charges?

Fourth: Did the trial court err in permitting plaintiff to amend his complaint after the trial to conform to the proof by striking from the complaint the words

which are underscored in the following paragraph:

"On or about January 9, 1937, pursuant to the agreement set forth in paragraph I above and upon the express written consent and at the direction and request of defendants, said stock certificate for said one thousand eight hundred seventy-five (1,875) shares of the Common Capital stock of Pacific Outdoor Advertising Company was transferred, assigned, endorsed and delivered to plaintiff and ever since said date plaintiff has been, and now is, the owner of and in the possession of said one thousand eight hundred seventy-five (1,875) shares of the Common Capital stock of Pacific Outdoor Advertising Company and the stock certificate representing the same."

[1-3] The first question must be answered in the affirmative, and is governed by these principles of law:

(1) A novation is the substitution of a new obligation for an existing one and is made (a) by the substitution of a new obligation between the same parties with intent to extinguish the old obligation, (b) by the substitution of a new debtor in place of the former one with intent to release the latter, or (c) by the substitution of a new creditor in place of the former one with intent to transfer the rights of the former creditor to the new creditor. Sec. 1531, Civ.Code; 46 Cor.Jur.(1928) 573, § 1.

(2) The effect of a novation is to make the original agreement a nullity (that is, void and of no effect), and the rights of the new parties are governed solely by the new agreement. *Struck & Johnson Co. v. Brown*, 113 Cal.App. 691, 693, 298 P. 1036; *Conklin v. Woody*, 33 Cal.App. 554, 165 P. 54; 20 Cal.Jur.[1925] 253, § 7. The novation in legal contemplation gives rise to a situation which is the same as if there had never been a former agreement or obligation.

[4] Applying these rules to the present case, the agreement of September 10, 1936, between plaintiff and defendant H. A. Brown, together with the assignment of H. R. McClintock of the same date, approved by said defendant, resulted in a novation and a new agreement, whereby H. R. McClintock was released from all obligations to defendants and plaintiff was substituted in his place and stead in a contractual relation, with defendants govern-

ed by their contract, as evidenced by the written agreement between them dated September 10, 1936. Hence, unless one of the questions hereafter discussed is decided adversely to plaintiff, plaintiff was entitled to recover the sum of \$3,250 from defendants, the agreement between them being a simple agreement, so far as we are here concerned, upon the part of the defendants to repurchase shares of stock from the plaintiff at a fixed price within a given period.

[5] The second question must also be answered in the affirmative. It is clear that the contract here under consideration was as heretofore stated a simple agreement upon the part of the defendants to repurchase shares of stock from the plaintiff at a fixed price within a given period. Section 1783 of the Civil Code is a portion of the Uniform Sales Act, which has been adopted in California. California has also adopted the Uniform Stock Transfer Act (Sec. 330 et seq., Civ.Code). It has uniformly been held that the Uniform Sales Act does not include within its provisions a contract for the repurchase of shares of stock. *Smith v. Lingelbach*, 177 Wis. 170, 187 N.W. 1007, 1008; *Goodhue v. State Street Trust Co.*, 267 Mass. 28, 165 N.E. 701, 704; *Millard v. Green*, 94 Conn. 597, 110 A. 177, 181, 9 A.L.R. 1610; 1 Uniform Laws Annotated (1931) 15.

[6, 7] The complaint in the instant case therefore stated a cause of action, as the rule is established in California that where there is a sale of stock accompanied with a repurchase agreement of the stock at a fixed price, the vendee after tender of the stock and demand that the vendor repurchase the same may upon making such allegations recover the amount specified in the agreement. *Hulen v. Stuart*, 191 Cal. 562, 568, 217 P. 750.

[8] The third question must be answered in the negative. Though it is the better practice to require by the judgment that the vendee endorse the stock certificates in his possession, no prejudice resulted to the defendants in the present case, for the reason that it actually appears that the stock certificates properly endorsed have been deposited with the clerk of the superior court. The failure of the judgment to require plaintiff to pay a tax or transfer charge is entirely immaterial, since the agreement upon defendants' part provided for the payment of a specific sum of money and there is

no provision in the agreement requiring plaintiff as a condition precedent to pay either of the suggested charges.

[9,10] The final question must also be answered in the negative. Not alone has defendant H. A. Brown failed to show wherein she was prejudiced by the amendment allowed by the trial judge, but it was the duty of the trial court to permit an amendment to the complaint to conform to the proof offered by plaintiff at the trial, when such amendment, as in the present case, was not prejudicial to defendants' interest.

For the foregoing reasons the judgment is affirmed.

I concur: WOOD, Acting P. J.



34 Cal.App.2d 66

C. I. T. CORPORATION v. HAWLEY.

Civ. 2317.

District Court of Appeal, Fourth District,
California.

Aug. 9, 1939.

Rehearing Denied Sept. 5, 1939.

1. Sales Ⓒ467

A trust receipt and time draft executed by automobile distributor in favor of finance company at same time as a device to facilitate sale of automobiles were to be considered together.

2. Sales Ⓒ467

A trust receipt and time draft executed by automobile distributor in favor of finance company as a device to facilitate the sale of automobiles constituted more than an ordinary trust agreement and created a relationship other than that of trustor and trustee as ordinarily understood.

3. Sales Ⓒ477(1)

A trust receipt and time draft executed by automobile distributor in favor of finance company were not rescinded by company's acquisition of knowledge that truck to which they related had been delivered to a dealer, and distributor was not relieved from liability thereunder after dealer sold the truck and absconded with the proceeds.

4. Sales Ⓒ467

A trust receipt and time draft executed by automobile distributor in favor of finance company as a device to facilitate the sale of automobiles did not preclude distributor from giving possession of automobile to which the instruments related to any of his agents in his territory.

5. Estoppel Ⓒ95

An estoppel may rise from silence as well as from words or conduct but such estoppel arises only where there is a duty to speak and where the party upon whom such duty rests has an opportunity to speak and, knowing that the circumstances require him to speak, remains silent.

6. Estoppel Ⓒ95

The circumstances attending entire transaction out of which an estoppel from silence allegedly arises must be such as to make it reasonably probable that the person seeking to set up the estoppel has suffered prejudice by the other's unreasonable acquiescence and there must be something willful or culpable in the silence. Code Civ. Proc. § 1962, subd. 3.

7. Estoppel Ⓒ90(1)

An automobile finance company with knowledge that truck covered by trust receipt and time draft had been delivered by distributor to dealer was not thereby estopped from denying that trust receipt and time draft had been rescinded, so that such knowledge did not relieve distributor from liability thereunder after dealer had sold truck and absconded with the proceeds. Code Civ. Proc. § 1962, subd. 3.

8. Sales Ⓒ479(15)

In action by automobile finance company against distributor to recover unpaid balance of amounts which distributor had agreed by trust receipt and time draft to pay for automobile, evidence that distributor by invoice charged dealer in whose hands automobile had been placed with the automobile, and after disposition of automobile by dealer, made payments to the company, precluded distributor from avoiding liability to company after dealer absconded with proceeds on basis of alleged rescission of trust receipt and time draft arising out of company's knowledge that automobile had been delivered to dealer, notwithstanding payments by distributor to company were allegedly made under threat of suit.

9. Contracts Ⓒ95(4)

It is not legal duress to threaten to or actually take advantage of usual remedy by suit for the enforcement of a debt or obligation.

10. Contracts Ⓒ253

Consent to rescission of a contract is not mutual unless the parties all agree upon the same thing in the same sense. Civ.Code § 1580.

11. Sales Ⓒ479(15)

In action by automobile finance company against distributor to recover unpaid balance of amounts which distributor had agreed by trust receipt and time draft to pay for automobile, evidence did not establish a rescission, waiver and abandonment of the contract between company and distributor. Civ.Code §§ 1580, 1698, 1699.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by the C.I.T. Corporation against John H. Hawley to recover the unpaid balance of amount which defendant had agreed to pay for automobile and truck pursuant to truck receipts and time drafts, wherein defendant filed a cross-complaint for payments made to apply on the purchase price of the automobile and truck. Judgment for defendant, and plaintiff appeals.

Reversed.

Clarence B. Smith, of El Centro, for appellant.

Childers & Roberts, of El Centro, for respondent.

GRIFFIN, Justice.

Appellant corporation is in the business of financing automobile dealers. Respondent was the Studebaker distributor in Imperial county. Appellant floored one sedan automobile and one automobile truck for respondent and accepted as to each a trust receipt and time draft which constituted the agreement of the parties as to each vehicle. Appellant filed this action in two counts to recover the unpaid balance of the amounts which respondent agreed to pay for the automobile and truck, according to the trust receipt-time draft transaction after respondent had placed the vehicles with a subdealer who had sold them and absconded with the proceeds. The case was tried before the court sitting

without a jury, resulting in a judgment in favor of respondent. The judgment also allowed respondent a recovery against appellant on a cross-complaint for payments which respondent had made to appellant to apply on the purchase price of the cars in question after the subdealer had disposed of them. Judgment was duly entered. Appellant moved the court for a new trial, which motion was denied.

On July 6, 1936, the respondent signed a dealer's application for flooring plan accommodations. Thereafter respondent, as distributor for all of Imperial county, purchased Studebaker automobiles which were financed by appellant. On the 28th day of January, 1937, the above-named respondent executed and delivered to appellant wholesale documents consisting of a trust receipt and a time draft for the flooring of three Studebaker sedans, one of which was the sedan in question. The appellant caused the automobile described to be delivered to the respondent at El Centro. The time draft above mentioned was accepted by the respondent. The trust receipt-time draft instrument had the trust receipt printed on one side of the sheet and the time draft on the opposite side. Hawley, the respondent, had been in the habit of leaving automobiles which he had secured in the above-mentioned manner and which had been financed by the appellant in the same manner as above related, with various dealers in Imperial county for display and sale purposes. When appellant's car checker came to Imperial county twice each month, he went to nearly every town in Imperial county to find all of the cars which had been left with the respondent and floored for the respondent on the same terms and conditions as the above cars were left with him. Respondent furnished all Studebaker dealers in Imperial county with all Studebaker cars and trucks sold by such dealers in Imperial county and he received a commission known as an "override" from the Studebaker Corporation for all cars delivered to dealers in Imperial county. The evidence disclosed that if for any reason the dealers with whom Hawley had left the cars had not sold them, the cars so left for display purposes were often returned to the respondent Hawley. Appellant and respondent had no agreement as to where respondent Hawley should keep or store the cars which were financed by appellant. Since Hawley was a distributor and not a mere retail dealer, ap-

pellant did not object to his leaving cars with dealers throughout the county as stated. Between June 11, 1937, and July 2, 1937, appellant, through its agent, checked the automobiles which respondent Hawley was supposed to have in his possession and found the above-described sedan and the 1½-ton truck missing (the 1½-ton truck being the subject of appellant's second cause of action). Appellant made verbal and written demands on respondent immediately, demanding payment of \$752.-65 balance due on the Studebaker sedan above described and also demanded \$752, the balance due on the 1½-ton truck. The 1½-ton truck was delivered to respondent on March 27, 1937. The respondent at the time of such delivery executed and delivered to appellant a trust receipt and time draft in the sum of \$752 as consideration for the flooring of the truck, which time draft was accepted by the respondent.

The evidence disclosed that the respondent Hawley left the 1½-ton truck above described with a dealer at Calexico, Imperial county, California. This dealer, whose name was Quiros, is hereafter referred to as Calexico Motors. The evidence does not show the exact date when the truck was taken from El Centro to Calexico. Respondent Hawley does not contend that he ever asked permission of appellant corporation to take the truck to Calexico or to leave it with Calexico Motors.

The evidence disclosed that respondent Hawley, without the knowledge or consent of appellant, caused the truck to be left with the Calexico dealer with authority to said dealer to sell the truck and that the Calexico dealer disposed of the truck and did not pay either Hawley or appellant corporation, and now respondent's only defense to the second cause of action pertaining to the truck is that he claims that appellant knew that the truck was at Calexico Motors for several weeks before the Calexico dealer sold it and that appellant knew that the Calexico dealer made some alterations as to the frame of the truck and that therefore and thereafter respondent was completely relieved of the obligation created by the trust receipt-time draft transaction and that appellant was estopped from denying that it consented to the placing of the truck in the possession of Calexico Motors.

Respondent first claims that appellant's complaint sets forth only a cause of ac-

tion for conversion; that when respondent established the fact that the property was placed in the hands of a third party with the consent and knowledge of the owner, he was no longer responsible to the owner. The complaint contains many averments essentially necessary to an action for conversion but the complaint also alleges the elements of contract, breach of contract, and damage. The appellant alleged: "That the defendant signed a trust receipt for said automobile and to which there was attached a time draft which was accepted by said defendant. That attached hereto and marked Exhibit 'A' and by reference made a part hereof is a true copy of said trust receipt above mentioned and a true copy of the time draft attached thereto. * * * That plaintiff has made demand upon the defendant for said automobile or for the balance owing on the purchase price thereof. * * * That defendant has failed and neglected to pay the plaintiff the balance of the purchase price of said car, to-wit, \$768.17, or any part thereof except that on June 23rd, 1937, the said defendant paid the plaintiff the sum of \$38.17 to apply as part payment on said car, leaving a net balance of \$730.-00, which is now past due, owing, payable, and unpaid. * * *" There is a similar allegation as to the second count of the complaint. Respondent apparently adopted the view that the action was upon the contract, as his pleadings are based on a theory beyond formal denial of conversion and contain allegations of matters by way of avoidance of the terms of the contract set up in appellant's complaint.

A closely parallel case is presented in *Cass v. Ocean Park Bath Co.*, 45 Cal.App. 656, 188 P. 616. In that case the court, while observing that the complaint was bad for misjoinder of causes of action, pointed out that the defendant's remedy was by demurrer under section 430 of the Code of Civil Procedure and that a failure to demur constituted a waiver of the objection under section 434 of the Code of Civil Procedure, and held that the defendant had breached the contract in failing, on demand, to redeliver the goods entrusted to his care and instructed the trial court to enter judgment in favor of the plaintiff. That case and the instant case proceeded to trial upon the issues joined by the complaint and answer without attack by demurrer. In this case the time draft and trust receipt were signed on the

same day as part of the same transaction and preceded the delivery of the cars to the respondent.

[1,2] Since the trust receipt came into common use as a device to facilitate the sales of automobiles, its nature has been widely discussed by the courts. The weight of opinion seems to be that a trust receipt and a time draft executed at the same time, together constitute a conditional sales contract. That view of the matter was adopted by our Appellate Court in *Commercial Acceptance Trust v. Bailey*, 87 Cal.App. 117, 261 P. 743. It is apparent that the sole purpose of the two instruments, the trust receipt and the time draft, was to provide security for the payment to C.I. T. Corporation of the agreed purchase price of the vehicles delivered to Hawley. The function of the time draft is apparently to fix the time when the obligation should be paid. The sale price of each car is fixed in the trust receipt-time draft. The two instruments were unquestionably made parts of one transaction and should be considered together. Under this interpretation, the transaction was more than the ordinary trust agreement and the relationship was not that of trustor and trustee as ordinarily understood.

Respondent next contends that the contract resulting from the execution and delivery of the time draft and trust receipt to the appellant and the delivery of the cars to the respondent was rescinded by agreement and the court so found. Appellant claims that the evidence was wholly insufficient to support any such conclusion of law. The trial court found that "while said so-called trust receipt was in full force and effect and before any breach thereof, the plaintiff and the defendant entered into an oral agreement that the same be waived, abandoned and rescinded as to the automobile described * * * and that the same was then and there so mutually waived, abandoned and rescinded between the parties. * * * That the plaintiff consented to the change in possession of the two automobiles referred to in the plaintiff's complaint and thus waived the terms of said trust receipt and is estopped to claim said automobiles or the proceeds thereof from the defendant."

[3,4] As to the second count, it is agreed that the truck was delivered to respondent under the written trust receipt-time draft. Possession of the truck was given to Calexico Motors by respondent.

The only evidence supporting respondent's contention and the court's finding that the parties entered into an oral agreement that the trust receipt-time draft was rescinded and waived for the reason that appellant was estopped from denying that possession of the truck was transferred to the Calexico Motors without its consent, was the fact of its knowledge of the possession being in the Calexico Motors when it was checked by the agent of appellant and he observed alterations being made thereon in the place of business of Calexico Motors. We are thoroughly convinced that this evidence falls short of supporting the finding that the parties mutually agreed that a rescission of the trust receipt-time draft was thereby effected. The mere knowledge of the presence of the truck at the Calexico Motors under the circumstances related would not operate as an estoppel as found by the court. The trust receipt-time draft did not preclude respondent from giving possession of the truck to any of his agents in Imperial Valley. Appellants at all times treated the truck as in the possession of respondent, as disclosed by their checking sheet record.

[5-7] An estoppel may arise from silence as well as from words or conduct. But this is only where there is a duty to speak, and where the party upon whom such duty rests has an opportunity to speak, and, knowing that the circumstances require him to speak, remains silent. The circumstances attending the entire transaction must be such as to make it reasonably probable that the person seeking to set up the estoppel has suffered prejudice by the other's unreasonable acquiescence. There must be something wilful or culpable in the silence. *Eltinge v. Santos*, 171 Cal. 278, 152 P. 915, Ann.Cas.1917A, 1143; *Stern v. Sunset Road Oil Co.*, 47 Cal.App. 334, 190 P. 651; Code Civ.Proc., sec. 1962, subd. 3. For the reasons expressed, the judgment as to the second count of necessity must be reversed.

[8] The Studebaker sedan described in the first cause of action of appellant's complaint was originally delivered to respondent Hawley at El Centro. Hawley apparently had it on his floor at El Centro for several weeks and then permitted it to be left with the Calexico dealer, known as Calexico Motors, with authority to sell the same. The Calexico dealer sold the sedan and did not pay either Hawley or appellant corporation.

The only additional substantial fact that can be offered to support respondent's theory and the court's finding that a rescission of the trust receipt-time draft was effected must be based on a telephone conversation. The testimony of respondent Hawley in relation thereto was as follows:

"Q. (By Mr. Childers.) That conversation was with Mr. Schrader, or whoever it was you talked to? A. I immediately called C. I. T. after having been requested to deliver the cars to Calexico by Mr. Jenkins and Mr. Schrader O.K.'d, or told me that I might deliver them to Mr. Jenkins to take to Calexico Motors.

"Q. Who is Mr. Jenkins? A. Mr. Jenkins was the Pacific Coast representative of the Studebaker Corporation.

"The Court: May I ask, did you say Mr. Schrader represented C. I. T.? A. C. I. T.

"The Court: He is the local representative of C. I. T.? A. Yes, sir.

"Q. Then what did you do? A. I called Mr. Jenkins back to Calexico and it happened that it hadn't been over ten or fifteen minutes, so I called him and told him C. I. T. had O.K.'d the removal of the cars.

"Q. What did you next do? A. I had to leave my business, place of business where the cars were and was gone for about two hours, and when I got back the cars had been taken. Mr. Jenkins had brought a couple of drivers up."

During the cross-examination of Hawley he testified as follows:

"Q. (By Mr. Smith): When you called Mr. Schrader, just what did you say to him and what did he say to you? A. Well, so far as the exact words are concerned, I couldn't repeat them, but I had been requested by Mr. Jenkins to let him take the cars to Calexico and I told Mr. Schrader about that request and Mr. Schrader granted the request.

"Q. Tell what you said in substance and what he said. A. That would be pretty hard to recall those exact words. I immediately called Mr. Jenkins back after talking to Mr. Schrader and told him the request had been granted by C. I. T.

"Q. Let's go back and get what was said by Mr. Schrader and what was said by you. A. I haven't any copy of it, all I could give you is an idea of what he said.

"Q. Did you tell him Mr. Jenkins the Pacific Coast factory representative wanted to take cars to Calexico? A. That is right.

"Q. What did he say? A. He granted that request.

"Q. What did he say? A. I don't remember.

"Q. Is that all that was said, just a short conversation? A. Just a short conversation.

"Q. You didn't tell him that you were going to sell the cars to Calexico Motors? A. I did not.

"Q. Or did you tell him whether or not the cars would be returned to El Centro? A. I did not.

"Q. Did you tell him that he was out of cars down there and you wanted to let him take them for a few days? A. I don't think so. Mr. Jenkins may have given some reason for taking them down there and I might have told them the reason Mr. Jenkins wanted them.

"Q. You had, before that time, loaned them cars without selling them, to let them have to show in their show room? A. On the opening Mr. Jenkins made the same request.

"Q. On that occasion you just loaned them and brought them back? A. I think most of them were returned. I am pretty sure one sold down there and they paid C. I. T. for it."

The testimony of Mr. Schrader, the agent for C. I. T. Corporation, regarding the telephone conversation was as follows:

"Q. (By Mr. Smith): Mr. Schrader, you are the El Centro manager of C. I. T.? A. Yes, sir.

"Q. And do you recall a telephone conversation with Mr. Hawley on or about the latter part of May, 1937, in which he asked something about Mr. Jenkins wanting a car to take to Calexico Motors? A. I do. * * *

"Q. What did he say to you and what did you say to him in that conversation? A. Hawley called up and asked for permission to take the cars down to Calexico Motors and he wanted to get my O. K.

"Q. What did you say? A. I said, 'If you are going to do that, Hawley, you should go ahead and change title to floor in the name of Calexico Motors like we

handled it previously,' and he said, 'No, it is going to be down there for a few days, and in their storage, where and just as a loan, and it will be returned,' and I said, 'You do so at your own risk,' because, after all, it is floored in Mr. Hawley. So he took it down, and the next thing I knew, the cars were there. * * *

"Q. You have no agreement with him as to where he could store cars, did you? A. No, he could store them anywhere he wanted to."

From this conversation as given by both Hawley and Schrader, it is quite apparent that Hawley never did say anything to Schrader which would lead Schrader or the C. I. T. Corporation to believe that Hawley expected to be relieved of the obligation of paying for or accounting for the truck and automobile.

One of appellant's witnesses testified on cross-examination, in reference to how Hawley handled similar transactions when sales were effected by one of his subdealers, as follows:

"Q. (By Mr. Smith): Explain now. A. Mr. Hawley, as distributor for Imperial County for passenger cars, would have his own stock of cars in his possession on which he had a flooring arrangement for them with C. I. T. If he wanted to sell a car to one of his subdealers he would call C. I. T. to find out if that subdealer had a line of credit with us and could agree to pay cash to him. The subdealer would come in and take possession of the car and the two of them, sometimes one of them separately, would come to our office and sign a trust receipt for the new dealer and Mr. Hawley would sign a bill of sale passing title, selling it for the full price to this dealer. * * *

"Q. That was never done with these two cars? A. It was never asked of us. He had done it on other occasions with the Calexico Motors, * * *."

In addition to this, respondent offered in evidence an invoice in which he charged the sedan and the truck to the Calexico dealer. It reads in part as follows:

"Valens Oil Co.

"Independently Owned By

J. H. Hawley. . .

"Sold to Calexico Motors. . .

"1 St. Regis Sedan...\$818.60

"For Resale Delivered By

J. H. H...."

Also dated "6-24-1937" and entitled as above:

"1 1-½ ton truck \$850.00

". . . For Resale Delivered by JHH."

By this invoice, the intentions of respondent became quite apparent. If the two vehicles in question had been billed and an invoice sent by C. I. T. Corporation to the Calexico dealer, then there would be some force to respondent's argument that C. I. T. Corporation had abandoned and waived its contract with him and had agreed to look to Calexico Motors for payment, but by the invoice mentioned, respondent personally billed the Calexico dealer with the two vehicles for money due Mr. Hawley. That act certainly was not consistent with his present argument that C. I. T. Corporation had waived and abandoned Hawley's written obligation. Appellant Hawley recognized his obligation to C. I. T. Corporation after the Calexico dealer had disposed of the sedan and the truck by making payments on these contracts to C. I. T. Corporation. There is no dispute that the payments were made several weeks after the cars had been taken to the Calexico dealer and even after they had been sold by the Calexico dealer and after he had absconded. Respondent never denied his obligations to appellant until after suit was filed.

[9] It is claimed by respondent that the payments were made under threat of suit and the trial court allowed a recovery of the amount so paid. It is not legal duress to threaten to or actually take advantage of the usual remedy by suit for the enforcement of a debt or obligation. *Holt v. Thomas*, 105 Cal. 273, 38 P. 891; *Burke v. Gould*, 105 Cal. 277, 38 P. 733; *Rooney v. Snow*, 131 Cal. 51, 63 P. 155.

[10,11] Hawley endeavored to collect for the two vehicles from the Calexico dealer after the Calexico dealer had sold them, but before he had absconded. We note in reading the transcript of the evidence that two Studebaker sedans were taken to the Calexico dealer on the day of the telephone conversation and that Hawley himself later went to Calexico and brought one of the sedans back to El Centro where he, Hawley, sold it. Respondent does not contend that there was any other act, written document, or oral conversation which relieved him of his

responsibility except the telephone conversation mentioned. Assuming the correctness of the telephone conversation as represented by respondent, we are unable to accept the finding that this evidence sufficiently supported the ruling that the facts related amounted to a rescission, waiver and abandonment of the contract between appellant and respondent. Consent is not mutual, unless the parties all agree upon the same thing in the same sense. Sec. 1580, Civ.Code. From the foregoing, it is plain that there never was a meeting of the minds to abandon or rescind the obligations of respondent. *Western Oil, etc., Co. v. Sullivan*, 128 Cal.App. 319, 17 P.2d 156; Civ.Code, secs. 1698, 1699; *Miller v. Steen*, 34 Cal. 138; *Hogan v. Anthony*, 52 Cal.App. 158, 198 P. 47; *Sanborn v. Ballanfonte*, 98 Cal.App. 482, 277 P. 152. The motion for a new trial should have been granted.

For the reasons expressed, the judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.



34 Cal.App.2d 179

In re O'DEA'S ESTATE.

BROWN v. O'DEA et al.
Civ. 12181.

District Court of Appeal, Second District,
Division 2, California.

Aug. 21, 1939.

Hearing Denied Oct. 19, 1939.

1. Executors and administrators ⇨32(2)

Where letters of administration have been granted to any person other than the surviving spouse, child, parent, brother or sister of the intestate, or the public administrator, any one of them who is competent may file a petition for the revocation of letters theretofore issued and pray that letters of administration be issued to the petitioner. Probate Code, § 450.

2. Executors and administrators ⇨29(5)

A finding by probate court that petitioner for letters of administration is "the next of kin," and an "heir at law" of deces-

ed, and "entitled" to letters of administration, is not *res judicata* in a subsequent proceeding under statute by the public administrator to have the letters revoked and himself appointed. Probate Code, § 450.

3. Executors and administrators ⇨32(1)

A person having superior right to letters of administration can directly attack the issue of letters of administration to one having a secondary right thereto, by filing a petition for the revocation of such letters of administration. Probate Code, § 450.

4. Executors and administrators ⇨32(1)

Where letters of administration were issued to second cousin of intestate, the public administrator, upon learning that there were three nonresident first cousins of intestate, was entitled under statute to petition for revocation of the letters and for appointment of himself as administrator. Probate Code, § 450.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Michael F. O'Dea, sometimes known as M. F. O'Dea, deceased, wherein Harriett T. O'Dea and the Citizens National Trust & Savings Bank were appointed administrators and Ben H. Brown, public administrator, filed petition for revocation of letters of administration, and requesting issuance of letters of administration to himself. From an order granting a judgment of nonsuit and dismissal of the petition, Ben H. Brown appeals.

Order reversed.

J. H. O'Connor, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for appellant.

Bailie, Turner & Lake, and Frederick W. Lake, of Los Angeles, for respondents.

McCOMB, Justice.

From an order of the superior court sitting in probate, granting a judgment of nonsuit and dismissal of appellant's petition for revocation of letters of administration issued to respondents and requesting the issuance of letters of administration to himself, appellant appeals.

These are the essential facts:

January 22, 1938, Michael F. O'Dea died intestate at Los Angeles. Thereafter letters of administration were issued to respondent Harriett T. O'Dea, a second

cousin of decedent, and to respondent Citizens National Trust and Savings Bank of Los Angeles, who was nominated by Miss O'Dea as coadministrator. Subsequently, upon learning that there were three non-resident, first cousins of decedent, appellant filed a petition to have the letters of administration theretofore issued revoked and to have himself appointed as administrator of decedent's estate. The probate judge sustained an objection to the introduction of any evidence and granted a judgment of nonsuit and dismissal of the petition.

These are the questions to be determined:

First: Does section 450 of the Probate Code authorize the public administrator, after letters of administration have been granted to another, upon learning that he had a prior right to said letters, to petition for revocation of the letters of administration theretofore issued and for appointment of himself as administrator?

Second: Where, after a hearing of the petition for letters of administration, the probate court makes a finding that petitioner is "the next of kin" and an "heir at law" of decedent and "entitled" to letters of administration as such, is such finding res judicata in a subsequent proceeding under section 450 of the Probate Code, when evidence is offered to prove that the prior petitioner was not "the next of kin" or an "heir at law" or "entitled" to letters of administration?

[1] The first question must be answered in the affirmative. The law is settled in California that, where letters of administration have been granted to any person other than the surviving (1) spouse, (2) child, (3) parent, (4) brother, or (5) sister of the intestate, or (6) the public administrator, any one of them who is competent may file a petition for the revocation of the letters theretofore issued and pray that letters of administration be issued to the petitioner. Sec. 450, Probate Code; Estate of Way, 29 Cal.App.2d 669, 673, 85 P.2d 563.

[2-4] The second question must be answered in the negative. The law is settled in California that under section 450 of the Probate Code a person having superior right to letters of administration can directly attack the issuance of letters of administration to one having a secondary right thereto by filing a petition for the

revocation of such letters of administration. Sec. 450, Probate Code; Estate of Way, 1938, 29 Cal.App.2d 669, 676, 85 P.2d 563.

The questions and arguments now being urged before us were presented to this court in Estate of Way, supra, and were determined adversely to the contentions made by respondents here. Thereafter on February 9, 1939, the Supreme Court denied a petition for a hearing of Estate of Way, supra, thereby overruling prior decisions which might appear to state a contrary rule, such as Estate of Nolan, 1904, 145 Cal. 559, 79 P. 428; Estate of Nelson, 1914, 167 Cal. 321, 139 P. 692; Estate of Davis, 1906, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am.St.Rep. 105; Lynch v. Rooney, 1896, 112 Cal. 279, 44 P. 565; Estate of Calhoun, July, 1938, 27 Cal.App.2d 706, 81 P.2d 605.

For the foregoing reasons, the order appealed from is reversed.

WOOD, Acting Presiding Justice.

I concur in the judgment. In my opinion Estate of Way, supra, does not overrule any prior decision.



34 Cal.App.2d 327

PEOPLE v. NICHOLSON.

Cr. 386.

District Court of Appeal, Fourth District,
California.

Aug. 9, 1939.

Rehearing Granted Aug. 16, 1939.

On Rehearing Aug. 24, 1939.

I. Criminal law §1023(2)

Where defendant was resentenced because of error in pronouncement of judgment before issue of defendant's insanity was tried, the judgment thereafter entered was a "final judgment," and defendant had the right to appeal therefrom and from the order denying him a new trial. Pen.Code, § 1237.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

2. Criminal law ⇨1023(8)

Order denying defendant's motion in arrest of judgment was not an "appealable order."

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

3. Criminal law ⇨1202(6)

Where information in burglary prosecution complied with requirements of the section of the Penal Code dealing with pleading of prior convictions, that part of the judgment which rested on the charge of prior convictions was not void merely because the service of terms in connection with convictions was not alleged in the information. Pen.Code, § 969.

4. Criminal law ⇨1202(3)

Where defendant in burglary prosecution was charged with two-prior convictions, it was necessary that the fact that such prior terms had been served should be established either by evidence, or by defendant's admission before judgment was pronounced. Pen.Code, § 969.

5. Criminal law ⇨1202(3)

In burglary prosecution, wherein defendant was charged with two prior convictions, evidence failed to establish the service of a term in connection with each of the prior convictions charged, and failed to sustain that part of the judgment adjudging defendant to be an habitual criminal. Pen.Code, § 969.

6. Criminal law ⇨1202(7)

Where evidence in burglary prosecution failed to establish that defendant had served sentences under prior convictions charged in information, but did establish that he had served sentences under prior convictions other than those charged, and that he was an habitual criminal, he would not be freed from the habitual criminal charge and re-sentenced as an ordinary offender, but the cause would be remanded in its entirety for a new trial. Pen.Code, § 969.

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

E. V. Nicholson was convicted of burglary and found to be an habitual criminal, and he appeals.

Reversed, and cause remanded for a new trial.

Francis C. Mackall, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with the crime of burglary. The information further charged him with two prior convictions, it being alleged that on or about December 21, 1922, he was, in the superior court of Los Angeles county, convicted of the crime of burglary and sentenced to San Quentin and that on or about October 28, 1924, he was, in the superior court of San Diego county, convicted of the crime of burglary and sentenced to Folsom. He was arraigned on June 24, 1935, and pleaded not guilty and not guilty by reason of insanity, but admitted the prior convictions of two felonies. A jury found him guilty of burglary in the second degree and some days later found that he was sane at the time of the commission of the offense. During the trial a statement made by the defendant to the district attorney was admitted into evidence without objection. In this statement, the defendant admitted that he had served eighteen months in San Quentin and about seven years in Folsom, as well as several terms in prisons in other states.

The verdict on the not guilty plea was rendered on July 16, 1935. After that verdict was returned it was stipulated that the same jury might try the issue of insanity and the court set the hearing on that plea for July 23, 1935, and fixed the time for pronouncing sentence for July 20, 1935. On July 20, 1935, after the defendant had stated that he had no legal cause to show why sentence should not be pronounced at that time, the court adjudged him an habitual criminal and sentenced him to imprisonment in Folsom for the term prescribed by law. It was then ordered that he be held in the county jail until after the trial on the plea of insanity "to be held on July 23rd, 1935". On that day the jury returned a verdict finding him sane on the date charged in the information and, thereafter, he was taken to prison. In 1937, he sought to obtain his discharge by a writ of habeas corpus alleging the illegality of the commitment, in that he had been sentenced before a trial on his plea of insanity. The court held that in so far as shown by the record before it the judgment was not void on its face and

the writ was discharged. In *re Nicholson*, 24 Cal.App.2d 15, 74 P.2d 288.

On May 3, 1939, the defendant filed a notice in the superior court of Riverside county that on May 4, he would move for an order vacating and setting aside the judgment upon the ground that the same "was prematurely entered and void". On May 4, this motion was argued. Without directly deciding the motion the court, after reciting that an information was filed charging the defendant with burglary together with two prior convictions of a felony, that the defendant pleaded not guilty and not guilty by reason of insanity, that on July 16, 1935, a jury found against and admitted the two prior convictions, him on his plea of not guilty, that on July 20, 1935, he was adjudged to be an habitual criminal and sentenced to Folsom for life, that on July 23, 1935, a jury found him to be sane, and that without further order or judgment of the court he was taken to and confined in Folsom, found that the commitment issued was erroneous and ordered the defendant returned to Riverside on May 22, 1939, "for the purpose of having judgment pronounced in accordance with the law". On that day, a motion for a new trial on all statutory grounds and on the ground that sentence had not been passed within the time prescribed by law was made and denied. A motion in arrest of judgment on the same grounds was made and denied and the court then entered an order adjudging and decreeing the defendant to be an habitual criminal, that he be punished by imprisonment in the state prison at Folsom for life, that he should not be eligible for parole until he had served at least twelve years, and that he be remanded to custody. Thereupon, the defendant appealed from the order denying the motion for a new trial, from the order denying the motion in arrest of judgment, and from the judgment.

The appellant does not here complain of the fact that he was resentenced, in so far as this affects the error in pronouncing judgment before the issue of insanity was tried. The correction of such errors by bringing back the defendant and resentencing him has been frequently upheld. See *People v. Marshall*, 209 Cal. 540, 289 P. 629; In *re Lee*, 177 Cal. 690, 171 P. 958; *People v. Wilson*, 15 Cal.App.2d 172, 59 P.2d 187; *People v. Stratton*, 133 Cal. App. 309, 24 P.2d 174. No contention is here made that the fact that the appellant

had served terms in prison on the two prior convictions charged was not sufficiently established. This fact was proved by the admission of the appellant, received in evidence without objection. The sole contention here made is that the habitual criminal portion of the judgment is void because the information failed to allege, in connection with the prior convictions charged, that the appellant had served terms therefor in a prison or penitentiary. We are asked to reverse the judgment with directions to sentence the appellant without considering the prior convictions, and not as an habitual criminal.

For the purposes of this opinion we will assume that a right of appeal existed from the orders denying the motions and from what may be termed the amended judgment. See *People v. Fry*, 137 Cal.App. 525, 31 P.2d 204; *People v. Marshall*, 209 Cal. 540, 289 P. 629.

The appellant relies upon *People v. Marshall*, 99 Cal.App. 224, 278 P. 258; *People v. McKinley*, 2 Cal.2d 133, 39 P. 2d 411; *People v. Dawson*, 210 Cal. 366, 292 P. 267, and *People v. Arnest*, 133 Cal. App. 114, 23 P.2d 812. The first two of these cases have no bearing on the present problem. In *People v. Marshall*, supra, no trial was ever had on the insanity issue and it was held that the trial court had no jurisdiction to pronounce sentence without taking evidence on the insanity plea. In *People v. McKinley*, supra, the court held that it was not necessary for the judgment to contain a statement that the defendant had served a prison term upon a prior conviction where the fact was alleged, proved and found by the jury. The other two cases contain some language which tends to support the appellant's contention. In *People v. Dawson*, supra, after noting that one of the requirements of section 667 of the Penal Code is that the defendant must have served a term in some penal institution in connection with a prior conviction, it is stated that "the necessary facts must be both pleaded and proved". [210 Cal. 366, 292 P. 269.] Immediately thereafter, however, the court points out that the case of *People v. Sampson*, 99 Cal.App. 306, 278 P. 492, recognizes the fact that, in establishing a foundation for a valid judgment imposing a more severe sentence on account of a previous conviction of a felony, "it is essential that, in some manner it appear that he has 'served a term therefor' in some

penal institution". The opinion in *People v. Arnest*, supra, also contains language to the effect that if the information fails to charge that a term in prison was served it fails to charge facts essential to support a judgment based upon a prior conviction. In both of those cases, however, the defendant pleaded guilty to the charge as contained in the information and in effect it was held that the fact that the defendant had served a term upon a prior conviction was neither alleged nor proved. It should also be noted that neither of those cases mentioned or discussed section 969 of the Penal Code, which clearly provides that in charging a previous conviction of a felony in an indictment or information it is sufficient to state that the defendant had previously, in a named court, been convicted of a felony.

In the case of *In re Boatwright*, 216 Cal. 677, 15 P.2d 755, 756, the defendant sought his release on habeas corpus after having been convicted of petit theft with prior convictions. The information alleged, as to each of the prior convictions, that the judgment had been pronounced and had never been reversed or set aside, but failed to charge that a term had been served in any penal institution. The defendant admitted the prior convictions "as charged in the information" and pleaded not guilty. No evidence concerning the prior convictions was introduced at the trial but when the defendant's statement was taken, before judgment was pronounced, he admitted that he had served time in penal institutions in connection with three of the former convictions. No appeal was taken from the judgment but after the defendant had served the requisite time, as for a first offense, the habeas corpus proceeding was brought. The court held that the information was sufficient in the light of the provisions of section 969 of the Penal Code, but held that proof of service of terms in penal institutions under the prior convictions was essential in order to give the court jurisdiction to adjudge the defendant an habitual criminal. The court said that while the better practice was to allege the service of terms under the prior convictions, the defendant could not be said to have suffered any prejudice by the failure to allege this in the information, inasmuch as he admitted before the judgment was pronounced that he had served such terms. In referring to *People v. Dawson*, supra, and *People v. Samson*, supra, the court said: "The most

that can be said for those cases is that, while the information did not charge service of time under said convictions, it was not shown, as a matter of fact, that the defendants in those cases had actually served a term under said prior convictions." The defendant was then ordered discharged for another reason.

In *People v. Birdsell*, 6 Cal.App.2d 749, 45 P.2d 378, the information failed to allege that the defendant had served terms in connection with prior convictions which were charged but upon arraignment he admitted that he had served a separate term in prison on each of the prior convictions. The court held that this was sufficient. In *People v. Harvey*, 137 Cal.App. 22, 29 P. 2d 787, the serving of time was not alleged in the information but the record showed that the defendant had admitted that fact, and this also was held sufficient. Similar holdings are to be found in *People v. Birdsell*, 21 Cal.App.2d 682, 70 P.2d 231, and in *People v. Fry*, supra. In the case of *In re Boatwright*, 119 Cal.App 420, 6 P.2d 972, 973, the court said: "Petitioner makes the further point that the information is defective in that it does not allege that as a result of the prior convictions he served terms in penal institutions. There is no merit in the point for the reason that section 969 of the Penal Code as amended in 1927 (St.1927, p. 1152), prescribes the form of allegation to be followed in charging a prior conviction, and the form here used follows the one there prescribed. It is true that in order to bring an accused within the provisions of section 667 it is essential to establish the fact in the trial court, either by evidence introduced to that effect, or by admission of the accused, that as a result of the prior convictions of felony he has served terms in penal institutions."

In the instant case the information complied with the requirements of section 969 of the Penal Code and evidence was received, without objection, in the form of a statement from the appellant himself admitting that he had served terms in connection with the prior convictions with which he was charged. It follows that that portion of the judgment which rests upon charges of prior convictions is not void.

The orders and judgment are affirmed.

We concur: GRIFFIN, J.; HAINES
Justice pro tem.

On Rehearing.

BARNARD, Presiding Justice.

The defendant was charged with the crime of burglary. The information further charged two prior convictions, it being alleged that on or about December 21, 1922, he was, in the superior court of Los Angeles county, convicted of the crime of burglary and sentenced to San Quentin and that on October 28, 1924, he was, in the superior court of San Diego county, convicted of the crime of burglary and sentenced to Folsom. He was arraigned on June 24, 1935, and pleaded not guilty and not guilty by reason of insanity, but admitted the prior convictions as charged.

On July 16, 1935, a jury found him guilty of burglary in the second degree. After that verdict was returned it was stipulated that the same jury might try the issue of insanity and the court set the hearing on that plea for July 23, 1935, and fixed the time for pronouncing sentence for July 20, 1935. On that day, the court adjudged the defendant an habitual criminal and sentenced him to imprisonment in Folsom for the term prescribed by law. It was then ordered that he be held in the county jail until after the trial on the plea of insanity "to be held on July 23rd, 1935". On that day, the jury returned a verdict finding him sane on the date charged in the information and, thereafter, he was taken to prison.

On May 4, 1939, in the superior court of Riverside county the defendant moved for an order vacating and setting aside the judgment upon the ground that the same "was prematurely entered and void". Without directly deciding the motion the court, after reciting most of the facts above stated, found that the commitment had erroneously issued and ordered the defendant returned to court on May 22, 1939, "for the purpose of having judgment pronounced in accordance with law". On that day, a motion for a new trial on all statutory grounds and on the ground that sentence had not been pronounced within the time prescribed by law was made and denied. A motion in arrest of judgment on the same grounds was made and denied and the court then entered an order adjudging and decreeing the defendant to be an habitual criminal, that he be punished by imprisonment in the state prison at Folsom for life, that he should not be eligible for parole until he had served at least 12 years, and that he be remanded to custody.

Thereupon, the defendant appealed from the order denying his motion for a new trial, from the order denying the motion in arrest of judgment and from the judgment.

[1,2] The appellant does not here complain of the fact that he was resentenced insofar as this affects the error in pronouncing judgment before the issue of insanity was tried. The correction of such errors by bringing back the defendant and resentencing him has been frequently upheld. See, *People v. Marshall*, 209 Cal. 540, 289 P. 629; *In re Lee*, 177 Cal. 690, 171 P. 958; *People v. Wilson*, 15 Cal.App. 2d 172, 59 P.2d 187; *People v. Stratton*, 133 Cal.App. 309, 24 P.2d 174. The respondent, however, contends that there was no right of appeal here since the same points might have been presented upon an appeal from the original judgment. In effect, the motion to vacate the original judgment was granted. The judgment thereafter entered was a final judgment and the appellant had the right to appeal therefrom and from the order denying a new trial. Penal Code, sec. 1237; see, also, *People v. Fry*, 137 Cal.App. 525, 31 P.2d 204; *People v. Marshall*, supra. The order denying the motion in arrest of judgment was not appealable.

The appellant contends that that portion of the judgment which adjudged him to be an habitual criminal is void because the information failed to allege, in connection with the prior convictions charged, that he had served terms therefor in a prison or penitentiary. It should be noted that while he admitted the priors as charged, this was not an admission that terms had been served. He relies upon *People v. Marshall*, 99 Cal.App. 224, 278 P. 258; *People v. McKinley*, 2 Cal.2d 133, 39 P.2d 411; *People v. Dawson*, 210 Cal. 366, 292 P. 267, and *People v. Arnest*, 133 Cal.App. 114, 23 P.2d 812. The first two of these cases have no bearing on the present problem. In *People v. Marshall*, supra, no trial was had on the insanity issue and it was held that the court had no jurisdiction to pronounce sentence without hearing evidence on the insanity plea. In *People v. McKinley*, supra, the court held that it was not necessary for the judgment to contain a statement that the defendant had served a prior term for a prior conviction where that fact was alleged, proved and found by the jury. The other two cases contain some language which tends to support the appellant's contention. In

People v. Dawson, *supra*, after noting that one of the requirements of section 667 of the Penal Code is that the defendant must have served a term in some penal institution in connection with a prior conviction, it is stated that "the necessary facts must be both pleaded and proved". Immediately thereafter, however, the court points out that the case of *People v. Sampson*, 99 Cal. App. 306, 278 P. 492, recognizes the fact that, in establishing a foundation for a valid judgment imposing a more severe sentence on account of a previous conviction of a felony, "it is essential that in some manner it appear that he has 'served a term therefor' in some penal institution". The opinion in *People v. Arnest*, *supra*, also contains language to the effect that if the information fails to charge that a term in prison was served it fails to charge facts essential to support a judgment based upon a prior conviction. In both of these cases, however, the defendant had pleaded guilty and, in effect, it was held that the fact that he had served a term upon a prior conviction was neither alleged nor proved. It should also be noted that neither of those cases mentioned or discussed section 969 of the Penal Code, which clearly provides that in charging a previous conviction of a felony in an indictment or information it is sufficient to state that the defendant had previously, in a named court, been convicted of a felony.

In the case of *In re Boatwright*, 216 Cal. 677, 15 P.2d 755, the defendant sought his release on habeas corpus after having been convicted of petit theft with prior convictions. The information alleged, as to each of the prior convictions, that the judgment had been pronounced and had never been reversed or set aside, but failed to charge that a term had been served in any penal institution. The defendant admitted the prior convictions "as charged in the information" and pleaded not guilty. No evidence concerning the prior convictions was introduced at the trial but when the defendant's statement was taken, before judgment was pronounced, he admitted that he had served time in penal institutions in connection with three of the former convictions. No appeal was taken from the judgment but after the defendant had served the requisite time, as for a first offense, the habeas corpus proceeding was brought. The court held that the information was sufficient in the light of the provisions of section 969 of the Penal

Code, but held that proof of service of terms in penal institutions under the prior convictions was essential in order to give the court jurisdiction to adjudge the defendant an habitual criminal. The court said that while the better practice was to allege the service of terms under the prior convictions, the defendant could not be said to have suffered any prejudice by the failure to allege this in the information, inasmuch as he admitted before the judgment was pronounced that he had served such terms. In referring to *People v. Dawson*, *supra*, and *People v. Sampson*, *supra*, the court said: "The most that can be said for those cases is that, while the information did not charge service of time under said convictions, it was not shown, as a matter of fact, that the defendants in those cases had actually served a term under said prior convictions." The defendant was then ordered discharged for another reason.

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[3] In the instant case the information complied with the requirements of section 969 of the Penal Code and we therefore hold that that part of the judgment which rests upon the charge of prior convictions was not void merely because the service of terms in connection with those convictions was not alleged in the information.

[4] It was necessary, however, that the fact that such terms had been served should be established either by evidence or by the admission of the appellant before judgment was pronounced. It is next contended by the appellant that the service of terms in connection with both of the particular prior convictions with which he was charged was not here established ei-

ther by his admission or by the evidence. This contention must be sustained.

[5] During the trial on the insanity issue a statement made by the appellant to the district attorney and taken down by a reporter was, by stipulation, received and read into evidence. In this statement the appellant admitted that he had served 18 months in San Quentin, although he stated that he was there in 1921 upon a conviction in San Diego on a charge of burglary. He further admitted that he went to Folsom in 1924 upon conviction in San Diego of a charge of first degree burglary and that he there served "seven years or more". He further stated that he served a term in the state prison of Arizona "for counterfeiting and robbing box cars", that he served a term for burglary in the state prison in Columbus, Ohio, and that he served a term of three years and four months in the state prison in Colorado, from 1914 to 1917. He further stated that he was "wanted in Arizona for several different charges." While he admitted having served terms upon five prior convictions, one of which corresponded to one of those alleged in the information, none of the others corresponded to the other prior with which he was charged. As a result, the evidence fails to establish the service of a term in connection with each of the prior convictions charged and fails to sustain that part of the judgment adjudging the appellant to be an habitual criminal.

Charges of prior convictions affect the circumstances surrounding the commission of a new offense and are to be considered for their effect upon the new offense which is charged. The proving of such prior convictions is a statutory proceeding and since the amendment of section 969a of the Penal Code, in 1931, there is no statutory authorization for passing upon the question as to whether such convictions have been suffered other than in connection with the new offense charged and by the same jury. *People v. Ysabel*, 28 Cal.App.2d 259, 82 P.2d 476. It is not practicable, therefore, by a reversal of that part of this judgment affecting the prior convictions, to remand the cause for further trial on that issue. Such a course was followed in *People v. Willison*, 116 Cal.App. 157, 2 P.2d 543. But, in that case, the new offense charged was committed and the judgment was pronounced prior to the amendment of section 969a in 1931.

In a number of cases where there was a failure to establish the fact that terms had been served in connection with prior convictions charged, the judgment has been modified by eliminating that portion based upon the prior convictions while affirming the remainder, or the judgment has been reversed with instructions to the trial court to resentence the defendant on a similar basis. *People v. Dawson*, supra; *People v. Arnest*, supra; *People v. Lohr*, 28 Cal. App.2d 397, 82 P.2d 615; *People v. Valdez*, 3 Cal.App.2d 700, 40 P.2d 592; *People v. Hayes*, 3 Cal.App.2d 59, 39 P.2d 213; *People v. Pace*, 2 Cal.App.2d 464, 38 P.2d 202; *People v. d'A Philippo*, 220 Cal. 620, 32 P.2d 962; *People v. Shaw*, 137 Cal. App. 533, 30 P.2d 1031. In all or nearly all of these cases it appears either that the defendant could not have been convicted as an habitual criminal, or that it did not appear that the defendant had actually served terms on the requisite number of prior convictions.

[6] We are here confronted with a somewhat different situation. While there is a variance between the charges of prior convictions contained in the information and the established facts with reference to terms actually served by the appellant in connection with prior convictions of felony, it appears from the admission of the appellant that two such terms were actually served in this state and at least three such terms were served in other states. While ample facts were established to sustain an adjudication that the appellant was an habitual criminal that part of the judgment cannot stand because of a technical error. Under such circumstances, the appellant should not be freed from the habitual criminal charge and resentenced as an ordinary offender or even as one who has suffered one prior conviction. He has appealed from the entire judgment and we are at liberty to treat the case as one where error not only appears in connection with one of the issues but where that issue is directly related to and intimately connected with the other issue. It would seem that upon a retrial evidence would be available to show that the appellant had served terms upon two prior convictions in this state. It might also be possible to procure evidence of the serving of terms upon one or more of the prior convictions in other states which were here admitted by the appellant. In such event, the information could still be amended to charge

such further priors since the charge upon the new offense would still be pending.

The appeal from the order denying the motion in arrest of judgment is dismissed. The appeals from the judgment and from the order denying the motion for a new trial are reversed and the cause in its entirety is remanded for a new trial.

We concur: GRIFFIN, J.; HAINES, Justice pro tem.



34 Cal.App.2d 278

PEOPLE v. JEFFERSON.

Cr. 3197.

District Court of Appeal, Second District,
Division 1, California.

Aug. 22, 1939.

1. Homicide ☞188(3)

While, generally, the reputation of deceased cannot be given in evidence, an exception arises where the plea of self-defense is interposed and the evidence leaves it in doubt whether the deceased was the aggressor, or where the circumstances attending the homicide render it doubtful whether defendant was justified in believing himself in imminent danger at the hands of deceased.

2. Homicide ☞188(2)

In murder prosecution, evidence of reputation of deceased, unknown to defendant at time of homicide, must be limited to question as to who was the assailant, but where such reputation was known to defendant, evidence thereof is admissible, not only to determine the aggressor but also as bearing on question whether defendant was justified in believing himself in imminent danger.

3. Homicide ☞188(1)

In murder prosecution, evidence of reputation of deceased should be confined to the traits of character which are in issue, and should bear some analogy and reference to the nature of charge.

4. Homicide ☞188(2)

Where only question to be determined is existence and reasonableness of belief un-

der which defendant claimed to have acted in self-defense, evidence of bad reputation of deceased, or of one whom defendant supposed to be his assailant, is wholly immaterial and inadmissible, unless defendant first shows that he had knowledge of such reputation.

5. Homicide ☞188(2)

In murder prosecution, wherein defendant admitted the killing but relied upon plea of self-defense, exclusion of testimony respecting defendant's knowledge, acquired prior to time of fatal shooting, with regard to deceased's proclivity to resort to use of knife while engaged in physical combat, was prejudicial error.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Cornelius L. Jefferson was convicted of manslaughter, and he appeals from the judgment of conviction and from the order denying his motion for new trial.

Judgment and order reversed.

Kent Blanche and Charles M. Fueller, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

YORK, Presiding Justice.

Appellant was charged in an information with the crime of murder committed on or about September 29, 1938, and pleaded "not guilty" to the charge. Thereafter the jury returned a verdict finding appellant guilty of the crime of manslaughter, a lesser offense than that charged in the information but necessarily included therein. This appeal is prosecuted from the judgment of conviction, as well as from the order by which appellant's motion for a new trial was denied.

On the evening of September 29, 1938, William Yates and his wife, together with two other men and one woman, called at the home of appellant. Accompanied by appellant and his wife, the party, all colored, went to the Elks Cocktail Lounge on Central avenue in the city of Los Angeles, where they all had drinks and danced, returning later to appellant's apartment, where more drinks were served. About midnight the party broke up and everyone went out to the Yates' car which was parked in front of appellant's house. Mrs.

Yates got in the front seat beside her husband, who was sitting behind the steering wheel, and the other woman and the two men got into the rear. Lottie Jefferson, appellant's wife, insisted on getting into the front seat next to Mrs. Yates, and asked to be taken to Central avenue. Appellant objected to this, but Mr. Yates assured him he would not take Mrs. Jefferson any place, whereupon appellant got into his car and drove away. Mr. and Mrs. Yates then tried to persuade Mrs. Jefferson to get out of their car so that they could leave, and finally she did get out of the car but immediately walked around to the other side and took hold of the steering wheel, refusing to let go. The evidence becomes somewhat confused at this point, but it appears from the record that appellant at this time returned to the scene and, according to his own testimony, he found Mr. Yates hitting Mrs. Jefferson, who was sitting on Mrs. Yates and attempting to choke her. With regard to this affray, appellant testified upon cross-examination as follows:

"When I got up and saw that it was my wife that Mr. Yates was hitting, I walked up there and jerked him back and threw him up against his car and picked my wife up, and I walked up to him and asked him what did he mean by hitting my wife like that. * * *

"Q. Then what happened? A. Well, when I asked of Mr. Yates what did he mean by hitting my wife like that, he put his hand in his pocket and come out with a knife and started toward me cussing. * * * I kept backing, I backed away from him and told him not to come up on me. * * * And he kept coming and cussing and I just kept begging him not to come up on me and I stopped and fired a shot to scare him.

"Q. You fired that shot up in the air, is that what you mean? Is that right? A. Yes, that is right.

"Q. And then what happened? A. He kept coming on me and I kept hollering not to come on me and I backed up against the side of the wall and fell in a hole and then I fired a shot at him.

"Q. When you fired that second shot you meant to shoot to kill him. A. I meant to hit him."

After the shooting, Mr. Yates walked to the automobile where he was placed on the back seat and taken to a hospital. He died on October 2, 1938, as result of

injuries he sustained when he was shot by appellant.

Appellant admitted the killing, but relied upon his plea of self-defense in justification of his conduct, contending upon this appeal that "the sole issuable fact is whether the acts and conduct of the deceased were sufficient to excite in the defendant a reasonable fear that the deceased intended and would do defendant some great bodily injury".

For a reversal of the judgment of conviction, appellant relies upon the following points:

"1. That the verdict is contrary to the evidence.

"2. The exclusion of testimony respecting the knowledge of defendant of a particular act of violence of the deceased and defendant's state of mind because of said knowledge.

"3. Failure to accord the defendant an opportunity to present newly discovered evidence respecting the actual character of the deceased.

"4. Failure of the court to give certain instructions requested by the defendant.

"5. The giving of three instructions not applicable to the facts of the case or misleading to the jury, to-wit: An instruction on flight, instruction on dying declaration, and instruction with respect to the plea of self-defense and when it was not available.

"6. The admission of testimony respecting the so-called declaration."

In connection with his second point, appellant urges that the court erred in sustaining an objection to his offer to prove that he knew that "on April 25th, in the year 1937, the decedent William Yates assaulted one Howard Morris with a knife, necessitating some 40 stitches, otherwise carved this Howard Morris; that as a result of this affray, Mr. William Yates served some time in the County Jail, and it was at that time that Mr. Jefferson first became acquainted with Mr. Yates, and it was with this knowledge of this tendency on the part of Mr. Yates to resort to the use of a knife in physical combat that made him (appellant) act as he did on the evening of September 29, 1938".

Appellant testified that decedent's reputation for peace and quiet was bad. To the question asked of appellant, "Did you have any reason to feel that Mr. Yates

might cut you with that knife?" the prosecution objected "unless it is confined to this particular occasion when the shooting occurred or some threat communicated by some manner and means, some threat by Yates toward the life or safety of this individual. My point is that there is an exception to the hearsay rule and it is confined to general reputation or threats by the decedent or assailant toward the witness or defendant.

"The Court: Well, I think it can go a little beyond that. It seems to me that you put something in that question that won't get by. The objection is sustained to that particular question.

"Q. By Mr. Fueller: On this evening, had you any knowledge of any act previously done by Mr. Yates which caused you to fear that he might cut you with that knife?

"Mr. Leavy: I object to that, if the Court please, unless it was an act done toward the defendant at some past time by the decedent, or else some threat made by the decedent toward this defendant and communicated by some manner or means.
* * *

"The Court: The objection is overruled to that question, answer yes or no. A. Yes.

"Q. By Mr. Fueller: What was that knowledge?

"Mr. Leavy: I object to that as incompetent, irrelevant and immaterial. * * *

"The Court: Objection sustained to that.

"Mr. Blanche: May we ask at this time, if the Court please, does the Court feel that any light that he might throw on what knowledge that he had would be irrelevant?

"The Court: I don't know that it is necessary to follow it any further, unless the district attorney wants to find out what he bases it on.

"Mr. Blanche: May we make our offer of proof at this time then?

"The Court: Is it the same offer that you made before?

"Mr. Blanche: The offer as to the particular act which we discussed.

"The Court: Do you object to it?

"Mr. Leavy: I didn't hear your inquiry.

"The Court: He just wants to make an offer of proof substantially the same as was made.

"Mr. Leavy: I will stipulate that they are making the same offer of proof as was made before.

"Mr. Blanche: We are willing to confine our offer of proof in accordance with the Court's suggestion.

"The Court: And you are objecting to that?

"Mr. Leavy: We object to this last question on the ground that I objected and for the reasons before that I gave.

"The Court: The objection is sustained."

[1-3] "While the general rule is that the reputation of deceased cannot be given in evidence, an exception arises where the plea of self-defence is interposed and the evidence leaves it in doubt whether the deceased was the aggressor, or where the circumstances attending the homicide render it doubtful whether the defendant was justified in believing himself in imminent danger at the hands of deceased. (People v. Lamar, 148 Cal. 564 [83 P. 993]; People v. Powell, 87 Cal. 348 [25 P. 481, 11 L.R.A. 75]). Evidence of the reputation of deceased, *unknown* to the defendant at the time of the homicide, must be limited to the question as to who was the assailant, but on the other hand, where such reputation was *known* to defendant, *evidence thereof is admissible*, not only to determine the aggressor but also *as bearing on the question whether defendant was justified in believing himself in imminent danger—whether his knowledge of the reputation of deceased, taken into consideration with all the other circumstances, was sufficient to excite the fears of a reasonable man.* (People v. Lamar, 148 Cal. 564 [83 P. 993]; People v. Howard, 112 Cal. 135 [44 P. 464]; People v. Powell, 87 Cal. 348 [25 P. 481, 11 L.R.A. 75]; People v. Singh, 78 Cal.App. 488 [248 P. 986].) Such evidence should be confined to the traits of character which are in issue, and should bear some analogy and reference to the nature of the charge. (People v. Cord, 157 Cal. 562 [108 P. 511]; People v. Barrett, 22 Cal.App. 780 [136 P. 520]; People v. Haydon, 18 Cal.App. 543 [123 P. 1102, 1114].) The reputation of deceased for peace and quiet is involved. * * * But it has been held that evidence is not admissible to show that deceased has been convicted of simple assault upon another. (People v. Griner, 124 Cal. 19 [56 P. 625].)" (13 Cal.Jur., p. 693.) (Italics added.)

[4] In the case of *People v. Hoffman*, 195 Cal. 295, at page 310, 232 P. 974, 980, it is stated: "Where the only question to be determined is the existence and reasonableness of the belief under which the defendant claims to have acted in self-defense, evidence of the bad reputation of the deceased, or of one whom the defendant supposed to be his assailant, is wholly immaterial and inadmissible, unless the defendant first shows that he had knowledge of such reputation. *State v. Kennade*, 121 Mo. 405, 26 S.W. 347; *State v. Rollins*, 113 N.C. 722, 18 S.E. 394; *Commonwealth v. Straesser*, 153 Pa. 451, 26 A. 17; *State v. Blassengame*, 132 La. 250, 61 So. 219. * * * Moreover, there is respectable authority for the proposition that the reputation for peace and quiet of the decedent, or of one whom the defendant supposed to be his assailant, is not alone sufficient where the issue is self-defense, but must be coupled with that person's reputation as a violent, turbulent, and bloodthirsty man. *Tribble v. State*, 145 Ala. 23, 40 So. 938; *King v. State*, 17 Ala.App. 381, 85 So. 876."

Also, in the case of *People v. Singh*, 78 Cal.App. 488, at page 496, 248 P. 986, at page 990, it was held that it was error to reject evidence offered by the defendant that the deceased was in the habit of carrying a gun, with which he had on prior occasions threatened others, and that these facts were known to the defendant, the court there stating: "Assuming that the evidence already before the court tended to show that immediately before the shooting occurred Hager had 'jumped at, or toward, or on' defendant, with knowledge in defendant that Hager was probably armed and that theretofore with a 'gun' he had threatened other persons, the serious and legally pertinent question would arise as to whether in such circumstances, as a reasonable man, defendant would be justified in believing that either his life was in danger, or that great bodily harm would result to him by reason of conditions then and there existing. It is clear that so considered the offered evidence was admissible and that defendant was substantially prejudiced by reason of the refusal of the trial court to permit such evidence to be introduced."

Several witnesses testified that they heard appellant tell the deceased, "Don't come up to me," or "Don't come back," or "Don't come upon me;" and "If you

come upon me I will shoot, I will shoot you," and also that Mr. Jefferson (appellant) was backing and Mr. Yates (decedent) was walking toward him.

[5] In the circumstances presented by the record herein and upon the authority of the cases hereinbefore cited, it was prejudicial error to exclude testimony respecting appellant's knowledge, acquired prior to the time he fired the two shots, with regard to decedent's proclivity to resort to the use of a knife while engaged in physical combat.

Because of the conclusion reached by this court upon the question hereinbefore discussed, it is not deemed necessary to pass upon the other points raised by appellant.

The judgment and the order denying appellant's motion for a new trial are, and each of them is, reversed.

We concur: DORAN, J.; WHITE, J.



34 Cal.App.2d 316
BUZZARD v. EAST LAKE SCHOOL DIST.
OF LAKE COUNTY, CAL.
Civ. 6150.

District Court of Appeal, Third District,
California.

Aug. 24, 1939.

1. Schools and school districts ⇄120

In action against school district for injuries sustained by third grade pupil while engaged in playing a game on school grounds during recess period when struck by boy on bicycle, complaint which alleged that teacher who was in charge of school grounds was negligent in permitting boys to ride their bicycles among children while children were playing games stated good cause of action against school district. School Code, § 2.801, as amended by St.1937, p. 414; § 5.543.

2. Schools and school districts ⇄120

In action against school district for injuries sustained by third grade pupil while engaged in playing a game on school grounds during recess period when struck by boy on

bicycle, alleged variance between complaint which alleged pupil was injured while "compelled" to play game and proof that she was injured while voluntarily playing game was immaterial. School Code, § 2.801, as amended by St.1937, p. 414; § 5.543.

3. Schools and school districts ⇨121

In action against school district for injuries sustained by third grade pupil while engaged in playing a game on school grounds during recess period when struck by boy on bicycle, evidence that teacher who was in charge of school grounds during recess period knew that boys had been in habit for several months prior to accident of riding their bicycles on grounds among children playing, that on day of accident teacher saw boys riding their bicycles among children playing on grounds, and that no effort was made to stop dangerous practice, was sufficient showing of teacher's negligence to permit recovery against school district. School Code, § 2.801, as amended by St.1937, p. 414; § 5.543.

4. Schools and school districts ⇨89

In determining whether school district was negligent in supervision of school grounds during recess period, test was whether school officials used the same care as persons of ordinary prudence charged with the duty of carrying on a public school system would use under the same circumstances. School Code, § 2.801, as amended by St.1937, p. 414.

5. Schools and school districts ⇨89

In determining whether school district is liable for injury to pupil allegedly resulting from failure of its employees to use ordinary care, what is ordinary care depends upon circumstances of each particular case, and is to be determined as a fact with reference to situation and knowledge of parties. School Code, § 2.801, as amended by St.1937, p. 414.

6. Schools and school districts ⇨121

In action against school district for injuries sustained by third grade pupil while engaged in playing a game on school grounds during recess period when struck by boy on bicycle, evidence sustained finding that pupil was free from contributory negligence. School Code, § 2.801, as amended by St.1937, p. 414; § 5.543.

Personal injury action by Donna May Buzzard, a minor, by Tom Buzzard, her guardian ad litem, against the East Lake School District of Lake County, Cal. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Geary & Geary and C. J. Tauzer, all of Santa Rosa, for appellant.

Lovett K. Fraser, of Lakeport, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff recovered a judgment of \$1,500 against East Lake School District, as damages for a broken leg sustained as the result of the negligence of a school teacher who had charge of the playgrounds. The plaintiff was run down by a pupil who was permitted to ride his bicycle among the children while they were engaged in playing a game during the recess period. From that judgment this appeal was perfected.

The plaintiff, who was seven years of age, was attending the public school of the defendant district in Lake county. She was a pupil in the third grade of that school. As a part of the athletic training required, she was engaged, with other young pupils during the recess period, in playing a game called "kick-the-can". They were playing on the school-grounds under the supervision of a teacher by the name of Anna Hull, who was then present within sight of the pupils. Without objection on the part of Miss Hull, two boys were permitted to ride their bicycles about the playground where the game was being conducted. With the knowledge of the teacher, and without protest on the part of the school district or its officers or employees, the boys had been permitted to ride their bicycles on and about the playgrounds while physical training and the games were being conducted for several months prior to the time of the accident. Without warning a boy by the name of Bob Nylander suddenly ran his bicycle against and over the plaintiff breaking her leg and seriously injuring her. In this suit for damages, the court, sitting without a jury, adopted findings to the effect that plaintiff was injured as the proximate result of the negligence of the defendant and its teacher, Anna Hull, and rendered judgment against the school district pursuant to sec-

Appeal from Superior Court, Lake County, Benjamin C. Jones, Judge.

tion 2.801 of the School Code. From that judgment this appeal was perfected.

The appellant contends that neither the pleadings, the findings nor the judgment are supported by the evidence; that the general demurrer to the complaint should have been sustained; and that the plaintiff was guilty of contributory negligence, which bars her right of recovery.

[1] The demurrer was properly overruled. The complaint states a good cause of action against the defendant for the negligence of its teacher and supervisor of physical training and sports of the pupils while she was in charge of the playgrounds during the period of recess. The complaint alleges that Anna Hull was the duly appointed and acting teacher of the school in actual charge and supervision of the physical training and games which were being conducted on the playgrounds at the time of the accident; that without protest, and with full knowledge of the dangers incident thereto, the boys were permitted by the teacher to ride their bicycles among the children upon the playgrounds while those exercises were being conducted; that while the plaintiff, with other children, were engaged in playing the game of "kick-the-can", without warning, a pupil by the name of Bob Nylander ran his bicycle against and over the plaintiff, knocking her down and breaking her leg, and that her injuries were sustained as a direct result of the "carelessness and negligence of the said defendant, its agents and employees, in compelling the said Donna May Buzzard to play a game in a dangerous and unsafe place on the school-grounds, and while under the supervision and direction of the said defendant, its agents and employees".

[2] It is contended there is a fatal variance between the allegations of the complaint and the proof adduced; that the negligence alleged consists of injuries received by the plaintiff while she was playing a game which she was "compelled" to participate in, and the uncontradicted evidence shows that she was voluntarily playing the game of "kick-the-can" at the time she was injured. The demurrer was general in its form. There was no specification of uncertainty in the allegations of the complaint. Paragraph VI of the complaint specifically alleges that the plaintiff was compelled to play the game "in a dangerous and unsafe place and in the presence of Anna Hull". Paragraph VIII alleges that the plaintiff was injured as a result of the

negligence of the defendant in compelling the plaintiff to play the game "in a dangerous and unsafe place". It is immaterial whether the plaintiff was actually compelled to play the game of "kick-the-can", or that she was injured while voluntarily playing that game as a part of her recess recreation, for the accident occurred on the school playgrounds during the period of recess while the pupils were under the personal supervision of the teacher. Section 5.543 of the School Code provides in that regard:

"Every teacher in the public schools must hold pupils to a strict account for their conduct on the way to and from school, on the playground or during recess."

Among the "Duties of Principals and Teachers" required by the State Board of Education, found in section III, subdivision "D" of the School Code of California in 1929,¹ is the following provision:

"Where special playground supervision is not provided, teachers shall supervise the conduct and direct the play of the pupils of their classes in the school or on the school-grounds during the intermissions and before and after school. * * *

A fair construction of the allegation of the complaint, in the absence of a special demurrer for uncertainty, is that the defendant failed to maintain a safe condition of the playgrounds by neglecting to prohibit the riding of bicycles among the children thereon while they were engaged in playing games. We are of the opinion the demurrer was properly overruled.

[3] The findings and judgment are adequately supported by the evidence. It was the duty of the teacher, Miss Hull, to regulate the conduct of pupils in their sports on the playground during the periods of recess. We are of the opinion it constituted negligence to permit pupils to ride bicycles about the playground among the children while they were engaged in playing games under the circumstances of this case. The teacher knew that the boys had been in the habit of doing so for several months prior to the time of the accident. She saw them riding their bicycles among the children where they were playing the game of "kick-the-can", on the occasion just prior to the accident. No effort was made to stop that dangerous practice.

Under the provisions of section 2.801 of the School Code, as it existed at the time of the accident which is involved in this

litigation, public school districts are liable for damages "on account of injury to person or property arising because of the negligence of the district, or its officers or employees". It was not then necessary for a verified claim for such damages to have been filed with the clerk of the board as a prerequisite for maintaining the action. The amendment of that section requiring a verified claim for damages to be filed within ninety days after the accident occurs did not become effective until August 27, 1937. Stats. 1937, page 414.

The findings and judgment are adequately supported by the evidence.

The evidence shows without dispute that Miss Hull was present, standing within fifty feet of the place where the accident occurred, and that she then had supervision of the pupils in their physical education and in the playing of games; that she actually saw Bob Nylander and another boy riding their bicycles within a few feet of the place where Donna May Buzzard and the other children were engaged in playing the game of "kick-the-can"; that she actually knew of their riding their bicycles about the playgrounds during the playing of games ever since Christmas, which was two and a half months prior to the time of the accident, and that while they were forbidden from riding "in front of the school or around the corners," they were not instructed to refrain from riding among the children on the playground.

[4, 5] It has been held that a school district is liable for damages for injuries sustained by a pupil on account of the negligence of its teachers and agents, resulting from the use of defective and dangerous machinery, equipment, explosive chemicals, or improper supervision of the playgrounds. *Bellman v. San Francisco High School District*, 11 Cal.2d 576, 81 P.2d 894; *Taylor v. Oakland High School District*, 12 Cal.2d 310, 83 P.2d 948; 23 Cal.Jur. 109, sec. 76, 10 Cal.Jur. 10 Year Supp. 237, sec. 77d-i. Regarding the question of negligence, the Supreme Court said in the *Bellman* case, supra [11 Cal.2d 576, 81 P.2d 897]:

"The question is whether the school officials used the same care as persons of ordinary prudence, charged with the duty of carrying on the public school system, would use under the same circumstances.

* * * What is ordinary care depends upon the circumstances of each particular case and is to be determined as a fact with

reference to the situation and knowledge of the parties."

In the *Taylor* case, supra, it was held to be negligent for the district to permit a garbage truck to drive upon the school grounds without proper restrictions when that conduct results in injuries to a pupil thereon.

In support of its assertion that the defendant is not liable for negligence in failing to prohibit the riding of bicycles among the pupils on the playground under the circumstances of this case, the following cases are relied upon: *Weldy v. Oakland High School District*, 19 Cal.App.2d 429, 65 P.2d 851; *Goodman v. Pasadena City High School District*, 4 Cal.App.2d 65, 40 P.2d 854; *Kerby v. Elk Grove Union High School District*, 1 Cal.App.2d 246, 36 P.2d 431, 94 A.L.R. 1502; *McCloy v. Huntington Park Union High School District*, 139 Cal.App. 237, 33 P.2d 882; *Underhill v. Alameda Elementary School District*, 133 Cal.App. 733, 24 P.2d 849; *Hack v. Sacramento City Junior College District*, 131 Cal. App. 444, 21 P.2d 477, and *Ellis v. Burns Valley School District*, 128 Cal.App. 550, 18 P.2d 79.

There is nothing in these cases at variance with what we have previously said regarding the negligence of the defendant in this case for failure to properly supervise pupils on the playgrounds of the school prohibiting students from riding bicycles among the children while they are engaged in playing games. Each of the cases relied on by the appellant were properly determined upon the particular facts involved therein. They may be readily distinguished from the circumstances upon which the present case was decided. Most of the last cited cases were founded on claims for injuries sustained by pupils on account of the conduct of other students engaged in playing games on the school premises, over which the supervisors of sports had no control, and which acts could not have been reasonably anticipated. None of those cases present accidents which were the result of negligent omissions to regulate the conduct of pupils on the playgrounds with respect to known acts or practice of pupils from which, by the exercise of reasonable prudence, the school authorities should have anticipated that injuries were likely to follow.

[6] There is no evidence that the plaintiff was guilty of contributory negligence. That was an issue for the determination of

the trial court. There is an abundance of evidence to support the finding that she was free from contributory negligence.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



34 Cal.App.2d 288

ADAMS v. HARRISON et al.

Civ. 2310.

District Court of Appeal, Fourth District,
California.

Aug. 22, 1939.

Rehearing Denied Sept. 15, 1939.

Hearing Denied Oct. 20, 1939.

1. Limitation of actions §177(3)

Where complaint in action to recover secret profits made by defendants through a real estate transaction was in the form of a common count for money had and received, and did not show upon its face that three years had elapsed since fraud, if any, had been committed by codefendant, the rule that one seeking relief in equity against fraud after three years have elapsed must allege in his complaint the time and circumstances of the discovery of fraud, together with facts relied upon as excusing an earlier discovery was inapplicable.

2. Action §28

Generally, a person from whom money has been obtained by wrongful or fraudulent means may waive the tort and sue in an action of assumpsit for money received for the plaintiff's use.

3. Joint adventures §5(2)

Partnership §327(1)

When plaintiff's action proceeded upon theory that a partnership or joint adventurer relationship had existed between plaintiff and codefendant with respect to purchase of land in question, a complaint in action for money had and received to recover secret profits made by defendants through the transaction was sufficient to state a cause of action, where such complaint alleged that money had been received by codefendant in connection with purchase of land from a third party, notwithstanding

that there was no allegation of fraud in connection with transaction in question.

4. Joint adventures §5(2)

Partnership §327(6)

Where complaint in action for money had and received to recover secret profits made by defendants in a real estate transaction alleged that codefendant had received the money in connection with purchase of certain land from a third party, proof showing that codefendant had purchased the land at a certain price and sold plaintiff a one-half interest therein upon representation that land had cost codefendant more than what he had actually paid for it was not a fatal variance from pleading, although there were no allegations of fraud.

5. Fraud §28

While one may sell his own property to another without disclosing what he himself paid for such property, he cannot agree that the other person shall become the owner of a half-interest by paying one-half of the cost of the property and then, by representing that the cost was greater than it was, deceive the other person, and obtain from him more than he should have paid.

6. Joint adventures §1

Partnership §53

In action to recover secret profits made by defendants through a real estate transaction wherein a one-half interest in property owned by codefendant was sold to plaintiff for more than its cost to codefendant, evidence that codefendant had wanted plaintiff to buy land in question with codefendant as a partner or coadventurer, each to pay one-half of costs, plus lack of positive evidence that codefendant had informed plaintiff that he had previously purchased the land in question, before selling an interest therein to plaintiff warranted judgment for plaintiff, as against codefendant's contention that a partnership or joint-adventurer relationship had not existed between parties.

7. Joint adventures §1

Partnership §53

In action to recover secret profits made by defendants through a real estate transaction wherein a one-half interest in property purchased by codefendant was sold to plaintiff at a price greater than its cost to codefendant, and a partnership or joint-adventurer relationship was claimed to have existed between plaintiff and codefendant, evidence supported finding and conclusion that plain-

tiff's purchase of property in question was to be on a fifty-fifty basis with codefendant, each party to pay an equal share of costs of land.

8. Joint adventures ⇨5(3)

Partnership ⇨329

In action to recover secret profits made by defendants through a real estate transaction wherein a one-half interest in property owned by codefendant had been sold to plaintiff for an amount exceeding its cost to codefendant, whether plaintiff was justified in believing that he was purchasing a one-half interest in the property in question by paying one-half of the costs thereof to codefendant and that such cost was to be shared equally by plaintiff and codefendant, was for jury.

9. Joint adventures ⇨5(1)

Partnership ⇨317

In action to recover secret profits made by defendants through a real estate transaction wherein a one-half interest in property owned by codefendant was sold to plaintiff at a price exceeding its cost to codefendant, and where plaintiff claimed that a partnership or joint-adventurer relationship had existed between plaintiff and codefendant with respect to transaction in question, plaintiff's knowledge of fraud, if any, by codefendant in connection with settlement of business affairs between plaintiff and codefendant did not, as a matter of law, put plaintiff upon notice and require plaintiff to make an investigation as to acts of codefendant in connection with original transaction involving land.

10. Limitation of actions ⇨199(2)

In action to recover secret profits made by defendants through a real estate transaction wherein a one-half interest in property owned by codefendant was sold to plaintiff at a price exceeding its cost to codefendant and where a partnership or joint-adventurer relationship was claimed to have existed between plaintiff and codefendant with respect to purchasing land in question, whether action was barred by statute of limitations, or whether sufficient excuse was not shown by plaintiff for failure to make an earlier discovery of the true facts, with respect to fraud in issue, was for jury.

11. Limitation of actions ⇨100(11)

The courts will not lightly seize upon some small circumstance to deny relief to a party, plainly shown to have been actually defrauded, against those who defrauded him

on the ground that he did not discover the fact that he had been cheated as soon as he might have done, and it is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with the discovery of the fraud in advance of actual knowledge thereof.

12. Joint adventures ⇨5(1,2)

Partnership ⇨328(2), 329

In action to recover secret profits made by defendants through a real estate transaction wherein a one-half interest in property owned by codefendant was sold to plaintiff at a price exceeding its cost to codefendant and where plaintiff and codefendant were claimed to have occupied a partnership or joint-adventurer relationship to each other with respect to purchase of land, excluding testimony as to value of land, and refusing to instruct that measure of damages, if any, would be difference between money plaintiff had paid for property and value of property received, was not error where plaintiff had waived the tort and sued for a return of his money. Civ.Code, § 3343.

13. Damages ⇨117

Where plaintiff had waived the tort and sued in assumpsit for money had and received, the statute concerning the measure of damages in an action for fraud was not applicable. Civ.Code, § 3343.

14. Evidence ⇨134

Joint adventures ⇨5(2)

Partnership ⇨328(2)

In action to recover secret profits made by defendants through a real estate transaction, wherein a one-half interest in property owned by codefendant was sold to plaintiff at a price exceeding its cost to codefendant, and where plaintiff and codefendant were claimed to have occupied a partnership or joint-adventurer relationship to each other with respect to purchase of land, evidence concerning the sale of other land to plaintiff by codefendant in a separate transaction was admissible for purpose of showing codefendant's intent and to prove that a confidential relationship had existed between the parties when property in question was purchased by plaintiff.

15. Joint adventures ⇨5(2)

Partnership ⇨328(2)

In action to recover secret profits made by defendants through a real estate transaction wherein a one-half interest in property owned by codefendant was sold to plain-

tiff at a price exceeding its cost to codefendant, and where plaintiff had bought the property believing that he and codefendant were acquiring it from a third party as joint adventurers, or partners, excluding a newspaper article offered by codefendant to prove public knowledge of fact that property was owned by codefendant at time of transaction in question was proper, where plaintiff was in Ohio.

16. Joint adventures Ⓒ5(1)
Partnership Ⓒ317

Plaintiff was not precluded from recovering secret profits realized by defendants in a real estate transaction wherein plaintiff had justifiably thought that he was buying the land as a joint adventurer or partner with codefendant by fact that by a subsequent contract of settlement codefendant had taken back the land in question, where settlement was not related to land transaction and did not purport to settle all differences between plaintiff and codefendant.

Appeal from Superior Court, San Diego County; Frank J. Macomber, Judge.

Action by Henry J. Adams against R. E. Harrison and another to recover secret profits claimed to have been made by defendants through a real estate transaction. From a judgment for plaintiff, defendants appeal.

Affirmed.

Stearns, Luce, Forward & Swing and Fred Kunzel, all of San Diego, for appellants.

Dempster McKee, Hillyer & Boldman, and Bertrand L. Comparet, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for the recovery of secret profits claimed to have been made by the defendants through a real estate transaction. A jury brought in a verdict for \$11,000 in favor of the plaintiff and the defendants have appealed from the ensuing judgment. The defendant R. E. Harrison, who will be referred to as the appellant, was a real estate agent in San Diego and practically the sole owner of two corporations named R. E. Harrison Co. and Rae Investment Company.

The respondent, who resided in Ohio, had met the appellant, during a visit to San Diego in 1921. On April 10, 1922,

the appellant sent a telegram to the respondent, saying he had just obtained a 30-day contract on the Otay ranch, consisting of 7000 acres, praising its investment possibilities and asking the respondent to buy it. About that time the appellant contracted to purchase from a Mr. Judson about 6360 acres of land known as the Otay ranch, and by a separate contract agreed to purchase from Judson an additional 1000 acres which adjoined the Otay ranch. Both parcels were thereafter frequently referred to by the parties as the "Otay Ranch". On April 1, 1922, Judson deeded the 1000 acres to the Rae Investment Company and on June 2, 1922, he deeded the 6360 acres to R. E. Harrison Co. In each instance the grantee company executed a mortgage to secure the balance of the purchase price, and the deeds and mortgages were all recorded. The purchase price for both tracts was \$155,000. The appellant took possession of the property in September, 1922, made certain improvements thereon and leased portions thereof to various tenants, who placed about 2500 acres under cultivation. The appellant loaned certain amounts to several of the tenants, taking back crop mortgages, which were recorded. He also placed signs at the four entrances to the ranch and smaller signs at intervals around the boundary thereof, warning against trespassing, which signs contained the words: "Otay Ranch, R. E. Harrison Co., Owners".

During the latter part of February, 1923, the respondent came to San Diego and was taken over the ranch by the appellant. On March 2, 1923, he was given an option reading, in part, as follows:

"For and in consideration of the sum of One (\$1.00) Dollar to me in hand paid, the receipt of which is hereby acknowledged, I hereby give to H. J. Adams of Fostoria, Ohio, the option to purchase from me within thirty (30) days from this date an undivided one-half ($\frac{1}{2}$) interest in and to the Otay Rancho and the one thousand (1000) acres, more or less, belonging to me and adjoining the Otay Rancho on the north, making a total acreage of seven thousand three hundred sixty (7360) acres more or less.

"The purchase price of said undivided one-half ($\frac{1}{2}$) interest to be the sum of Ninety-five Thousand (\$95,000.00) Dollars, payable as follows:" (Here follow terms of payment, including a provision that the

respondent was to assume one-half of the encumbrance on the property.)

On April 11, 1923, the respondent exercised this option and on June 13, 1923, a one-half interest in these lands was conveyed to him and the appellant wrote him saying, "I am this day deeding to you an undivided one-half interest in the Otay Rancho, consisting of 6360 acres, and 1000 acres, more or less".

About the time this option was given the parties were negotiating for the purchase of another tract of 3435 acres, known as the National ranch, which is not directly involved in this action. On March 6, 1923, the appellant sent a letter to the respondent at Los Angeles in which he said: "I have got everything signed on the dotted line this afternoon. After whittling everything down to the last dollar I find that the tract will cost approximately \$78,250.00. I made Jones come through with some of his commission—therefore this price. I have got everything in escrow and will have the deed within a very few days. I am taking it in my name and then will redeed you a half interest. There will be approximately 3435 acres." He further asked the respondent to send him \$10,000, stated that he would let him know in a few days the exact amount of the respondent's "pro-rata" share of the cost, and that on the next day he would send him "a contract for us between ourselves". The next day the appellant sent the respondent a contract setting forth that "I hereby agree to deliver to Henry J. Adams of Fostoria, Ohio, an undivided one-half interest in and to", followed by a description of the property, providing that the full purchase price for said undivided one-half interest was to be \$39,125.00, and providing for terms of payment.

From and after April 11, 1923, the ranch properties were operated by the respondent and the appellant as partners, the latter being in active charge. Trouble arose between them in 1925. After two agreements had been entered into in an attempt to adjust their affairs a final agreement was executed on April 8, 1926, as a result of which the appellant got the Otay ranch and the respondent got the National ranch.

It appears, without conflict, that the appellant, as above stated, paid \$155,000 for the Otay ranch and charged the respondent \$95,000 for a one-half interest therein, and that he represented the cost of the

National ranch to be \$78,250, when in fact the purchase price was \$51,500. The National ranch transaction is not directly involved here and the appellant contends, with respect to the Otay ranch, that he was dealing with the respondent at arms length, that he had owned the Otay ranch for about a year prior to the present transaction, that he had a legal right to sell a one-half interest to the respondent at a profit, and that no partnership relationship existed between them until after the sale had been made, when they became partners in the operation of the ranch. The respondent contends, on the other hand, that the case is one where a secret profit was obtained by one partner or joint adventurer through taking advantage of the other.

The first point raised is that there is a fatal variance between the allegations of the complaint and the proof. The complaint is one for money had and received. A demurrer was overruled and the appellant answered denying the allegations of the complaint and setting up as a separate defense that the cause of action was barred by the statute of limitations. A bill of particulars was demanded and the one furnished stated that the amount sued for was received on or about March 2, 1923, and that the circumstances under which the appellant received the money were "in connection with the purchase from C. S. Judson of a tract of land located in San Diego County, California, known as the Otay Ranch". The appellant contends that the complaint which was filed on May 15, 1937, contained no allegation of fraud, fraudulent representation, or of a secret profit, and further, that although the bill of particulars discloses that the cause of action, which is based upon fraud, arose more than three years before the complaint was filed, the complaint contained no allegations showing when the fraud was discovered or giving facts and circumstances justifying the delay in bringing the action.

[1-4] In support of this contention the appellant relies upon cases which have held that one seeking relief from a court of equity against fraud after three years have elapsed must allege in his complaint the time and circumstances of the discovery of the fraud, together with the facts relied upon as excusing an earlier discovery. *Phelps v. Grady*, 168 Cal. 73, 141 P. 926; *Gibson v. Rath*, 13 Cal.App.2d 40, 55 P. 2d 1219; *Nighbert v. First Nat. Bank of*

Bakersfield, 26 Cal.App.2d 624, 79 P.2d 1105. In such cases, there has been involved the sufficiency of complaints which show upon their face that three years have elapsed since the fraud was committed. Since the complaint in the instant action was in the form of a common count this fact did not appear upon its face. In such a case, a different rule prevails. *MacDonald v. Reich & Lievre, Inc.*, 100 Cal.App. 736, 281 P. 106; *Agee v. Virden Packing Co.*, 15 Cal.App.2d 691, 59 P.2d 1058. In *Philpott v. Superior Court*, 1 Cal.2d 512, 36 P.2d 635, 637, 95 A.L.R. 990, the history and present standing of the common count for money had and received is rather thoroughly discussed. In that case the first count was based upon money paid for stock in a bank in reliance upon fraudulent representations, and the second count was for money had and received. The court there said: "Under the peculiar facts in this case, a judgment for plaintiff in the sum of \$625, with interest and costs, would fully satisfy his demands. In short, he asks no relief that a court of law may not in all respects give him. This, of itself, would seem sufficient to deny plaintiff a place in a court of equity." The court quoted with approval from *Clark on Contracts*, as follows: "'A frequent illustration of a quasi-contractual obligation of this kind arises where a person obtains another's money by wrongful or fraudulent means. * * * He is not always restricted, however, to an action ex delicto for the specific wrong, but may in general waive the tort, and sue in assumpsit for the money as for money received for his use. * * * The same is true in any case in which one person, by means of trespass, fraud, or other tortious means, obtains another's money.'" The court then held that the action was one at law. Under these authorities, we hold that the complaint in the instant action was sufficient and that there was no fatal variance between the pleading and the proof.

It is next contended that the evidence is not sufficient to support the judgment. Among other things, the respondent testified as follows:

"A. He stated he wanted me to go in with him on the purchase of the Otay and National Ranches on a 50-50 basis and at a figure, I was to put up the same amount he was to put up on both properties, in the National and the Otay—property which he stated belonged to Mr. Judson.

"Q. Did he during these conversations tell you what he was paying for these ranches or what he could get them for?
A. He did.

"Q. Did he say what the basis of your relationship would be after they were purchased? A. We would be joint adventurers, partners in all of the transactions we may go into.

"Q. Did he say that before you entered into the deal? A. He did.

"Q. What did he tell you was the cost of the Otay Ranch? A. He said he could get the Otay and one thousand acres adjoining which we always called the Otay, at \$190,000; certain payments down and the rest spread over quite a considerable period."

And again:

"Q. What did he say with respect to what your relationship would be? A. He said that we would buy the Otay and parts of the National Ranches in partnership, and we would both put up equal sums of money for the partnership and joint adventure, the two deals we were figuring on, on both the Otay and parts of the National Ranch.

"Q. Did these transactions take place before there was any transaction between you? A. They took place before, in regard to the purchase, and many times after we made a deal."

It is contended that on or about March 1, 1923, when this conversation was had, there was no confidential relation between the parties and that the respondent's cause of action is based entirely upon his claim that when he entered into the transaction he did not know that the appellant was the owner of the property, but believed that he and the appellant were then buying the property from Judson for the price of \$190,000. It is then argued that the respondent could not have so believed; that the option itself disclosed on its face that it was an option to purchase from the appellant lands belonging to him; that in the letter of June 13, 1923, the appellant told the respondent "I am this day deeding to you an undivided one-half interest in the Otay Rancho"; that the deed itself was from R. E. Harrison Co.; that the signs on the ranch showed the same thing; that the respondent had seen a certificate of title disclosing the appellant's ownership; and that a certain witness testified that early in 1923 the respondent told him

the appellant had purchased the land from Judson.

Much of the evidence thus referred to was denied by the respondent. It must be conceded that portions of the evidence justify the inference that the respondent should have known that the appellant had already purchased at least a part of these lands from Judson. There are some facts, however, justifying a contrary inference. The appellant was a real estate agent and had tried to sell the entire property to the respondent in April, 1922, when he said he had obtained a 30-day contract, apparently in the nature of a listing agreement. If it be assumed that the respondent saw the signs on the ranch naming R. E. Harrison Co. as the owner, he may have thought that the appellant's original 30-day contract had been extended but not known that an actual sale had been consummated, especially in view of the appellant's efforts to get him to purchase a half interest in the property. It should be noted in this connection that the option itself stated that the 1000 acres adjoining the Otay ranch belonged to the appellant, but made no such statement with reference to the other 6360 acres. It appears that from the beginning the parties were negotiating not only for the purchase and sale of a one-half interest in the Otay ranch but for the purchase, by the two together, of the National ranch. In his letter of March 6, 1923, the appellant told the respondent he was then buying the National ranch for the respondent and himself, that he had not yet received the contract, that this property "will cost" \$78,000, and that "I am taking it in my name and will then redeed you a half interest." In the same letter, he said: "Hoping you will find everything satisfactory and that our mutual interests will never be marred, and that we will each make a 'killing' on our proposition." The proposition and the mutual interests mentioned in this letter may well have been taken by the respondent to refer to both parts of the deal, that is the purchase of both the National and Otay ranches. When the appellant wrote to the respondent on June 13, saying "I am this day deeding to you a one-half interest in the Otay Ranch," the respondent may have thought that part of the deal was being handled the way the National ranch had been handled, namely, "I am taking it in my name and then will redeed you a half interest." We are pointed to no evidence that the

respondent was ever told that the appellant had actually purchased the Otay ranch about a year earlier, and it would not have been entirely unreasonable for the respondent to have thought that the two deals were being handled in a similar manner.

[5] However, if it be conceded that the respondent knew or ought to have known that the appellant had previously purchased the Otay ranch from Judson, that fact is not conclusive. The gist of respondent's cause of action is not that the appellant deceived him with respect to who then owned the ranch, but that he had agreed to sell him a one-half interest in the Otay ranch for what that interest would cost or had cost the appellant; in other words, that it was agreed that each should pay the same amount for his interest in the land. While, as the appellant argues, one may sell his own property to another without disclosing what he himself paid, he may not agree that the other shall become owner of a half interest by paying one half of the cost of the property and then, by representing that the cost was greater than it was, deceive the other and obtain from him more than he should have paid.

The appellant argues that no confidential relationship existed until the respondent exercised the option and agreed to take an interest in the property on April 13, 1923 and, therefore, that he was under no obligation to give the true facts to the respondent when the conversations were had on or about the first of March. Those conversations and the acts of the parties over a period of six weeks led directly to the transaction here in question. It clearly appears that the primary purpose of both parties was to obtain the land for speculative purposes. It also appears that the appellant was confronted with financial difficulties in holding the land and that he desired the respondent's assistance. While the appellant insists that there was no partnership between him and the respondent, except later in connection with the operation of the land, the evidence justifies the inference that they went into partnership for the purpose of either buying or holding the land. It matters little, however, whether the arrangement was technically a partnership or a joint adventure. The material and controlling element is whether the respondent entered into the transaction upon the representation and with the understanding that each was to pay the same amount and that they were to

share the cost of the ranch whether past or future. If, in fact, there was an agreement that this cost was to be shared equally there was a sufficient confidential relationship between the parties to require the appellant to disclose the true facts with respect to the cost of the land, regardless of the exact date upon which the formation of a partnership was consummated, or a joint adventure begun.

[6-8] There is no question that such an arrangement was made with respect to the National ranch, which was purchased from Judson after the parties hereto had begun their negotiations, about March 1, 1923. The parties were then negotiating for the sale to the respondent of a half interest in both the Otay and National ranches, a total of about 11,000 acres. In his letter of March 6, the appellant referred to their "mutual interests" and expressed the hope that they would "each make a 'killing' on our proposition". At that time the respondent had not agreed to buy an interest in either the Otay ranch or the National ranch, and he may well have taken a portion of this letter as relating to the purchase of both ranches and to their mutual interests in the entire proposition involved in their previous conversations. The evidence supports the finding and conclusion that his purchase of a half interest in the Otay ranch was to be, like that of the National ranch, on a 50-50 basis, each party to pay an equal share of the cost of the land. The appellant required the respondent to pay to him one half of the amounts he had advanced to tenants upon the land. Many of the circumstances shown by the evidence indicate that the respondent was justified in understanding and believing that he was purchasing a one-half interest in the Otay ranch by paying one-half of the cost thereof to the appellant, and that such cost was to be shared equally by them. While there is considerable conflicting evidence the question was one of fact for the jury, and its finding thereon is not without support.

[9] It is next contended that it appears as a matter of law that the action was barred by the statute of limitations and that the evidence conclusively shows that the respondent, as a reasonable man, was put upon inquiry, that means of knowledge were open to him, and that a reasonable inquiry would have developed the true facts. A large part of this argument is

devoted to the proposition that information was available which would have disclosed that the appellant had actually purchased the Otay ranch in 1922. In addition to what we have already said on this subject it should be remembered that the respondent lived in Ohio, that the transaction was closed by mail, and that the respondent was in San Diego very little for some years thereafter. The important consideration is whether circumstances existed which put the respondent upon his guard with respect to the action of the appellant in charging him more than his proportion of what the land had cost, and whether means of knowledge were open to the respondent which, if pursued, would have disclosed the true facts in that regard. The appellant relies upon the fact that trouble developed between the parties in 1925 and 1926 over the management of the ranch and the payment of existing obligations, which led to an agreement separating their interests, and which left the parties with considerable ill-will toward each other. There was some evidence that the respondent, after that time, told certain parties that the appellant had defrauded him in connection with the settlement of their affairs. Not only is that evidence contradicted by the testimony of the respondent but knowledge of wrong-doing on the part of the appellant in that connection could hardly be said, as a matter of law, to have put the respondent upon notice and to have required him to make an investigation as to the acts of the appellant in originally entering into the transaction.

[10, 11] Moreover, it does not appear that means of knowledge were then open to the respondent or that any reasonable inquiry on his part would have developed the true facts with respect to the real fraud, which is here in issue. It appears that after he had received an intimation of this fraud, in 1936, the respondent went to Judson, from whom the land had been purchased, to Judson's attorney and to the real estate agent who had represented Judson, all of whom refused to give him any information on that subject. It does not appear that an earlier inquiry would have been more successful, and it is not to be anticipated that the appellant would have been any more helpful had an inquiry been made of him. While there is a great deal of evidence upon this subject, the only thing that clearly appears therefrom is that

it is sharply conflicting in the respect now under consideration. From the record before us it cannot be said, as a matter of law, that the action was barred or that sufficient excuse was not shown for a failure to make an earlier discovery of the true facts. Again the question was one of fact for the jury. It may be said here as was said in *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 P. 243, 249: "Without some information which carried a direct implication or suggestion of possible fraud, the plaintiff could not be put upon inquiry. The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part. The present case is not of that character."

[12, 13] The next points raised are that the court erred in excluding testimony as to the value of this land and in refusing to instruct the jury to the effect that the measure of the respondent's damages, if any, would be the difference between the money he paid for the property and the value of the property he received. It is argued that since the action was in fact based upon fraudulent representations the measure of damages is fixed by section 3343 of the Civil Code. That section has no application in this case where, in the manner pointed out in *Philpott v. Superior Court*, supra, the respondent waived the tort and sued for the return of his money. In such an action the actual value of the land is not material and has nothing to do with the amount which the plaintiff has paid and which he seeks to have returned. *King v. Wise*, 43 Cal. 628; *Fink v. Weisman*, 129 Cal.App. 305, 18 P.2d 961.

[14, 15] It is next urged that the court erred in admitting evidence concerning the

sale of an interest in the National ranch to the respondent. While it is conceded that this evidence disclosed that the appellant had secured a secret profit in that deal it is argued that it was an entirely separate transaction and that evidence of a prior or subsequent fraud is not admissible. Not only was this evidence admissible for the purpose of showing intent (*Atkins Corporation v. Tourny*, 6 Cal.2d 206, 57 P.2d 480; *Evans v. Gibson*, 220 Cal. 476, 31 P.2d 389), but it had a direct relation to the entire transaction and was admissible to prove the existence of a confidential relationship between the parties at that time and before the option for the purchase of the Otay ranch was exercised by the respondent. It is further urged that the court erred in excluding evidence of public knowledge of the fact that the Otay ranch was owned by the defendant. The only thing referred to in this connection is that the court excluded an article supposed to have appeared in a newspaper published in San Diego. This article was published while the respondent was in Ohio, it did not show that the appellant owned the land in question, and a great deal of other evidence was admitted by the court for the purpose of showing such public knowledge. No reversible error appears in this connection.

[16] Some contention is made that the differences between the parties were completely adjusted by the contracts of settlement which finally resulted, in 1936, in the appellant taking back the Otay ranch. That settlement had nothing to do with the original transaction here in question, and the facts upon which this action is based were not then known to the respondent. In so far as shown by the evidence, that settlement purported to settle certain matters between the parties and made no pretense of settling all of their differences or affairs.

The judgment appealed from is affirmed.

We concur: GRIFFIN, J.; HAINES, Justice pro tem.

34 Cal.App.2d 147

In re MALLON'S ESTATE.

**MARY KNOLL MISSIONARY SOC. v.
BANK OF AMERICA NAT. TRUST &
SAVINGS ASS'N et al.**

Civ. 2353.

**District Court of Appeal, Fourth District,
California.**

Aug. 18, 1939.

1. Wills ⚭671

No particular form of words or conduct is necessary for the manifestation of an intention to create a trust.

2. Wills ⚭675

Precatory words may or may not create a trust, according as they are used, and whether in any particular will they have been used for this purpose depends upon the construction to be given to that will.

3. Wills ⚭675

In order to make a trust under a will, it must appear that testator intended to impose an imperative obligation upon trustee and for that purpose used words which excluded the exercise of discretion or option in reference to the subject of the trust.

4. Wills ⚭675

While desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate of interest which he has given to him in absolute terms.

5. Wills ⚭675

Under will bequeathing all property to testator's sister "who will care for" certain named person "until death shall separate them," testator merely expressed expectation of what his sister would do but language did not show that the estate bequeathed was to be used for such purpose since obligation could be carried out by use of any other funds in sister's possession and valid trust was not created.

6. Wills ⚭671

Unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist.

7. Trusts ⚭1

It is an essential element of a trust that the subject matter of the trust be held

by the trustee for some one else, or be used for the accomplishment of some other object or objects than the personal benefit of the trustee.

8. Wills ⚭448

A construction preventing an intestacy is to be favored over one which results in an intestacy, either total or partial. Probate Code, § 102.

9. Wills ⚭675

Under will by which testator bequeathed all property to his sister "who will care for Mary L. Barrett until death shall separate them," testator did not intend that sister would hold personalty in trust for the care of the named individual during lifetime where to do so would be to disinherit sister and result in partial intestacy of testator with respect to the disposition of personalty. Probate Code, § 102.

10. Wills ⚭672(1)

The language of a will which was not addressed to an executor or trustee was insufficient to create a trust.

11. Wills ⚭675

Under will by which testator bequeathed all property to sister "who will care for" named person until death, words "who will care for" named person expressed a hope and belief but did not create a trust in favor of such person.

12. Wills ⚭472

When an absolute estate has been conveyed in one clause of a will, it will not be cut down or limited by subsequent words, except such as indicate clear intention as was shown by the words creating the estate, but words which merely raise a doubt or suggest an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the first estate conveyed. Probate Code, § 104.

13. Wills ⚭675

Where testator bequeathed all property to sister "who will care for" named person until death and provided that from amount of money realized from sale of realty certain portion should be given to named legatee, legatee could not claim that it had vested remainder in portion of corpus of alleged trust where no trust was legally created and words relied upon could not be given any effect in the absence of such trust.

14. Wills ⇨672(2)

While the desire of a testator for disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon estate or interest which he has given in absolute terms.

15. Appeal and error ⇨1008(3)

Where the construction placed upon a will by the trial court is a reasonable one, Court of Appeal will not disturb such construction.

16. Judgment ⇨344

The trial court did not abuse discretion in denying motion to vacate decree construing will.

Appeal from Superior Court, San Diego County; Frank J. Macomber and Arthur L. Mundo, Judges.

Proceeding in the matter of the estate of Joseph C. Mallon, also known as J. C. Mallon, deceased, by the Mary Knoll Missionary Society against the Bank of America National Trust & Savings Association, administrator, petitioner, and another. From an order construing a will and from an order denying a motion to vacate the judgment and order, the Mary Knoll Missionary Society appeals.

Affirmed.

Marcus L. Roberts, of Los Angeles, for appellant.

Gray, Cary, Ames & Driscoll and Green & Morrison, all of San Diego, for respondents.

GRIFFIN, Justice.

This is an appeal from an order construing a will, directing disposition of the property of the estate, and from an order denying a motion to vacate the judgment and order. Certain phases of this case were heretofore presented to this court for decision. Estate of Mallon, 28 Cal.App.2d 106, 81 P.2d 992. We need not cause this decision to become exuberant by reiteration of the salient facts there related.

The deceased left a will written entirely in his own handwriting, which reads:

"835 B Ave.,
"Coronado, Calif.
"July 1, 1936

"The following is a statement of all the personal and real property that I own.

(Here follows a list of personal and real property.)

"I, Joseph C. Mallon, on this date, July 1st, 1936, hereby will and bequeath all of the above property to my sister, Mary A. Mallon, who will care for Mary L. Barrett until death shall separate them. To the survivor shall be given one half of the amount of money realized from the sale of all real property. One fourth of that amount shall be given to my niece, Mrs. James Leahy, 35 Water St., Stonington, Connecticut, and one-fourth to the Mary Knoll Missionary Society, whose headquarters are in New York State.

"Signed by myself,

"Joseph C. Mallon."

A previous will, dated June 8, 1934, left all of decedent's property in trust during the lifetime of decedent's sister, Mary A. Mallon. It was held on the former appeal that this previous will was revoked by the execution of the subsequent will above quoted. The trial court has now found from an interpretation of its terms and provisions that the whole of the estate of the decedent was devised and bequeathed to decedent's sister, Mary A. Mallon, absolutely. The conclusion was that the words: "I * * * hereby will and bequeath all of the above property to my sister, Mary A. Mallon," constituted an absolute bequest; that the words "who will care for Mary L. Barrett until death shall separate them" were precatory and insufficient to raise a trust; that there being an absolute bequest to Mary A. Mallon in the first sentence, this could not be cut down by any subsequent provisions of the will.

Appellants contend that the gift to Mary A. Mallon provided for in the opening sentence of the will conveyed a life interest in all of the property of the testator, subject to a trust, the purpose of which was the care by the said Mary A. Mallon of Mary L. Barrett during their lives; that upon the death of either Mary A. Mallon or Mary L. Barrett the trust was terminated; that upon the termination of the trust created by the first sentence of the testator's will, the property was to be distributed to remaindermen, whose interest was created by the later provisions in the will, and whose interests became vested equally with those of Mary A. Mallon and Mary L. Barrett on the death of the testator. Therefore, the question for determination is whether the devisee or legatee is the sole beneficiary or, subject to her life es-

tate, merely a trustee for others of the gift bestowed upon her; whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of that party, leaving it, however, to the party to exercise her own discretion.

[1-7] What words annexed to a bequest or devise will create a trust in reference to the property bequeathed or devised has been the subject of frequent discussion in the construction of wills, and it is impossible to harmonize the several decisions upon the subject. No particular form of words or conduct is necessary for the manifestation of an intention to create a trust, and section 102 of the Probate Code demands that the words of a will receive an interpretation which will give every expression some effect, rather than one which will render any of the expressions inoperative. Precatory words may or may not create a trust, according as they are used, and whether, in any particular will, they have been used for this purpose will depend upon the construction to be given to that will. In order to make Mary Mallon a trustee under the will it must appear that the testator intended to impose an imperative obligation upon her, and for that purpose has used words which exclude the exercise of discretion or option in reference to the act in question. While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given to him in absolute terms. *Estate of Marti*, 132 Cal. 666, 61 P. 964, 64 P. 1071. It should be noted that the words of Joseph Mallon are not directed to an executor or trustee. As to the first provision, "who will care for Mary L. Barrett * * *", it appears to us that the language is at most a mere recital of the testator's expectation. By the use of the language above quoted, the testator merely expresses his expectation of what his sister will do. He has only stated his belief that something will be done for Mrs. Barrett by Miss Mallon. It is an established rule of law that unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist. *Estate of Marti*, supra. A be-

quest may be made and in such language as to admit of no doubt that the testator intended to impose an obligation upon the legatee and yet no trust exist. The reason is that the obligation imposed does not run to the disposition of the money or property bequeathed, that is, the money or property is neither given nor received upon any obligation as to what shall be done with it. The essential element of a trust that the subject-matter of the trust (that is the money or the property) be held by the trustee for someone else, or be used for the accomplishment of some other object or objects than the personal benefit of the trustee, is absent. So here, even assuming that the language of the testator shows that he intended respondent Mary A. Mallon to receive his estate subject to a binding obligation to care for Mrs. Barrett, nevertheless he did not use any language to show that *the estate bequeathed* was to be used for such purpose. The obligation could be carried out by the use of any other funds in Miss Mallon's possession. The language used by the court in *Estate of Hamilton*, 181 Cal. 758, 764, 186 P. 587, 589, is especially appropriate to the will here involved.

"As to them, the essential point is that while they will receive the money upon the obligation to offer masses as required, such obligation does not go to the use or disposition of the money."

So here, Miss Mallon receives the money for herself. The only obligation (if there was any obligation at all) was to care for Mrs. Barrett, not necessarily out of the money or property bequeathed, but out of any money she might have. Assuming that she receives the bequest upon an obligation to care for Mrs. Barrett, "such obligation does not go to the use or disposition of the money or property bequeathed", and there is, therefore, no trust.

If we accept appellant's interpretation of the will, that is, that Miss Mallon held the personal property in trust for the care of Mrs. Barrett during her lifetime, on this theory Miss Mallon would not receive any beneficial interest whatsoever in the corpus of the property for herself during Mrs. Barrett's lifetime. In fact, she would actually be entirely disinherited unless she survived Mrs. Barrett. She was the testator's own sister, while Mrs. Barrett was only his housekeeper. Certainly, it cannot be said that the testator intended to put his housekeeper above his sister and that

he intended to wholly disinherit his sister unless she survived the housekeeper. There were the closest ties of blood and long association between the testator and Miss Mallon and every reason why he should wish to benefit her personally.

[8,9] Also accepting the appellant's theory of the trust as to the personal property and assuming the death of Miss Mallon prior to the death of Mrs. Barrett, the will would make no disposition of the corpus of the personal property for it refers only to the eventual disposition of the proceeds of the sale of the real estate. This would involve a partial intestacy. The law is too well settled to require citation of authorities that a construction preventing an intestacy is to be favored over one which results in an intestacy, either total or partial. Sec. 102, Probate Code; Estate of Farely, 214 Cal. 199, 4 P.2d 948.

It is to be noted that in the will which the testator executed in 1934, he expressly created a trust, named a trustee, and appointed an executrix. In Estate of Mitchell, 160 Cal. 618, 117 P. 774, the testator created a trust in an earlier will but did not carry over the same provisions into a later will. The court held that this fact was in itself proof that no trust was intended by the later document, saying in 160 Cal. at page 624, 117 P. at page 776:

"The fact that the testatrix made so many wills, and that the one of August, 1907, disposed of one-half of the residue to a trustee in trust for Lucille, showed that she had some knowledge about wills, and understood the nature of trusts and something of the forms of expression used in creating them. So far as these facts have any bearing, they would seem to point to a design not to establish a trust in favor of Lucille, since the testatrix must have been familiar with the proper form of words to create a trust, and could easily have done so if she had so desired."

This fact was previously recognized by this court in considering the two wills involved. Estate of Mallon, supra, 28 Cal. App.2d at page 110, subd. 4, 81 P.2d 992. In Estate of Browne, 175 Cal. 361, 165 P. 960, 961, the residuary bequest was as follows:

"All the rest and residue of my property of every kind, character and nature whatsoever, whether real or personal, I give and bequeath unto my beloved son, Clarence W. Browne, save and except I desire that he pay out of said property to Miss

Cora McGarvey, the sum of two hundred dollars (\$200.00), and to Miss Edith Johns the sum of two hundred dollars (\$200.00)."

In holding that this language did not create a trust, the court said, 175 Cal. at pages 362 and 363, 165 P. at page 961:

"Clearly the words above quoted are not sufficient to create a precatory trust in favor of the appellants. Whatever may be the rule elsewhere, 'it is the settled law in California that precatory words are not to be regarded as creating a trust unless it appear that the testator intended to impose an imperative obligation and to exclude the exercise of discretion on the part of the person to whom the recommendatory words are addressed.' * * * It is to be observed that the testator's desire is expressed not to his executor, but to one of the beneficiaries under his will. Under such circumstances it may only be regarded as a mere request, and not as partaking of the nature of a command."

[10] So here, the language which is not addressed to an executor or trustee is insufficient to create a trust. To the same effect is Estate of Price, 138 Cal.App. 462, 32 P.2d 994, in which case the testatrix by will left all her property to her husband "with the earnest request that he provide and maintain a home for my aunt". In reversing the judgment of the trial court, which held that this language created a trust, the court said, 138 Cal.App. at page 464, 32 P.2d at page 994:

"It was early decided that if a mere desire be expressed, without a devise for a purpose, or if a bequest so depends upon the discretion of the general devise as to be incapable of execution without superseding that discretion, there can neither be a trust or charge." See, also, Kauffman v. Gries, 141 Cal. 295, 74 P. 846; Estate of Mooney, 25 Cal.App.2d 481, 77 P.2d 1098; Estate of Logan, 29 Cal.App.2d 60, 84 P.2d 245.

[11] Certainly, all that is expressed by the phrase "who will care for Mary L. Barrett" is the belief, and perhaps the hope, of the testator that Miss Mallon would so care for Mrs. Barrett. Language expressing a "hope and belief" does not create a trust. McDuffie v. Montgomery, C.C., 128 F. 105; Holmes v. Dalley, 192 Mass. 451, 78 N.E. 513; Estate of Lee, 104 Cal.App. 15, 284 P. 948; Estate of Oliver, 21 Cal. App.2d 106, 68 P.2d 735; Estate of Farely, supra. We therefore find nothing in this

provision of the will creating a trust in so far as it may affect the real or personal property.

Approaching the second provision, we find the following language: "To the survivor shall be given one half of the amount of money realized from the sale of all real property * * *. One fourth * * * to my niece * * * and one-fourth to the Mary Knoll Missionary Society * * *." Previously, we have not considered the effect of Probate Code section 104 (formerly section 1322 of the Civil Code), which provides as follows:

"A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will."

[12] The leading case upon the construction of this section is *Estate of Marti*, supra, to which we have already referred. The authorities all agree that when an absolute estate has been conveyed in one clause of a will, it will not be cut down or limited by subsequent words, except such as indicate as clear an intention therefor as was shown by the words creating the estate. Words which merely raise a doubt or suggest an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the estate first conveyed. This rule of construction controls the rule that an interest given in one clause of a will may be qualified or limited by a subsequent clause.

[13] Appellant contends that it has a vested remainder in a portion of the corpus of the alleged trust. From our conclusion heretofore reached, no trust has been legally created so that the foundation for this argument in this connection fails. The words relied upon cannot be given any effect in the absence of a trust. This was established in *Estate of Goldthwaite*, 140 Cal.App. 551, 35 P.2d 1050, in which case the testator left a formal will which was admitted to probate in which his father was named as executor and practically sole legatee. Thereafter the following document was admitted to probate as a holographic codicil to the will:

"Father—If anything should happen to me * * * will you do me the everlasting favor of giving one-half the proceeds

from the sale of my house and furniture to Mary Johnson. * * * (Italics ours.)"
"Spem * * *."

In reversing the order admitting the document to probate and holding the instrument wholly ineffective, the court said:

"The writing refers to 'one-half the proceeds from the sale of my house and furniture,' but there is nothing either in the will or in the writing itself which orders, or even requests, a sale of the house and furniture, the will declaring: 'I give, devise and bequeath * * * My home and furniture * * * to my father * * *.' This is an unconditional and absolute devise of the homeplace to the father under the last will and testament of decedent, and the writing here involved we construe to be only an expression of a desire on the part of decedent that his father look after the proponent."

In that case the testator's father was named executor. Here, as in the *Goldthwaite* case, there is nothing in the whole will which "orders or even requests a sale" of the real property. The language here can therefore be given no more effect than the similar language in the *Goldthwaite* case.

It is to be noted that it is the specific real property, not the "amount of money realized from the sale of all real property" which is devised to Miss Mallon. Therefore, the testator must have intended Miss Mallon to have physical possession and control of the property. Who, then, is the person by whom the "amount of money realized from the sale of all real property" is to be given to appellant and to the other alleged beneficiaries? Obviously, it cannot be the administrator with the will annexed, for the testator expressly directed him to distribute the real property itself to Miss Mallon. Likewise, it cannot be a trustee, for there is no trustee, nor even a trust. The language can only be interpreted as a request to Miss Mallon to have the property sold and distributed personally, if she should be the survivor of herself and Mrs. Barrett, or by direction to her own executor, if she should predecease Mrs. Barrett.

In the 1934 will the testator disposed of the residue of his estate after the life tenant's death in the following manner:

"I give and bequeath to Mary L. Barrett, * * * To Mrs. * * * Leahy * * * I give and bequeath one-fourth * * *."

[14] The testator recognized that it was he who gave and bequeathed the remainder interests to each of the various remaindermen and in each and every instance he used the precise and definite phrase "I give and bequeath". Similarly, in the 1936 will he used the phrase "I * * * will and bequeath" with reference to the absolute gift of the property which he willed and bequeathed to respondent Mary A. Mallon. We note the contrast with the language used in the balance of the will. Instead of saying "I will and bequeath" or "I give and bequeath" one-half of the proceeds of the real estate to the survivor, the testator said: "To the survivor shall be given one-half of the amount * * *." Instead of saying "one-fourth of that amount I give and bequeath to the Mary Knoll Missionary Society", the testator says, "one-fourth of that amount shall be given to the Mary Knoll Missionary Society." In other words, the testator does not give or bequeath anything to the so-called beneficiaries. He does not direct his language to his executor or to the law. He directs it simply to Miss Mallon and requests her to make the designated gifts. This case is, therefore, squarely within the rule stated in *Estate of Marti*, supra, which is quoted with approval in *Estate of Tooley*, 170 Cal. 164, at page 167, 149 P. 574, at page 575, Ann. Cas.1917B, 516, as follows:

"* * * 'While the desire of the testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given * * * in absolute terms.'"

[15] We therefore are of the opinion that the trial court was justified in concluding that the language used by the testator was entirely insufficient to create a trust. The essential requirements of a trust were not present and to hold that a trust was created would result in the virtual disinheritance of Miss Mallon, to whom the testator expressly willed and bequeathed all his property. Under the provisions of section 104, Probate Code, the absolute estate given Miss Mallon cannot be affected by the later ambiguous and doubtful language upon which appellant relies or by inference or argument from other parts of the will. The construction placed upon the will by the trial court is a reasonable one and should not be disturbed. *Estate of*

Bourn, 25 Cal.App.2d 590, 600, 78 P.2d 193. This court has heretofore stated that no trust was created by the "express provision of the testator". The concluding sentences of the will which are directed to Miss Mallon and not to the administrator with the will annexed or to the law, do not give the appellant any interest in the testator's estate. The question whether the decedent intended to create a trust must be resolved in favor of testacy and the trial court was justified in placing the construction which it did on the disputed language of the will.

[16] In view of this conclusion, it becomes unnecessary to review the merits of appellant's appeal from the order refusing to vacate the decree construing the will. However, a review of the affidavits and counter-affidavits on file support the action of the trial court and make it obvious that there was no abuse of discretion in denying the motion. *Thaler v. Thaler*, 127 Cal. App. 28, 15 P.2d 192.

The orders from which this appeal has been perfected are affirmed.

We concur: BARNARD, P. J.; HAINES, J., pro tem.



34 Cal.App.2d 189

NORTON v. HOFFMANN et al.

Civ. 2419.

District Court of Appeal, Fourth District,
California.

Aug. 21, 1939.

1. Municipal corporations ⇨745½

A municipal or other public corporation is not liable, in absence of special statute, for torts of its agents in performance of governmental, as distinguished from proprietary, functions.

2. Municipal corporations ⇨747(1)

City was not liable for alleged malicious prosecution of plaintiff by city's attorney.

3. Municipal corporations ⇨741(1)

Where no verified claim for damages was presented to the city of Los Angeles within six months after alleged malicious

prosecution of plaintiff, as required by the Los Angeles charter, no action could be maintained on plaintiff's claim, even if it were otherwise well-founded. St.1927, p. 2014, § 376.

4. Pleading ⚡35

The fact that city attorney and deputy city attorney, who were sued as individuals for malicious prosecution, recited in their demurrer that they were sued as city officials, did not alter the fact that they really demurred as individuals, and the recital would be treated as surplusage.

5. Municipal corporations ⚡744

City attorney and his deputy were immune from liability for alleged malicious prosecution of an attorney who was charged with practicing law without a license, where they acted within the scope of their authority. St.1933, pp. 2742, 2744, §§ 42(8), 43; St.1927, p. 45, § 49; St.1925, pp. 657, 1052, §§ 24, 53(3); St.1921, p. 1654, § 1; St.1913, pp. 469, 472, §§ 2, 7.

6. Constitutional law ⚡305

The sections of the Los Angeles charter requiring that a verified claim for damages be presented to the city within six months after the occurrence complained of before institution of action did not violate the rights under section 1 of the Fourteenth Amendment of the Federal Constitution of attorney who brought action against city and others for alleged malicious prosecution. St. 1927, p. 2014, § 376; U.S.C.A.Const. Amend. 14, § 1.

7. Criminal law ⚡168

Prosecution under the section of the State Bar Act providing that any person who, not being an active member of the state bar, or who after he has been disbarred or while suspended from membership in the state bar, shall practice law, shall be guilty of a misdemeanor, did not put attorney twice in jeopardy for the same offenses, since disciplinary proceedings before administrative committees of the state bar and before the board of governors are not, strictly speaking, criminal in character. St.1927, p. 45, § 49.

8. Constitutional law ⚡258

Prosecution under the section of the State Bar Act providing that any person who, not being an active member of the state bar, or who after he has been disbarred or while suspended from membership in the state bar, shall practice law, shall be guilty

of a misdemeanor, was not a denial of due process of law. St.1927, p. 45, § 49; U.S.C. A.Const. Amend. 5.

9. Pleading ⚡238(4)

Trial court did not err in denying plaintiff's petition for leave to amend his pleadings, where he made no application for leave to amend when demurrer was sustained to his pleadings, and petition to amend contained no new fact which would form subject for amendment and was not filed until day judgment was signed and filed.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by M. G. Norton against Charles W. Hoffmann and others for damages for malicious prosecution. From a judgment sustaining the defendants' demurrer and from an order refusing to vacate its ruling on the demurrer, the plaintiff appeals.

Judgment and order affirmed.

M. G. Norton, in pro. per.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and John L. Bland and Bourke Jones, Deputy City Attys., all of Los Angeles, for respondents.

HAINES, Justice pro tem.

The complaint in this action is in six counts. In the first count plaintiff and appellant alleges that he was, on October 10, 1892, duly admitted and licensed to practice as an attorney and counselor at law in all the courts of the State of California, and that at all times mentioned in his complaint, and for nearly half a century, he has been such attorney and counselor at law in good standing, admitted to practice law and entitled to practice the same in the courts of the state of California and in the federal courts.

It is alleged that in August, 1933, defendant John M. C. Marble Company, a corporation, in the municipal court of the City of Los Angeles, sued one Hattie F. Norton, and her husband, Aaron F. Norton, who is appellant's brother, seeking to recover \$113.60; that in said municipal court case, defendant Wackerbarth appeared as attorney for the John M. C. Marble Company, and appellant entered his appearance as attorney for said Hattie F. Norton and Aaron F. Norton; that

according to his information and belief some time prior to June 20, 1935, defendant John M. C. Marble Company, defendant John M. Marble its president, defendants Wackerbarth, Hendrick, and defendants and respondents Chesebro and Hoffmann, the latter two then being, respectively, city attorney and deputy city attorney of defendant and respondent City of Los Angeles, conspired together to eliminate appellant from further participation in said municipal court case by charging him with having committed a misdemeanor in acting in said municipal court case for the said Hattie F. Norton and Aaron F. Norton without being an active member of the state bar, all in violation of the State Bar Act.

The complaint goes on to allege that in pursuance to such conspiracy, at the instance of Marble and Wackerbarth, respondent Chesebro, on June 20, 1935, authorized a criminal prosecution against appellant on the verified complaint of his deputy, respondent Hoffmann, that such complaint contained six counts and was on said last-mentioned date filed in said municipal court and that upon being arraigned, appellant pleaded not guilty to it.

It is further alleged that said criminal cause came on for trial before said municipal court sitting with a jury; that said city attorney submitted the case on behalf of the People and rested; that thereupon appellant, having presented to the court a certificate from the clerk of the Supreme Court of the State of California, certifying that he, said appellant, was an attorney and counselor at law in good standing and duly admitted as attorney and counselor at law in all the courts of this state, the court ordered a dismissal of said criminal complaint, the discharge of appellant from custody and the jury from further service.

It is further alleged that the issuance and filing of said criminal complaint, and said entire prosecution of appellant were without probable cause and induced by the influence exerted upon respondent Chesebro by other defendants and were done with intent on the part of the present respondents, maliciously, to harass, annoy and injure appellant and destroy his reputation as attorney and citizen and to unjustly subject him to humiliation, contempt and embarrassment in the eyes of the public. The complaint states that appellant had never before been charged with any crime but had borne an exemplary char-

acter; that he was required to appear repeatedly in court in the company of many criminal offenders; that his trial occurred during the week of July 15, 1935, while a convention of the American Bar Association was in session in Los Angeles; that by reason of appellant's prominence and the nature of the offense charged, the occurrence received considerable newspaper publicity, to appellant's great distress and humiliation; in consequence of all of which he has suffered anguish in mind and body and his health has been impaired, in addition to the loss of time occasioned to him in his business. Appellant complains in the first count of his complaint that he suffered by reason of the occurrences recited, special damages through loss of time, to the extent of \$1,000, and for expenses incurred in defending himself, in the sum of \$100, as well as general damages for humiliation, worry, and injury to his health and reputation in the sum of \$10,000. He further asserts that the defendants have, in the premises, been guilty of fraud, malice and oppression, for which exemplary damages should be awarded in the sum of \$30,000. By reason of the matters stated in his first count, therefore, he asks judgment for damages aggregating \$41,100.

By way of a second cause of action, he largely repeats the allegations of his first cause of action, but, instead of setting up the general charge made against him in the municipal court, of acting in the case referred to, for Hattie F. Norton and Aaron F. Norton, without being at the time an active member of the state bar, he sets up the specific charge made against him in the second count of the complaint filed with the municipal court, namely, that without being at the time an active member of the state bar he made and filed an affidavit for a subpoena duces tecum in said action in which Hattie F. Norton et al. were defendants. By reason of his prosecution on this charge he seeks damages in sums identical in amount with those sought in his first count, aggregating \$41,100. So, also in the four remaining counts of the complaint in the instant case, he, for the most part, repeats, in each, the allegations of his first cause of action but sets out in these, respectively, the charges made against him in the third, fourth, fifth and sixth counts of the criminal complaint filed against him, that is, that without being at the time an active member of the state bar, he made and filed an affidavit

for an extension of time in the case in which Hattie F. Norton et al. were defendants; that he made and filed a notice of appeal from the judgment of the municipal court therein; that he prepared, served and filed objections and reservations to proposed amendments to a bill of exceptions therein; and finally, that he appeared for his said clients upon the hearing of a motion therein.

On account of his prosecution on each of these several charges he separately asks judgment on each count for items aggregating \$41,100. That is to say, by reason of his prosecution on the six counts of the criminal complaint, he seeks a total judgment for \$246,600.

To this complaint a joint demurrer was filed by the defendants and respondents Hoffmann, Chesebro and the City of Los Angeles. This demurrer was sustained without leave to amend on July 12, 1938, and judgment rendered on July 18, 1938, and entered on July 20, 1938, accordingly. Demurrers interposed by certain of the other defendants were overruled and they were required to answer. Appellant, having unsuccessfully moved the trial court on July 22, 1938, to vacate its ruling on the demurrer of respondents Hoffmann, Chesebro and the City, which necessarily involved an application to vacate the judgment entered; and to permit him to amend his complaint, he now appeals from the said judgment and also from the court's said order of July 22, 1938, denying his said motion.

[1-3] So far as the City of Los Angeles is concerned, appellant's complaint of the trial court's action can be dealt with in a few words. It has long been settled in this state that a municipal or other public corporation is not liable, in the absence of any special statute rendering it liable for the torts of its agents in the performance of governmental as distinguished from proprietary functions. *Morrison v. Smith Bros. Inc.*, 211 Cal. 36, 293 P. 53; *Yolo v. Modesto Irr. Dist.*, 216 Cal. 274, 276, 13 P.2d 908; *Brindamour v. Murray*, 7 Cal.2d 73, 78, 59 P.2d 1009; *Municipal Bond Co. v. Riverside*, 138 Cal.App. 267, 274, 32 P.2d 661; *Fox v. Pasadena*, 9 Cir., 78 F.2d 948. If it could be successfully claimed that particular torts of its agents were outside the scope of their agency, the rule would evidently be a fortiori applicable. Moreover it is not even alleged here that any verified claim

for damages was presented to the city within six months after the occurrence complained of, as required by section 376 of the Los Angeles charter. St.1927, p. 2014. In the absence of such presentation, even if the claim were otherwise well founded, no action upon it could be maintained. *Western Salt Co. v. San Diego*, 181 Cal. 696, 698, 699, 186 P. 345; *Crescent Wharf & Warehouse Co. v. Los Angeles*, 207 Cal. 430, 278 P. 1028; *Douglas v. Los Angeles*, 5 Cal.2d 123, 53 P.2d 353; *White-Satra v. Los Angeles*, 14 Cal. App.2d 688, 58 P.2d 933.

[4] We come, then, to the asserted liability of Chesebro and Hoffmann. As to the question of whether or not they are sued or defend in their capacities as officials of the city, we need waste few words. It would appear from the complaint that what they did was under color of what was treated as authority derived from the public offices which they held. We have just seen, however, that no liability that could be claimed to exist against them could affect the city. It is incorrect to say they are sued as city officials nor do we find any language in the complaint which bears that import. The recital, therefore, in their demurrer, that they are so sued is surplusage but being the nature of a mere recital is, on the principle *falsa demonstratio non nocet*, harmless and does not alter the fact that they really demur in the only capacity in which they are really sued, that is, as individuals.

The first question, then, that merits serious examination on the present appeal is whether or not Chesebro and Hoffmann, though now sued as individuals, were acting within the scope of their official duties or authority as prosecuting officers of the city in undertaking to file and prosecute a proceeding against appellant for alleged violation of the State Bar Act, St.1927, p. 38.

Subdivision (8) of section 42 of the Los Angeles City charter is to the effect:

"Whenever it shall be authorized by the laws of this state, the city attorney shall prosecute any or all misdemeanor offenses arising upon violation of the laws of the state and appeals arising therefrom. He shall draw complaints for misdemeanors committed against the laws of this state, prosecute all recognizances and bail bonds forfeited in such misdemeanor cases and prosecute all actions for the recovery of fines, penalties and forfeitures accruing to

the city or county of Los Angeles in said cases." St.1933, p. 2742.

Section 43 of the same charter provides that:

"That the office of the city prosecutor be and the same is hereby abolished. The city attorney is hereby declared to be the successor to the city prosecutor." St. 1933, p. 2744.

This section 43 was adopted in 1933 as an amendment to the charter. The office of city prosecutor had previously been provided for and his appointment, qualifications and duties defined by sections 51 to 53, both inclusive of the charter as adopted in 1925. Stats.1925, pp. 1051, 1052. Said subdivision (3) of said section 53, as it stood prior to the 1933 amendment of the charter, read as follows:

"Whenever it shall be authorized by the laws of this state, the City Prosecutor shall prosecute any or all misdemeanor offenses arising upon violation of the laws of the state and appeals arising therefrom. He shall draw complaints for misdemeanors committed against the laws of this state, prosecute all recognizances and bail bonds forfeited in such misdemeanor cases and prosecute all actions for the recovery of fines, penalties and forfeitures accruing to the City or County of Los Angeles in said cases." Stats.1925, p. 1052.

Section 24 of the Municipal Court Act, St. 1925, p. 657, reads as follows:

"Whenever a municipal court is established in a city or city and county wherein there is an officer charged with the duty of prosecuting misdemeanor charges in the police court of such city or city and county, such prosecuting officer shall prosecute all such misdemeanor charges in the municipal court with the same rights, duties and privileges with respect thereto that he formerly exercised with respect to such charges in such police court, including the prosecution of appeals in criminal cases arising in the municipal court and the defense of all writs arising out of arrests for offenses triable in the municipal court in whatever court or courts the same may be appealed to or initiated in."

Los Angeles is a city of the first and $\frac{1}{2}$ class. St.1921, p. 1654, § 1, Deering's Gen. Laws, ed. 1937, vol. II, Act 5151, p. 2206, sec. 1. Its police court existed until superseded by the municipal court by virtue of general law. St.1913, p. 469, as amended. Deering's Gen.Laws, ed. 1937, vol. II p. 2821 et seq., Act 6027. The act last refer-

red to, in section 2, invested such police court with jurisdiction not only of criminal cases arising out of the violation of ordinances but also generally of misdemeanors committed within the city. In section 7, it made it the duty of such prosecuting attorney as should be chosen pursuant to the city charter both to draft complaints in all misdemeanor cases of which the court had jurisdiction, whether arising under ordinances or otherwise, and to prosecute the same. As just seen, his duties under section 43 of the charter, as amended in 1933, devolved on the city attorney who is, therefore, under the above quoted section 24 of the Municipal Court Act, charged with the prosecution before the municipal court of misdemeanors generally, at least when committed within the city.

Section 49 of the State Bar Act, St.1927, p. 45, Deering's Gen.Laws, ed.1937, vol. I, p. 188, Act 591, provides that:

"Any person who, not being an active member of the state bar, or who after he has been disbarred or while suspended from membership in the state bar, as by this act provided, shall practice law, shall be guilty of a misdemeanor."

We see nothing in the State Bar Act which forbids the institution of criminal proceedings under section 49 thereof, in the same manner and by the same authorities as in the case of other misdemeanors. The disciplinary proceedings before administrative committees and the board of governors are not, strictly speaking criminal in character (In re Winne, 208 Cal. 35, 41, 280 P. 113) though sometimes referred to as quasi criminal. 9 Cal. Jur., 10 Year Supp. pp. 429, 430, sec. 79; *Furman v. State Bar*, 12 Cal.2d 212, 83 P.2d 12. Proceedings before these boards are really special in their nature and, as said in *Re Winne*, supra [208 Cal. 35, 280 P. 115], are designed to determine whether or not the practitioner "has exercised the privilege of franchise to practice law in conformity with the statutes and ethics of the legal profession". Such proceedings in no wise exclude prosecutions under ordinary procedure for any conduct described either by the State Bar Act or any other valid statute as criminal. In fine, we do not think it even doubtful that prosecutions for occurrences within the City of Los Angeles made misdemeanors by section 49 of the State Bar Act fall within the duties of the city attorney. This being the situation, the case

at bar presents many aspects of similarity to that of *Pearson v. Reed*, 6 Cal.App.2d 277, 44 P.2d 592, wherein a hearing was denied by the Supreme Court. It there appeared that the plaintiffs had been arrested and charged in the Los Angeles municipal court with petty theft. One Johnson was city prosecutor. Without his knowledge certain parties had obtained from one of his deputies, named Wygant, the complaint on which the arrest was made. Johnson, however, after learning what had occurred, proceeded to prosecute the case, which resulted in an acquittal of the plaintiffs. They, thereupon, brought action against Johnson, as well as against the complaining witnesses, for malicious prosecution and a verdict was given and judgment rendered therein in their favor. Johnson appealed and the judgment was reversed. After reciting that Johnson had acted throughout in his official capacity, the Appellate Court for the Second District went on to say (6 Cal.App.2d page 280, 44 P.2d page 594):

"In considering the sufficiency of the facts * * * to charge Johnson with liability for damages for malicious prosecution, we will assume that the findings of the jury that the prosecution was malicious and without probable cause are sustained by the evidence. There is thus clearly presented the question whether a public prosecutor, acting solely in his official capacity, is liable in damages for a criminal prosecution instituted without his knowledge, but maintained and carried on maliciously and without probable cause.

"Principles of public policy declared and expounded by courts which have given the subject exhaustive consideration lead irresistibly to the conclusion that no such liability exists. No policy has been declared and maintained more firmly than the one which preserves the independence and freedom of action of judicial and quasi judicial officers acting in official capacity. The exemption runs as to liability for damages resulting from official acts, although they be done without probable cause and with malice. There are but few cases in which the courts have been called upon to decide whether the immunity is extended to a prosecuting officer. The latter question has not been decided in California."

Thereupon the court proceeded to consider with some elaboration the decisions on the question of immunity, both of judicial officers and of others having func-

tions in some sort judicial, citing, inter alia, *Bradley v. Fisher*, 13 Wall. 335, 80 U.S. 335, 337, 20 L.Ed. 646, 647; *Cooley on Torts*, third edition, volume 2, page 795; *Spalding v. Vilas*, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780; *Downer v. Lent*, 6 Cal. 94, 65 Am.Dec. 489; *Turpen v. Booth*, 56 Cal. 65, 38 Am.Rep. 48; *Smith v. Parman*, 101 Kan. 115, 165 P. 663, L.R.A.1917F, 698; *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001; *Yaselli v. Goff*, 2 Cir., 12 F.2d 396, 56 A.L.R. 1239, affirmed in 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395; and *Watts v. Gerking*, 111 Or. 641, 222 P. 318, 228 P. 135, 34 A.L.R. 1489. The conclusion was reached that a public prosecutor's functions called for action on his part sufficiently partaking of a judicial nature to render it imperative that the immunity extend to him.

It is, of course, true that the facts presented in *Pearson v. Reed*, supra, fall somewhat short of the situation in the case at bar, in that, in *Pearson v. Reed*, the prosecutor had no personal knowledge in advance that his deputy intended to issue the complaint, so that whatever malice he exhibited could only have affected his prosecution of the case after it had been instituted. However, in *White v. Brinkman*, 23 Cal.App.2d 307, 73 P.2d 254, the District Court of Appeal for the First District not only approved the doctrine of *Pearson v. Reed*, but extended it to cover the cases of one Sherry, a deputy district attorney of Alameda county acting as prosecutor of Berkeley, one Thompson, the city manager of Berkeley, and one Brinkman, the chief building inspector of that city, all of whom were alleged to have maliciously conspired to cause the plaintiff's arrest for excavating on certain property without having sufficiently protected the excavation to avoid the caving in of the soil, in violation of the requirements of a city ordinance. In this case it was charged that the complaint was actually verified by Brinkman but that the other two officials named, together with certain others, were parties to the plan that resulted in its issuance and the arrest complained of. It appeared that the prosecution had been dismissed on motion of Sherry himself. The trial court sustained demurrers to the complaint and entered judgment for the defendants, and, in upholding such action, the Court of Appeal held the immunity to extend not only to Sherry, the deputy district attorney, but

also to the city manager and building inspector, on the ground that official duty required them also to see the city ordinance enforced and, therefore, clothed them with the same immunity given to the prosecuting attorney. It will be observed that this case was like the one at bar, not only in the circumstance that the parties adjudged to be entitled to the immunity had all been charged with knowledge in advance of the proposed institution of the prosecution and with participation in the plan of instituting it, but in the further circumstance that, as in the instant case, one of them verified the complaint himself.

[5] We think, then, that in the case before us, in sustaining the immunity of the city attorney and his deputy for acts which we hold to have been within the scope of their authority as prosecutors, the trial court was amply justified by the decisions referred to. Appellant, indeed, claims that the immunity asserted violates his rights under the Constitution of the United States and refers to certain language of Mr. Justice Field, in *Bradley v. Fisher*, *supra*. His reliance on that case, however, is founded on the assumption that Chesebro and Hoffmann were acting in a matter, the subject of which was outside their jurisdiction, and that assumption is an erroneous one. As pointed out in *Bradley v. Fisher* [13 Wall. 352, 20 L. Ed. 646], there is a distinction between "acts done in excess of jurisdiction and acts where no jurisdiction whatever over the subject-matter exists". And in speaking of immunity for the acts complained of, which there consisted of the making by a judge of a disbarment order without previous citation or hearing, the court said:

"A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the

correctness of his determination in these particulars the validity of his judgments may depend."

[6-8] Appellant also asserts that the requirements of section 376 of the Los Angeles charter, that a claim be presented to the city within six months after the occurrence complained of before the institution of an action, violates his rights under section 1 of the Fourteenth Amendment to the federal Constitution, U.S.C.A.; also that his prosecution under section 49 of the State Bar Act violated his immunity from being put twice in jeopardy for the same offenses and also amounted to a denial to him of due process of law contrary to the inhibitions of article V of the amendments to that instrument. These contentions are too unsubstantial to justify discussion.

We think that the trial court was correct in holding that appellant's complaint stated no cause of action as against either the City of Los Angeles, Chesebro or Hoffmann.

[9] Appellant further complains that he ought to have been allowed to amend his pleadings. The demurrer, as we saw, was sustained on July 12, 1938. The minutes show that at that time the appellant was personally present in court. The record fails to show that he at that time made any application for leave to amend. On July 18, 1938, however, he filed a petition for leave to amend, which despite its elaboration, amounted merely to an argument and suggested no additional facts which could form the subject for such amendment. It does not appear that this petition was called to the attention of any judge of the superior court until July 20, 1938, being the same date on which the judgment, already signed and filed on July 18 was entered. On July 20 the presiding judge made an order setting down said petition or motion for leave to amend for hearing before the trial judge on July 22d. On that day the same was heard and denied. In these circumstances we find no error in such denial.

The judgment and order refusing to vacate the same, or to vacate the court's ruling on the demurrer, and refusing leave to amend, are affirmed.

We concur: BARNARD, P. J.; GRIF-FIN, J.

LOWEN v. FINNILA. *

Civ. 10784.

**District Court of Appeal, First District,
Division 1, California.**

Aug. 23, 1939.

Rehearing Denied Sept. 22, 1939.

Hearing Granted Oct. 19, 1939.

1. Trial ☞359(1)

Where a special finding of fact is inconsistent with a general verdict, special verdict must prevail and judgment be rendered accordingly. Code Civ.Proc. § 625.

2. Trial ☞343

A return of a general verdict for plaintiff carries with it implied finding that evidence substantiated plaintiff's position on issues of defendant's negligence and plaintiff's contributory negligence.

3. Trial ☞359(1)

Where answer for defendant on a special interrogatory, standing alone, entitles defendant to different verdict than a general verdict for plaintiff, the special verdict controls. Code Civ.Proc. §§ 625, 629.

4. Trial ☞359(1)

For special finding for defendant to control a general verdict for plaintiff, such finding must exclude any reasonable theory in support of general verdict. Code Civ.Proc. § 625.

5. Negligence ☞142

In personal injury case where several acts or omissions are charged, a special finding for defendant must negative all alleged negligence which is supported by evidence, in order to overcome a general verdict for plaintiff. Code Civ.Proc. § 625.

6. Appeal and error ☞837(7), 930(3)

In personal injury action for alleged negligence where a special verdict was rendered for defendant and a general verdict for plaintiff, on appeal from judgment for defendant, District Court of Appeal would consider the pleadings and findings but would not consider evidentiary presumptions favorable to the special verdict. Code Civ.Proc. § 625.

7. Appeal and error ☞837(7)

In personal injury action for alleged negligence wherein a special verdict was rendered for defendant and a general verdict for plaintiff, on appeal from judgment for defendant, District Court of Appeal in de-

termining sufficiency of general verdict would examine the evidence and all reasonable inferences drawn therefrom. Code Civ. Proc. § 625.

8. Judgment ☞199(3)

In action for scalding in bathhouse, where plaintiff intending to take cold shower turned on hot water, and jury in special verdict found that faucets were marked, defendant was entitled to judgment notwithstanding a general verdict for plaintiff, since injury could not have occurred without plaintiff's contributory negligence, notwithstanding defendant's alleged negligence in failing to properly maintain hot water faucet, and the special verdict was inconsistent with and destroyed the general verdict. Code Civ.Proc. §§ 625, 629.

9. Trial ☞355(2)

When separated words or clauses in an interrogatory submitted for special verdict are antithesis of each other, separated by the disjunctive conjunction "or," answer "yes" is meaningless and the special finding must be entirely disregarded.

10. Trial ☞355(2)

When interrogatory submitted for special finding is double in form and leads to confusion resulting in an unintelligible answer as in question "was the injury wilfully or intentionally inflicted," the answer "yes" is meaningless and a special finding must be disregarded.

11. Trial ☞359(1)

When answer to interrogatory submitted for special finding is susceptible of two reasonable constructions, the one in consonance with general verdict should be adopted.

12. Trial ☞350(2)

An interrogatory submitted for a special finding must be directed to a material issue.

13. Trial ☞352(1)

Any ambiguity or uncertainty in interrogatory submitted for special finding must be resolved against party framing question.

14. Trial ☞352(1)

In negligence action, an interrogatory with alternatives stated therein, which is submitted for a special finding, is sufficient where the alternatives are not irreconcilable and completely answer question of negligence or contributory negligence.

15. Trial ☞352(1)

The test for a special interrogatory is whether the question is plain, manifest, and intelligible, and whether a direct answer may be given.

16. Trial ☞355(2)

In action for scalding in a bathhouse, affirmative answer to special interrogatory, whether any sign "or" lettering designated hot and cold water faucets, was not meaningless so as to entitle plaintiff to judgment on general verdict for him, since issue was whether faucets were designated hot and cold, and whether designated by signs or lettering was immaterial. Code Civ.Proc. § 625.

PETERS, P. J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge.

Action by Jacob Lowen against M. A. Finnilla, for injuries inflicted by hot water in defendant's bathhouse. From a judgment for defendant notwithstanding a general verdict for plaintiff, plaintiff appeals.

Judgment affirmed.

Rehearing denied; PETERS, P. J., dissenting.

Cross & Brandt, of San Francisco, for appellant.

Hone & Hone and Bronson, Bronson & McKinnon, all of San Francisco, for respondent.

WARD, Justice.

This is an appeal by plaintiff from the court's judgment in favor of defendant following the return by a jury of a general verdict in favor of plaintiff. The motion of the defendant for judgment notwithstanding the verdict was based upon the separate provisions of sections 625 and 629 of the Code of Civil Procedure. It was granted pursuant to those of section 625.

The complaint set forth in part that defendant operated a public bath house having therein a steam room with a shower; "that said shower bath was so carelessly and negligently constructed and maintained by the defendant, that the pipe carrying hot water to said shower bath, when the valve or faucet attached to said pipe was opened, first emitted from said shower cold water before emitting therefrom hot water, that said cold water, without

any intermediate change in temperature, suddenly without notice or warning changed from cold water to hot water and that said shower emitted boiling, scalding water; that said defendant carelessly and negligently failed and neglected to notify the plaintiff which of said pipes leading to said shower carried hot water and which of said pipes carried cold water, or to designate by sign, writing or in any other manner, which of said pipes leading to said shower bath carried hot water and which of said pipes carried cold water thereto." The complaint further alleged that plaintiff, intending to take a cold shower, for the purpose of ascertaining which of the pipes carried cold water, turned on a faucet or valve attached to one of the pipes; that cold water was first emitted, followed, without warning, by scalding water, which struck and injured the body of plaintiff; that as a proximate result plaintiff suffered severe burns on his right arm and the right side of his body. Defendant denied the allegations of negligence and charged contributory negligence. Appropriate instructions were given on the law applicable to the facts. Two forms of verdict, general and special, were submitted to the jury, the latter reading in part as follows: "At the time and place of plaintiff's accident were there any signs or lettering plainly designating as to which faucet was hot and which cold. The answer is to be 'yes' or 'no' and signed by the foreman of the jury." The general verdict was returned in favor of plaintiff, and the special was answered in the affirmative.

[1-5] Factually, the real issue in this case was whether or not defendant gave notice, by signs or otherwise, as to which valves terminating the respective water pipes released the hot and cold water; and if notice was so given, did plaintiff pay heed to the signs or lettering designating the hot and the cold water. The special interrogatory having been answered in the affirmative, it is necessary to determine whether the special finding is irreconcilably inconsistent with the general verdict. When a special finding of fact is inconsistent with a general verdict, the special verdict must prevail and judgment be rendered accordingly. Code Civ.Proc., sec. 625, supra. The return of the general verdict in favor of plaintiff carried with it implied findings that the evidence substantiated the position of plaintiff on the issues presented relative to the alleged negligence

of defendant, and on the issue of his own alleged contributory negligence. If the answer to the special interrogatory, standing alone, as a matter of law legally entitled defendant to a different verdict, then the special controlled the general verdict. *Hudgins v. Standard Oil Co.*, 136 Cal.App. 44, 28 P.2d 433; *Koskela v. Albion Lumber Co.*, 25 Cal.App. 12, 142 P. 851. Such finding, however, must exclude any reasonable theory in support of the general verdict. If, for instance, in a personal injury case several acts or omissions of acts are charged as proximately causing the injury, the special finding must negative all of the alleged negligence which is supported by evidence, in order to overcome the significant predominance of the general verdict. *Antonian v. Southern Pacific Company*, 9 Cal.App. 718, 100 P. 877.

[6, 7] It becomes necessary, therefore, irrespective of the special finding, to inquire whether the complaint alleged, and the evidence proved, negligence by the defendant. In considering the special verdict, we will confine our attention to the pleadings and findings and not indulge in evidentiary presumptions favorable to the answer to the interrogatory. In determining the sufficiency of the general verdict, the evidence and all reasonable inferences drawn therefrom will be examined. *Law v. Northern Assurance Co.*, 165 Cal. 394, 132 P. 590.

The complaint alleges careless and negligent construction and maintenance of the shower apparatus, and negligent failure to notify or designate "by sign, writing or in any other manner" which valves controlled the emission respectively of hot and cold water. Our attention has not been called to evidence supporting the theory of faulty construction in installation. The question of maintenance is closely interwoven with the subject of sufficient reasonable notice given as to the operation of the controls determining the temperature of the water emitted from the shower pipes. The evidence discloses a description of the storage tank, the heater and the system of distributing the hot and cold water. Attached to the front of the hot water tank was a thermostat automatically controlling the temperature of the water. Assuming that plaintiff desired a tepid shower, there was no evidence to show that the thermostat was not functioning properly, or that the valves would not respond to proper manipulation. However,

plaintiff did not desire a hot or tepid bath. After remaining in the steam room for a reasonable time, he decided to take a cold shower. In such a situation, the maintenance of the hot water pipes or the operation of the valve controlling water from such pipes could have nothing to do with the negligence of either plaintiff or defendant. Plaintiff was familiar with public bath houses and the operation of showers. He entered the shower space intending to turn on the cold water. Instead his hand reached for the valve connected with the hot water pipes, an act which would not be performed by an ordinarily prudent man under the circumstances if he knew or should have known the location of the respective valves. Assuming for the moment that he had constructive knowledge of such location, then we conclude that if the shower was properly maintained, plaintiff was guilty of negligence; if it was not functioning properly, he was nevertheless guilty of contributory negligence by turning on the hot instead of the cold water faucet. The proximate cause of plaintiff's injury was his own contributory negligence, found by the jury in its answer to the special issue, since without it the injury could not have occurred notwithstanding the assumed negligence of the defendant. Plaintiff alleged in his complaint that he had no knowledge of any kind as to which of said pipes leading to the shower carried cold water and which carried hot water. Upon this subject, he testified that "there was light enough"; that "I could not see no sign on the valves and I look above the valves on the wall—above and below—and between the valves, and could not find no sign".

[8] The purpose of the special interrogatory was to ascertain whether defendant by signs or writing notified plaintiff regarding the shower temperatures. If the answer "yes" to the interrogatory was upon a material matter and constituted a special finding, it was inconsistent with the general verdict. The designation or lack thereof by signs or lettering was an issue raised in the complaint. It was material to the issue of the negligence of plaintiff, and if answered in the affirmative destroyed the general verdict.

[9, 10] Appellant's objection is that the words "signs" and "lettering" in the special interrogatory are separated by the disjunctive conjunction "or" and that there-

fore it cannot be ascertained whether there were signs, whether there was lettering, or whether there were both signs and lettering. This form of interrogatory, while sometimes permissible, has often been criticized. When the question is indefinite, uncertain or ambiguous it frequently results in overcoming the aim and purpose of the side sponsoring such interrogatory. Likewise, when one of the separated words or clauses in the question is the antithesis of the other, such as "was it night or day", "was it true or false", the answer "yes" is meaningless. In other words, when the affirmative of one may be construed as the negative of the other, the special finding must be entirely disregarded. Also, when an interrogatory is double in form and leads to confusion resulting in an unintelligible answer, as in the question "was the injury willfully or intentionally inflicted", the same rule applies. In *Pennsylvania Co. v. Reesor*, 60 Ind.App. 636, 108 N.E. 983, the court pointed out that willfully includes intentionally, that "willfully" is the broader term and as used in the interrogatory in that case called for a conclusion of law and hence could not be considered synonymous with the word "intentionally". In a question such as "was the construction of the shower or the lack of signs and lettering the proximate cause of the injury", the answer "yes" would not convey an intelligible idea of the conclusion of the number of jurors required to return a special finding as to which clause had been adopted as the proximate cause of the injury. *Tosty v. Morgan Co.*, 151 Wis. 601, 139 N.W. 402.

[11-14] When the answer is susceptible of two reasonable constructions, the one in consonance with the general verdict should be adopted (*Hudgins v. Standard Oil Co.*, supra), as the general rule is that the interrogatory must be directed to a material issue, and that any ambiguity or uncertainty should be resolved against the party framing the question. *Benedict v. Carter State Bank*, 54 S.D. 14, 222 N.W. 500. One interrogatory with alternatives stated therein is sufficient if the alternatives are not irreconcilable, and completely answer the question of negligence or contributory negligence as the facts and the law demand. If one witness in a given case testified that bruises upon the body of an alleged injured person were black and a second witness claimed they were blue, a question seeking to ascertain wheth-

er the bruises appeared upon the body before the accident, and describing the discoloration as "black or blue", would not be objectionable, because the color of the bruises would be immaterial. The purpose of such an interrogation would be to ascertain whether the bruises, black or blue, were present before the accident.

[15, 16] Assuming that the word "signs" and the word "lettering" as applied to the facts in the instant case are alternatives, either alternative produces the same legal effect. The test for a special interrogatory is whether or not the question is plain, manifest and intelligible, and whether or not a direct answer may be given. *Plyler v. Pacific etc. Cement Co.*, 152 Cal. 125, 92 P. 56. By the answer returned to the question, the jury determined that the faucet to the hot water and the faucet to the cold water were "plainly" designated by "signs or lettering". As used in the question, the word "sign" is not an antonym of the word "lettering", but rather falls into the classification of a synonym. Having determined that each of the faucets was "plainly" designated, the manner or method of designation was simply corroborative of such plain designation. Whether it was by sign or by lettering was a mere incident and indicative only that if plaintiff, from either the signs or the lettering, or both, did not see the designated hot and the designated cold water faucets, he should have seen them. The answer to the question determined the proximate cause of the accident, and being inconsistent with the general verdict, precluded plaintiff from recovery.

Appellant contends that there is nothing in the record to show that the requisite number of jurors did in fact answer in the affirmative the question as presented. The answer to this is that our attention has not been called to anything in the record to support such contention.

The judgment is affirmed.

I concur: KNIGHT, J.

PETERS, Presiding Justice (dissenting).

I dissent.

While it is true that a special finding will control a general verdict, it is equally true that "all presumptions are in favor of the general verdict for the plaintiff, and it must control if the special verdict is not absolutely irreconcilable there-

with". *Koskela v. Albion Lumber Co.*, 25 Cal.App. 12, 27, 142 P. 851, 857. The same case reiterated the well-settled rule that (25 Cal.App. page 27, 142 P. page 857) "answers to interrogatories cannot be aided by intendment, as all intendments are in favor of the general verdict". The general verdict imports a finding in favor of plaintiff on all the averments of the complaint material to his recovery. It is the duty of an appellate court in a case like the instant one, to interpret the special verdict, if reasonably possible, so that it is harmonized with the general verdict. (24 Cal.Jur., 910.) In *Hudgins v. Standard Oil Co.*, 136 Cal.App. 44, 51, 28 P.2d 433, 436, the court quotes from 27 *Ruling Case Law*, 880, in part as follows: "* * * the special facts returned must be of such a nature as to exclude the possible existence of other controlling facts, provable under the issues, relating to the same subject. They must clearly exclude every conclusion that would harmonize with the general verdict, as it is only when the antagonism between the special findings and the general verdict on material questions is of such a nature as to be beyond the possibility of reconciliation under any supposable state of facts provable under the issues that the special findings control." Under these rules it is our duty to engage in every presumption and every inference to support the general verdict, and if any reasonable theory can be evolved whereby the special and general verdicts can be reconciled, then the general verdict controls. The majority decision, while correctly stating these rules, fails to apply them to the facts here presented. It is my opinion that if these rules be so applied a reversal must result.

The complaint charged negligence in two respects: (a) In not properly marking the faucets; and (b) in so maintaining the shower that the hot water faucet first emitted cold water and then, without "any intermediate change in temperature, suddenly without notice or warning changed from cold water to hot water, and that said shower emitted boiling, scalding water." All that the jury specially found in the present case was that there were "signs or lettering plainly designating as to which faucet was hot or cold"—all other issues, including that of *proximate cause* were decided in favor of the plaintiff by the general verdict. The jury might well have found, and on this appeal I think we are

compelled to assume they did find, that even if the faucets were plainly marked, that the proximate cause of the injury, under the circumstances disclosed in the record, was not the failure to see the markings, but the maintenance of a shower that first emitted cold water and then suddenly, without intermediate changes in temperature, emitted *boiling* water—a condition that would exist if the water in the tank were boiling and the pipes partially filled with steam.

It is my opinion that the jury was entitled to find, and we must conclusively presume it did find, that the maintenance of a shower in the condition above described constituted a trap, and that such maintenance was the proximate cause of the injury. It is my view that the majority opinion improperly invades the proper province of the jury. Proximate cause is normally a question for the jury and not for the appellate court. For this reason I believe the judgment should be reversed.



34 Cal.App.2d 86

MARTIN v. VIERRA.

Civ. 10541.

District Court of Appeal, First District,
Division 1, California.

Aug. 11, 1939.

Hearing Denied Oct. 9, 1939.

See 94 P.2d 567.

1. Trial $\hookrightarrow$ 178

A motion for directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference therefrom, there is no evidence of sufficient substantiality to support a verdict for plaintiff, and no other reasonable conclusion is legally deducible from the evidence, and any other holding would necessarily be reversed upon appeal or set aside as a matter of law by the trial court.

2. Automobiles $\hookrightarrow$ 245(6, 72, 91)

In action against automobile driver for injuries to aged woman pedestrian who was struck while crossing street at intersection,

evidence held to make jury questions on issues of defendant's negligence, plaintiff's contributory negligence, and liability under the last clear chance doctrine.

3. Trial ⇐295(1)

On appeal, all instructions given must be taken and considered as a whole.

4. Trial ⇐296(4)

Giving of instruction on last clear chance which omitted certain elements of the doctrine was not ground for reversal where other instructions stated all elements of the doctrine clearly and correctly.

5. Automobiles ⇐246(58)

In pedestrian's action against automobile driver for injuries suffered when struck while crossing street, instruction that plaintiff had the right to cross street at any point and was chargeable only with exercise of due care should not have been given where ordinance required pedestrians crossing streets in business district to keep within marked lanes.

6. Trial ⇐296(4)

Error in instructing that pedestrian had right to cross street at any point and was chargeable only with due care was not reversible where court also charged that violation of ordinance requiring pedestrians to keep within marked lanes would be negligence unless excused, and confusion resulting from conflict between two instructions was clarified by other instructions. Const. art. 6, § 4½.

7. Appeal and error ⇐1170(9)

The giving of conflicting instructions is not ground for reversal where it appears that jury was not misled thereby. Const. art. 6, § 4½.

8. Automobiles ⇐246(4, 31)

In pedestrian's action against automobile driver for injuries suffered while crossing intersection, giving of particular instructions on the amount of care required of motorist and pedestrian respectively held not error.

9. Appeal and error ⇐1064(1)

In pedestrian's action against automobile driver, verdict should not be set aside because of incidental reference in one instruction to an automobile as a dangerous instrumentality capable of inflicting severe injuries.

10. Appeal and error ⇐1170(9)

In action by aged woman for injuries suffered when struck by automobile while crossing street, alleged error in form of instruction on degree of care to be exercised by persons mentally deficient by reason of old age was not ground for reversal where defendant was given a favorable instruction on plaintiff's duty to exercise greater care, and the evidence authorized finding against defendant on issue of last clear chance. Const. art. 6, § 4½.

11. Appeal and error ⇐1170(9)

Trial ⇐295(1)

In determining whether jury has been properly instructed on the law, instructions taken as a whole must be considered, and questionable instructions are not ground for reversal where appellant's rights are clearly stated in other instructions. Const. art. 6, § 4½.

12. Appeal and error ⇐1170(10)

Where several issues are submitted to jury, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error. Const. art. 6, § 4½.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey Judge.

Action by Dolores Martin against Joe Vierra, for injuries suffered by plaintiff when struck by an automobile. From a judgment on a verdict for plaintiff, defendant appeals.

Affirmed.

Prior opinion, 90 P.2d 846.

Frank V. Campbell, Robert E. Hayes, and Walter E. Rankin, all of San Jose, for appellant.

Jensen & Holstein and Robert E. Cassin, all of San Jose, for respondent.

KNIGHT, Justice.

The plaintiff, Dolores Martin, about seventy years of age, while attempting to cross a public street in the business section of Santa Clara during the noon hour on a clear day, was knocked down and severely injured by a delivery automobile owned and driven by the defendant Joe Vierra; and she brought this action against him for damages. At the trial the cause was submitted to the determination of a jury on three issues of fact, namely, negligence

of defendant, negligence of plaintiff, and the last clear chance; and a verdict was rendered in favor of plaintiff for the sum of \$2500. From the judgment entered thereon the defendant appeals. Summarized, the grounds urged for reversal are that the trial court erred in refusing to grant defendant's motion for a directed verdict; that there was a want of evidence to justify the submission to the jury of the issue of the last clear chance; and that the jury was erroneously instructed. We are satisfied that no prejudicial error has been shown.

[1] The law governing the right of a trial court to grant a motion for directed verdict is well settled. As said in the *Estate of Lances*, 216 Cal. 397, 14 P.2d 768, wherein numerous earlier cases are cited, such a motion may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given; that therefore unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. Continuing, the court points out that such a motion is in the nature of a demurrer to the evidence, is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom; that in the determination of such a motion the trial court is controlled by rules entirely different from those governing in the matter of granting a new trial; that on motion for a new trial, the trial court may weigh the evidence and judge of the credibility of the witnesses, whereas on a motion for a directed verdict, it may not do so, its power in passing upon such motion being strictly limited; that therefore, while the state of the evidence may be such as would warrant the trial court in granting a new trial, it would not be justified in directing a ver-

dict on the same evidence. In other words, says the court, the function of the trial court on motion for directed verdict is analogous to and practically the same as that of a reviewing court in determining on appeal whether there is any evidence in the record of sufficient substance to support a verdict.

[2] Measured by the foregoing rules, it is apparent that the evidence here falls far short of being such as would have warranted the trial court in granting a motion for a directed verdict, for the reason that it was conflicting on material points, and the facts and circumstances adduced in support of plaintiff's case were amply sufficient to justify a verdict against the defendant on any one or all of the following grounds: driving his automobile at a speed greater than was reasonable and prudent, having regard to the traffic and so as to endanger the safety of persons crossing the street; operating the same with defective brakes; and failure to exercise due care to avoid colliding with plaintiff after having observed her in the street in a position of peril. In other words, it affirmatively appears from the evidence that when defendant first saw plaintiff she was in the street fifty feet or more distant from him; that he observed she was an elderly woman, and was attempting to cross the street, that he gave no warning of his approach, and although he applied his brakes at a point some thirty-three feet distant from the point of collision, plaintiff was hurled twelve feet by the force of the impact, and the automobile was not brought to a stop until it reached the curb about twenty-three feet beyond the point of collision.

Defendant's contention that plaintiff was guilty of contributory negligence as a matter of law is based upon the fact that the city maintained an ordinance requiring pedestrians while crossing the streets in the business section to keep within lanes marked by white lines, and certain testimony introduced in behalf of defendant to the effect that plaintiff was attempting to cross the intersection outside of the pedestrian lanes. On the other hand, there are ample circumstances disclosed by the evidence which reasonably support the claim made in behalf of plaintiff that she was actually within the pedestrian lane when she was struck. In any event, the situation presented by the evidence was such as to justify the conclusion that after

defendant observed plaintiff in the street in a position of peril of which she was obviously unaware, he had the last clear chance to avoid colliding with her by diverting the course of his automobile to the left, which he readily could have done if he had been driving prudently and with due care, instead of swerving to the right. He claimed that if he had adopted the former course he would have collided with a truck; but there is testimony in the record showing that the location of the truck would not have interfered with such movement. It is quite evident, therefore, that in the foregoing state of the evidence the trial court properly denied defendant's motion for a directed verdict, and submitted the cause to the determination of the jury on the issues of fact above mentioned.

[3, 4] With respect to the instructions, complaint is made first of a group given at plaintiff's request pertaining to the doctrine of the last clear chance, the chief criticism made being that certain elements of the doctrine were omitted therefrom. The rule is, however, that all instructions given must on appeal be taken and considered as a whole; and here the record shows that in addition to those challenged the court gave others proposed by the defendant wherein all of the elements of said doctrine were clearly and correctly stated. Therefore, when the latter are read in connection with those criticized, it becomes apparent that the law bearing upon the subject of the last clear chance was fully and fairly presented to the jury.

[5-7] The next objection goes to instruction No. 7 proposed by plaintiff, to the effect that plaintiff had the right to cross the street at any point and was chargeable in so doing only with the exercise of due care. On account of the existing city ordinance requiring pedestrians while crossing the streets in the business district to keep within lanes marked for such purposes, it is evident that said instruction was inapplicable to the facts of this case and therefore should not have been given. It appears, however, that later in its charge the court gave another instruction proposed by the defendant wherein the law upon the subject was clearly and correctly stated. This latter instruction is numbered 49, and is as follows: "In addition to the general rule of ordinary care which applies to the conduct of all parties using the streets, a traffic ordinance of the city of Santa Clara, in full force and ef-

fect at the time this accident occurred, provided as follows: Section 10. Pedestrian's Limited Right to Use of Roadway. When within the business district, no pedestrian shall cross a roadway other than by a crosswalk. * * * It shall be unlawful for any person to be in any roadway other than a safety zone or crosswalk, provided that this provision shall not be construed to prevent the necessary use of a roadway by a pedestrian. * * *

The court instructs you that a violation of the foregoing ordinance by the plaintiff would be negligence as a matter of law on her part, unless such violation was excused. The court further instructs you that the place where this accident occurred was within a business district, and therefore it was a violation of the ordinance for the plaintiff to cross at any other place than within a crosswalk." Moreover, the record shows that after the jury retired to deliberate and before it reached a verdict it returned into court at its own request, called the court's attention to the apparent conflict between the two instructions so given, and asked that the matter be clarified; whereupon after some discussion the court re-read defendant's instruction No. 49 (the correct one) and omitted entirely any reference to instruction No. 7 (the inapplicable one); and following the reading of the correct instruction it re-read also at the request of the foreman of the jury another instruction proposed by defendant to the effect that the slightest degree of contributory negligence on plaintiff's part barred her recovery, no matter how negligent defendant may have been. Thereupon the jury again retired to deliberate, and subsequently returned its verdict in favor of plaintiff. The governing rule is that the giving of conflicting instructions does not serve as ground for reversal where it appears that the jury was not misled thereby (2 Cal. Jur. p. 1027; 1 Cal. Jur. Ten Year Supp., p. 646); and manifestly this is such a case, for as will be seen from the foregoing, the jury itself noted the conflict before it reached an agreement on the merits, and upon returning into court it was not only correctly instructed on the doubtful point but as shown by the record the confusion which had theretofore apparently arisen by reason of the conflict was clarified to the satisfaction of the jury before it again retired to deliberate upon its verdict. As held in the following cases, the determination of the question of whether a jury

has been misled by conflicting instructions must depend necessarily upon the circumstances of each particular case (*Barkhaus v. Producers' Fruit Co.*, 192 Cal. 200, 219 P. 435; *Pittam v. City of Riverside*, 128 Cal.App. 57, 16 P.2d 768); and here the proceedings had following the return of the jury into court for the very purpose of being advised as to which of the two instructions properly declared the law show beyond doubt that the jury fully understood before it reached its verdict that instruction No. 49 as re-read to them was controlling.

[8,9] Also without merit are the objections made to instructions No. 9, No. 15 and No. 16 regarding the amount of care required of an automobilist and a pedestrian respectively. *Weihe v. Rathjen Mercantile Co.*, 34 Cal.App. 302, 167 P. 287. Indeed, quite contrary to the contentions made by defendant in this behalf, it is held to be error to refuse instructions in the form here challenged (*Dawson v. Lalanne*, 22 Cal.App.2d 314, 70 P.2d 1002; *Broun v. Blair*, 26 Cal.App.2d 613, 80 P.2d 95; *Vedder v. Bireley*, 92 Cal.App. 52, 267 P. 724; *Pinello v. Taylor*, 128 Cal. 508, 17 P.2d 1039); and in *Dawson v. Lalanne*, supra, the refusal was held to be reversible error. Nor may the verdict be set aside because of the incidental reference in one of said instructions to an automobile as a dangerous instrumentality capable of inflicting severe injuries. *Del Carlo v. Oberti*, 2 Cal.App.2d 304, 37 P.2d 1050. In *Warne v. Griffith Co.*, 133 Cal.App. 481, 24 P.2d 583, 590, relied on by defendant, the trial court refused to give an instruction embodying among other matters the principle of law here questioned, and such refusal was upheld on appeal; not, however, upon the ground, as defendant argues, that such was not the law, but because the requested instruction was "very long" and involved, and the other legal matters incorporated therein would have had the effect of confusing the jury. In fact the soundness of the principle of law here objected to was there expressly recognized, the court in this behalf saying: "* * * and while it is undoubtedly true that the amount of care required of the driver of the truck was greater than that required of appellant, as set forth in the part of the instruction refused by the court, and while such instruction sets forth a correct principle of law, we are of the

opinion that the charges given by the court are equally sound as principles of law."

[10-12] Defendant's final point is directed against instruction No. 20, bearing upon the issue of contributory negligence and having particular reference to the standard to be used in measuring the degree of care to be exercised by persons "mentally deficient by reason of old age". As authority for the instruction, plaintiff cites the statement of law set forth in section 40, 19 California Jurisprudence at page 603, which is founded on certain portions of the opinion rendered in *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 P. 108, 28 L.R.A. 596, 48 Am.St.Rep. 114; and it is quite apparent that the theory upon which the instruction is based finds support in the general language used in said opinion, as well as in the quotation therein from *Shearman and Redfield on Negligence* (sec. 87). However, assuming that the instruction in the form here presented and given deviated somewhat from the precise standard of conduct contended for by defendant, it cannot be said that the giving of this single instruction had the prejudicial effect claimed by defendant, for as said in the following cases, "in determining whether a jury has been properly instructed as to the law, the instructions taken as a whole must be considered * * and questionable instructions are not ground for reversal where the rights of appellant are clearly stated to the jury in other instructions" (*American Marine Paint Co. v. Nyno Line, Inc.*, 70 Cal.App. 415, 233 P. 366, 368; *Anderson v. Southern Pacific Co.*, 129 Cal.App. 206, 18 P.2d 703); and here not only was the jury instructed in several instances throughout the court's charge in accordance with defendant's views, but the court gave also an instruction proposed by the defendant which in terms and substance was extremely favorable to defendant, to the effect that if the jury found that plaintiff "by reason of physical infirmity or old age was more apt to have difficulty in going about the public streets, then ordinary care on her part would require her to use more care for her own protection * * * than would be required of one who is not so apt to be injured or fall by reason of such infirmity * * *." Moreover and in any event, the question of the precise correctness of instruction No. 20 is not vital in the present case be-

cause as stated the evidence was amply sufficient to justify the jury in finding against the defendant under the doctrine of the last clear chance, which, as shown by defendant's instruction No. 46, can be applied only after finding that the plaintiff has in fact been negligent. In this connection attention may be properly called to the general rule of law that "where several issues in a cause are tried and submitted to a jury for its determination, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error." *Hume v. Fresno Irr. Dist.*, 21 Cal.App.2d 348, 69 P.2d 483, 488. And reference may be made also to the constitutional inhibition that no judgment shall be set aside or new trial granted in any case, on the ground of misdirection of the jury, unless after an examination of the entire cause, including the evidence, the court should be of the opinion that the error complained of has resulted in a miscarriage of justice. Article VI, sec. 4½, Constitution of California. In the present case there is no reasonable ground upon which it may be so held.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.



CARROLL v. CALIFORNIA HORSE RACING BOARD.*

Civ. 6103.

District Court of Appeal, Third District,
California.

Aug. 25, 1939.

Hearing Granted Oct. 23, 1939.

1. Gaming ☞3

Betting on horse races may be prohibited by law, and the Legislature having power to prohibit betting had the power also to permit betting on horse races under such regulations and restrictions as it might see fit in its discretion to impose. *St.1933, p. 2046; St.1935, p. 1943.*

2. Theaters and shows ☞3

The Legislature in omitting to provide in the horse racing act for notice and hear-

ing with respect to licensees preliminarily to the suspension or revocation of their licenses intended that there should be none. *St. 1933, p. 2046, §§ 1, 2; p. 2050, § 9; St.1935, p. 1943, § 3.*

3. Theaters and shows ☞3

Where the occupation of training horses is used in connection with training horses which are to participate in races conducted under the horse racing act where wagers are made and for which, under the act, a license is required, the rights of the person so licensed are limited to the purposes and conditions imposed by the act and the rules and regulations prescribed by the racing board. *St.1933, p. 2046, §§ 1, 2; p. 2050, § 9; St.1935, p. 1943, § 3.*

4. Theaters and shows ☞3

Under the provisions of the horse racing act relating to the granting of licenses by the racing board, the Legislature intended that the board should have the right to suspend or revoke licenses granted under the act and under the rules of the board. *St. 1933, p. 2050, § 9; St.1935, p. 1943, § 3.*

5. Theaters and shows ☞3

The fact that horse trainer was called before racing board and gave testimony or made statements in connection with his knowledge of matter under consideration did not constitute notice or opportunity for hearing as respects validity of order suspending trainer's license. *St.1933, p. 2046, §§ 1, 2; p. 2050, § 9; St.1935, p. 1943, § 3.*

6. Estoppel ☞90(1)

A person who accepts and acts under a license on the condition that it may be revoked at discretion, whether that condition is imposed by statute, ordinance, or the license itself, thereby assents to the condition and is estopped to question the right to revoke, and that estoppel applies even though notice of an intention to revoke is given to him.

7. Theaters and shows ☞3

A license granted to a horse trainer by racing board was a mere "privilege" and did not constitute a "contract" or "property" or a "vested right," as respects validity of order suspending license. *St.1933, p. 2046, §§ 1, 2; p. 2050, § 9; St.1935, p. 1943, § 3.*

[Ed. Note.—For other definitions of "Contract," "Privilege," "Property," and "Vested Right," see Words & Phrases.]

*For subsequent opinion see 105 P.2d 110.

8. Licenses ↪(1), 38

Generally, a license to practice a profession, trade, or occupation can be revoked only after the licensee has been given notice and an opportunity to be heard and to obtain and present witnesses in his behalf; but with respect to privileges or occupations which may prove harmful to public health, morals, safety, or welfare, the license may be summarily revoked without giving the licensee notice or opportunity to be heard, and a statute or ordinance so providing is not in that respect unconstitutional.

9. Theaters and shows ↪3

Even in absence of assent to conditions that horse trainer's license could be revoked, canceled, temporarily suspended, or withdrawn by racing board under the horse racing act and rules of board, the right to suspend and revoke existed without charges being preferred, without notice, and without affording an opportunity to be heard, subject only to condition that board could not revoke license unless just cause existed. St. 1933, p. 2046, §§ 1, 2; p. 2050, § 9; St.1935, p. 1943, § 3.

10. Theaters and shows ↪3

On question whether there was just cause for suspension of horse trainer's license by racing board, finding of board that a race horse was in fact drugged was binding on Court of Appeal.

11. Mandamus ↪172

In proceedings for writ of mandate requiring racing board to rescind order suspending horse trainer's license, it was not for the courts to consider the circumstance that trainer had charge of horse found to be drugged because of illness of regular trainer, but it was a circumstance which board could consider in connection with all other facts and circumstances appearing before it in determining the proper action to be taken.

12. Theaters and shows ↪3

A regulation of the racing board, placing on the owner and trainer of a horse racing where wagering is permitted the absolute, final responsibility for the condition of the horse before entering the race, is reasonable and violates no constitutional right.

13. Theaters and shows ↪3

Under provision of horse racing act stating that no license granted by racing board shall be revoked without just cause, the use of the words "just cause" does not

imply or require that charges should be made, notice of hearing given, and an opportunity to be heard afforded, since board in considering whether a license should be revoked acts only in an administrative capacity. St.1935, p. 1943, § 3.

[Ed. Note.—For other definitions of "Just Cause," see Words & Phrases.]

14. Theaters and shows ↪3

Under rules and regulations of racing board placing, on owner and trainer of horse racing where wagering is permitted, responsibility for horse's condition, those persons are made insurers of the horse's condition.

15. Theaters and shows ↪3

Evidence showed that racing board had just cause for suspending horse trainer's license for the remainder of its period on ground that horse in his charge on particular day had been drugged. St.1935, p. 1943, § 3.

**16. Constitutional law ↪70(3)
Gaming ↪3**

The Legislature in enacting the horse racing act intended to prevent so far as possible the return of evils resulting from the indiscriminate wagering on horse racing, and, if the requirements of the act and the rules of the racing board are reasonable and necessary to prevent those evils where wagering is permitted under the law, it becomes a matter of the exercise of legislative discretion and one which may not be questioned by the courts. St.1933, p. 2046; St. 1935, p. 1943.

17. Theaters and shows ↪3

Whether rule of racing board requiring that horses entered in a race be placed in a receiving barn one hour before the race does not allow sufficient opportunity to trainer to afford a proper observation of horse is a matter addressed to the sound discretion of the board, and does not constitute a question of law reviewable by the Court of Appeal.

18. Theaters and shows ↪3

A rule of the racing board delegating to stewards the right to suspend licenses granted under the horse racing act is reasonable and properly necessary to carry into effect the purposes and objects of the act. St.1933, p. 2046; St.1935, p. 1943.

19. Theaters and shows ↪3

The racing board having delegated to stewards the right to suspend licenses grant-

ed under the horse racing act would have power to vacate and set aside action of the stewards should the board in the exercise of its discretion deem it proper. St.1933, p. 2046; St.1935, p. 1943.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Petition by Thomas J. Carroll against the California Horse Racing Board for a writ of mandate requiring respondent to rescind certain orders, acts, and resolutions of the board and an order and act of the Board of Racing Stewards. From a judgment for petitioner, respondent appeals.

Reversed.

Earl Warren, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for appellant.

Leo R. Friedman, of San Francisco, T. B. Cosgrove and Homer N. Boardman, both of Los Angeles, and Burton K. Wheeler, for respondent.

MONCUR, Justice pro tem., delivered the opinion of the court.

The appellant herein, California Horse Racing Board, has appealed from the judgment of the superior court in and for the county of Sacramento, ordering a writ of mandate to issue to the appellant, requiring it to rescind its orders, acts, and resolutions taken and done on February 27, 1937, and October 6, 1937, suspending to and including the 31st day of December, 1937, the license of petitioner, Thomas J. Carroll, to act as a trainer of horses under the "California Horse Racing Act", and also requiring said board to rescind, revoke, cancel and annul the order and action of the Board of Racing Stewards of the racing meet held at Santa Anita Park, Arcadia, California, beginning December 25, 1936, and ending March 6, 1937, suspending petitioner.

The trial court held that the order of the California Horse Racing Board suspending said license was invalid upon the grounds that no notice or hearing was given petitioner. Appellant contends the law does not require notice or hearing in this instance, that sufficient notice was given and hearing had, that petitioner was absolutely responsible for the condition of his horse, and that therefore the judgment is erroneous and should be reversed.

The facts are as follows: The petitioner herein applied to the horse racing board

for a trainer's license to authorize and permit him to train horses entered in races upon the outcome of which wagers are made. His application, signed by him, contained the following statement: "I do hereby assent and agree as a condition precedent to receiving said license that I will strictly comply with Chapter 769, of the Statutes of 1933 of the State of California, and the Rules and Regulations of the California Horse Racing Board, and I further agree that the said license may be at any time summarily revoked, canceled, temporarily suspended or withdrawn by the said California Horse Racing Board."

A trainer's license for one year was issued to petitioner on January 1, 1937, expiring December 31, 1937, and contained the following statement: "This license to act as a trainer was granted to the above named person, whose signature appears on the back hereof, with the understanding that same may at any time be revoked, canceled, temporarily suspended or withdrawn by the California Horse Racing Board."

Petitioner was in the employ of one Norman W. Church, the holder of an owner's license. Said Church was the owner of a horse named "Proclivity", which was entered in Race No. 4 at the Santa Anita track on January 1, 1937. One E. L. Fitzgerald appears on the race entry record as trainer. He was not, however, at that particular time the trainer in charge of the horse Proclivity, he being sick, and petitioner was actually in charge of the horse on that particular day.

The horse racing board, under the authority vested in it by the California Horse Racing Act, formulated many rules for the government and regulation of horse racing where bets may be made. Subdivision (d) of rule 146, provides as follows:

"If any person administer a drug, stimulant, narcotic or any other chemical, internally or by hypodermic method prior to a race to affect the action or temperament of a horse, or shall use in a race or while in training, appliances, mechanical or electrical, other than the ordinary whip and spur, every person so offending shall be ruled off.

"Any owner, trainer, foreman, groom, stable employee, or any other person connected with any stable, found with any drug, stimulant or narcotic in his possession while upon the premises of any race track shall be ruled off and such possession

shall be deemed sufficient evidence for such ruling, without further proof.

"The use of medicine of any kind, or anything, except feed or water, for twenty-four (24) hours before a horse is to take part in a race is forbidden, except that medicine may be given in cases of emergency under the supervision of a veterinarian licensed by the Board. Veterinarian and trainer shall immediately report such action to the stewards.

"Equipment as prescribed by the California Horse Racing Board for the administration of saliva test will be required at all meetings. All horses will be subject to this, or any other test, ordered by the Stewards, either before or after the race, or both, as prescribed in Rule 38. Should the examination prove positive, and the test show the presence of a prohibited drug or chemical, owner and trainer of the horse shall be ruled off for life."

Following the race, which was won by Proclivity, a saliva sample was taken of the said horse, which sample was submitted to chemists selected by the horse racing board. A report thereon was made by the chemist on January 7, 1937, showing general reactions to alkaloids "positive", that the characterization of the alkaloid "resembles strychnine", physiological test "faintly bitter", conclusion "Alkaloidal tests—positive", which report was filed with the horse racing board and the Board of Stewards of Santa Anita track.

Strychnine is a heart stimulant which would cause a horse to run an exceptional race.

The rules and regulations of the California Horse Racing Board provide that among other officials of a race there shall be three stewards. The stewards of a racing meet are employees of the association, person, or corporation conducting the racing meet. They are not employees of the horse racing board. Their authority extends only to the particular racing meet and for the duration thereof. Their general purpose is to conduct and supervise the racing meet. The stewards have general supervision and authority over owners, trainers, jockeys, grooms and other persons attending the horses and over all officials of the meeting, and also over the premises where the meeting is conducted. All questions pertaining directly to racing arising during the period of the meeting are determined by the stewards. The stewards may suspend, for no greater period

than the duration of the meeting, anyone whom they have authority to supervise, or they may fine not exceeding \$200. All such suspensions and fines must be reported to the California Horse Racing Board, and under no circumstances have the stewards power to extend the punishment inflicted on any one track to another track or meeting without specific sanction from the California Horse Racing Board. Stewards have power to exclude from all places under their control persons who are warned or ruled off and they may exclude persons guilty of corrupt or fraudulent turf practices.

On January 16, 1937, the Board of Stewards of Santa Anita Park held a special meeting to consider the matter of the presence of a drug or chemical in the saliva of Proclivity. At this hearing the chemist who made the analysis of the saliva sample testified in effect that strychnine was present in the saliva of the horse.

The board of stewards held further meetings on January 19, 1937, and January 21, 1937. On January 22, 1937, the board of stewards suspended or ruled off the racing meet trainer Fitzgerald, but later, on January 27, 1937, found that Fitzgerald was not actually in charge of the horse the date of the race by reason of illness and set aside the suspension of Fitzgerald and thereupon suspended or ruled off petitioner Carroll pending further investigation.

Following the meeting of January 22, 1937, the action of the board of stewards was reported to the horse racing board. On January 26, 1937, the horse racing board, at a meeting, studied and discussed the reports which had been received concerning the positive saliva test of the horse and decided to await a complete report and further investigation of the case before taking any action. Petitioner Carroll appeared before the board on January 26, 1937, and was questioned in regard to his knowledge of the matter and at said time acknowledged that he was in charge of the horse and that Fitzgerald was absent on the day of the race. Subsequent meetings were held by the stewards and by the horse racing board from time to time and further investigations were being made by the horse racing board up to October, 1937. On October 6, 1937, the horse racing board adopted the following resolution:

"Whereas, the Board of Stewards, duly appointed, qualified and acting for the term of the 1936-1937 racing meet at Santa

Anita Park, California, have heretofore suspended Thomas J. Carroll as a trainer from participating in said racing meet; and

"Whereas, the California Horse Racing Board has heretofore continued said suspension indefinitely until further investigation could be made; and

"Whereas, said investigation has now been completed and all of the members of the Board have considered all of the information, evidence and reports concerning the drugging of the horse Proclivity on January 1, 1937; and

"Whereas, said board finds from said investigation that the said horse Proclivity did run in the race meeting held at Santa Anita Park on January 1, 1937, and was in fact drugged; and

"Whereas, Thomas J. Carroll was then and there the trainer of said horse;

"It Is, Therefore, Resolved, that the trainer's license heretofore issued to Thomas J. Carroll be, and it is hereby suspended to and including the 31st day of December, 1937."

So far as is necessary for the purpose of this opinion, the California Horse Racing Act (Stats.1933, chap. 769, p. 2046, and as amended, Stats.1935, chap. 719, p. 1943) provides as follows:

"Section 1. No person, association or corporation shall hold or conduct or assist, aid or abet in holding or conducting, any meeting within the State of California, whereat horse racing with wagering on the results thereof shall be permitted, except and unless such persons, association or corporation shall comply with the provisions of this act and be licensed to conduct a horse race meeting, as provided in this act.

"Sec. 2. There is hereby created and established the California Horse Racing Board, hereinafter called the board, which shall be vested with the powers and charged with the duties in this act specified, and also with the powers necessary and proper to enable it to carry out fully and effectually the purpose of this act. The jurisdiction and supervision of said board shall extend to any and every person or persons, association or corporation that shall hereafter hold or conduct any meeting within the State of California whereat horse races shall be held or conducted upon the results of which there shall be wagering and to every such race and every such race meeting and each and every thing having to do

with the operation thereof; and this board shall not have jurisdiction, supervision or control over any contests of speed and endurance of man or beast except horse races upon the results of which there shall be wagering.

"Sec. 3. Said racing board shall have full power to prescribe rules, regulations and conditions consistent with the provisions of this act under which all horse races, upon the results of which there shall be wagering, shall be conducted within the State of California. Said board shall make rules governing, permitting and regulating mutual wagering on horse races under the system known as pari-mutuel method of wagering, which shall be conducted only by such licensee and only within the enclosure and only on the dates for which such horse racing has been licensed by the board. * * * All other forms of wagering or betting on the result of a horse race shall be and remain illegal and any and all wagering or betting on horse races outside the enclosure where such horse races shall have been licensed by the board shall be and remain illegal.

"All horse owners, riders, agents, trainers, stewards, starters, timers, judges and others acting as officials at any such racing meeting shall be licensed by the board, pursuant to such rules and regulations as the board may adopt, and by the payment of a license fee as fixed and determined by said board. All licenses shall be granted for a period of one year and shall be valid at all race meetings in said State during said period. Said licenses shall be subject to revocation and no person shall be eligible to, or permitted to participate in such racing unless so licensed, and only during the time such license remains unrevoked. No qualified person shall be refused such license, nor shall such license be revoked without just cause."

It is further provided in said section 3 that the board may at any time require the removal of any employee or official employed by any licensee thereunder and in any case where it shall have reason to believe that such employee or official has been guilty of any dishonest practice in connection with horse racing and has failed to comply with any condition of such licensee's license, or has violated any rule, law or regulations of said board. Also, that the board shall have power to summon witnesses before it and to administer oaths or affirmations to such witnesses, when-

ever, in the judgment of the board, it becomes necessary for an effectual discharge of its duties.

Section 9 provides, among other matters, that all licenses provided to be granted under the provisions of the act, including those granted pursuant to the provisions of section 3 thereof, shall be subject to all rules, regulations and conditions from time to time prescribed by the board and shall contain such conditions as shall be deemed by said board necessary or desirable for the purposes of this act. Such license shall be subject to suspension or revocation by the board in any case where the board shall have reason to believe that any condition of its license has not been complied with or any law or any rule or regulation of such board shall have been broken or violated; and if any license is suspended or revoked, said board shall state publicly its reason for so doing and cause an entry of such reasons to be made on the minute book of the board, and the action shall be final; provided, however, that the propriety of such action shall be subject to review, upon questions of law only, by the superior court of the county or city and county within which such license was to be exercised, the action of the board to stand unless and until reversed by the court.

[1] It is well settled in this state that betting on horse races may be prohibited by law. In the case of *In re O'Shea*, 11 Cal.App. 568, 105 P. 776, the validity of section 337a of the Penal Code of this state, commonly called the Racetrack Bill, was before the Appellate Court. In that case the violation alleged involved the betting and wagering on a dog race. At page 571 of 11 Cal.App., 105 P. at page 777, of the decision the court said: "It has long been the practice in this country for the Legislature of the state, or the legislative body of municipal corporations, to pass laws prohibiting and punishing any practice or business tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness, instead of habits of industry, and to prohibit and punish gambling in the various forms in which it is practiced. Such regulations, when not in conflict with general laws, or with the constitution or charter under which they are enacted, are universally upheld by the courts. In fact, it has been said that gambling in its many forms may be rightfully suppressed and punished, and that the

question is no longer open for discussion in this country. *Harper v. Commonwealth*, 93 Ky. 290, 19 S.W. 737; *Ex parte Tuttle*, 91 Cal. 589, 27 P. 933."

Under the law of this state as it stood prior to the enactment of the California Horse Racing Act of 1933, betting upon horse races in this state was absolutely prohibited. By said horse racing act betting upon horse races under the pari-mutuel system was legalized. Under the terms and conditions of the act itself and the rules and regulations prescribed by the racing board by the act, the license issued to petitioner was one permitting him to act as a trainer for horses participating in races authorized under the act and as to which bets were made.

The legislature, having power to prohibit such betting, had, of course, the power also to permit the betting upon horse races under such regulations and restrictions as it might see fit, in its discretion, to impose. In considering the questions involved herein, we think there is a marked difference to be noted in cases falling under the practice governing in matters, such as gambling, saloons, and the like, which may absolutely be prohibited, and those businesses, callings or occupations which may be conducted or followed as a matter of right, and which, under the police power, are subject only to such reasonable, proper regulations as may be necessary. In the case of *Angelopoulos v. Bottorff*, 76 Cal.App. 621, 245 P. 447, 448, where the revocation of a restaurant keeper's license was involved, the court said: "There appears to be some conflict in the authorities relating to the power of the city council to revoke a license without notice, apparently due to the fact that the distinction has not been kept clearly in mind between a right to do business and a privilege to engage in certain occupations, usually attended by acts inimical to the public welfare, such as the keeping of saloons. But whatever the rule is in other states, it is now well settled in California that the fundamental right to engage in a business or occupation otherwise lawful and not inimical to the public welfare is different from occupations considered as a mere privilege, and is surrounded with certain constitutional safeguards, among which is the right to be heard, and the further fact that this right cannot be taken away except by due process of law."

[2] Under the horse racing act it has been noted that the legislature specifically

provided that the governor could not remove members of the California Horse Racing Board without preferring charges and affording them an opportunity to be heard. However, as to licensees, there is absolutely no reference whatever to any requirement for notice of any kind or provision for a hearing. We are satisfied that the legislature, in omitting to provide for notice and hearing as to licensees preliminarily to the suspension or revocation of their licenses, intended that there should be none. In fact, the successful conduct of racing meetings where betting is permitted, with all of the known evils following in the wake of such betting, must absolutely depend upon the vigilance, the uprightness and the efficiency of the racing board stewards and other officials of the racing meetings, and upon the formulation of adequate clear and far-reaching rules and regulations, with strict and impartial enforcement of the requirements of the horse racing act and such rules and regulations as may be prescribed thereunder.

[3] It is, of course, unquestioned that the occupation of training horses is a perfectly legitimate one, but when such occupation is used in connection with the training of horses which are to participate in races conducted under the horse racing act where wagers are made and for which, under the act, a license is required, the rights of the person so licensed are limited to the purposes and conditions imposed by the horse racing act and the rules and regulation prescribed by the racing board.

[4,5] We are satisfied that it was the clear intention of the legislature that the racing board should have the right to suspend or revoke licenses granted under the act and under the rules and regulations of the board and that in suspending the license of petitioner herein no constitutional right has been violated. No notice and opportunity to be heard were given to the petitioner in any of the proceedings held before either the stewards or the racing board. The fact that petitioner was called before the board and gave testimony or made statements in connection with his knowledge of the matter could not, in any view, be held to constitute notice or opportunity for hearing.

In connection with the granting of licenses in these matters where discretion is vested in the board, commissioner or other officer to issue licenses under regulatory acts, what is said by the Supreme Court in

the recent case of *McDonough et al. v. Goodcell, Commissioner, etc.*, 91 P.2d 1035, is, we think, enlightening concerning the constitutional question involved herein. At page 1041 it is said:

"It is insisted that the bail bond statute fails to provide for notice and a hearing; that since this is so the statute is invalid, and that therefore the hearing conducted by the Commissioner was entirely ineffectual to afford due process. The answer is that the notice and hearing which it is insisted the statute fails to provide for could in any event be only such notice and hearing as would afford due process when it is contemplated that some constitutional right is claimed to be invaded. Here the hearing was not for the purpose of affording the petitioners an opportunity to resist an invasion of a constitutional right but was for the purpose of enabling the commissioner fairly and intelligently to determine whether a right should be granted to the petitioners, namely, a right to engage in a business the conduct of which, without a permit, was unlawful.

"Nor did the order of the commissioner denying the permit deprive the petitioners of their property without due process. True, the statute had the effect of terminating their right to do business without a permit, but owing to the nature of the business, the legislature had the right to so terminate it conditionally, under its constitutional power to regulate such business. 'Where the purpose of the statute is to protect the public from unfit persons, it is constitutional, although it disqualifies a person, by reason of past acts, from continuing in the practice of his profession or from remaining in his business.' 12 Corpus Juris, p. 1106, sec. 815, and cases there cited."

In *McDonough et al. v. Goodcell, Commissioner, etc.*, supra, the question involved concerned the right of the McDonoughs to have issued to them a permit to conduct a bail bond business, which application was denied, while in the instant proceeding the right to suspend, after issuance of the license or permit, is involved. Nevertheless, as to the constitutional questions under consideration, the principle enunciated in *McDonough et al. v. Goodcell, Commissioner, etc.*, supra, seems particularly applicable.

[6] It is contended by appellant that by his assent in writing, and over his signature, to the condition in the license that said license might at any time be re-

voked, canceled, temporarily suspended or withdrawn by the racing board, petitioner thereby was estopped to complain of the action of the racing board in suspending his license. On the other hand, it is contended by petitioner that the foregoing conditions contained in the license issued to petitioner imposed an unauthorized condition upon the enjoyment of the rights granted by the statute; that in reality the trainer was given a choice of submitting to the requirement that converted the right granted by statute into a privilege resting in the pleasure of the board, or of forfeiting his right to engage in his profession and to sacrifice the experience of years of training. We question that it is material to the disposition of this matter to determine the effect of the assent to the imposed condition concerning the attempted reservation of the right to suspend or revoke. The general rule respecting licenses or permits to conduct occupations or businesses otherwise prohibited seems to be as stated in 37 Corpus Juris, page 247, section 109: "One who accepts and acts under a license on the condition that it may be revoked at discretion whether such condition is imposed by statute, ordinance, or the license itself, thereby assents to said condition, and is estopped to question the right to revoke, and such estoppel applies, even though no notice of an intention to revoke is given to him. The licensee accepts the conditions upon which the license is granted to him." State ex rel. Bluemound Amusement Park v. Mayor of the City of Milwaukee, 207 Wis. 199, 240 N.W. 847, 79 A.L.R. 281, 284; 3 McQuillen on Municipal Corporations, sec. 1108; 6 R.C.L. 447, sec. 442.

[7, 8] The license granted herein was a mere privilege. It did not constitute a contract or property or a vested right. One who accepts and acts under a license on the condition that it may be revoked at discretion, whether such condition is imposed by statute, ordinance or the license itself, thereby assents to said condition and is estopped to question the right to revoke, and such estoppel applies even though no notice of intention to revoke is given to him. 37 Cor.Jur. 247, sec. 109. As a general rule, a license to practice a profession, trade or occupation can be revoked only after the licensee has been given notice, an opportunity to be heard and to obtain and present witnesses in his behalf. Under some acts and ordinances, however, particularly as to privileges or occupations

which may prove to be harmful to public health, morals, safety or public welfare, the license may be summarily revoked without giving the licensee notice or an opportunity to be heard, and such a statute or ordinance is not in this respect unconstitutional or void. 37 Cor.Jur. 248, sec. 112.

[9] We are satisfied that, even in the absence of an assent to the conditions which have just been discussed, under the horse racing act and the rules and regulations of the racing board, the right to suspend and revoke existed without charges being preferred without notice, and without affording an opportunity to be heard, subject only to the condition that the racing board could not revoke the license except where just cause existed.

As has been noted, the horse racing act provided that the licenses be granted for a period of one year, subject to revocation and that no qualified person shall be refused such license, nor shall such license be revoked without just cause. In granting the license to petitioner the racing board, at least impliedly found that he was qualified. This qualification existed at least until the board, by its final order, suspended petitioner's license for the remainder of the year. The suspension, as has been stated, was made on October 6, 1937, and was to be to and including December 31, 1937. As the license expired on the latter date in any event, the suspension was, in effect, a revocation of the license. The act also provided that the license should be subject to suspension or revocation by the board in any case where the board should have reason to believe that any condition of the license had not been complied with or any law or any rule or regulation of such board shall have been broken or violated. If any license is suspended or revoked, the board should state publicly its reason for so doing and cause an entry of such reasons to be made in the minute book of the board, and the action should be final; provided, however, that the propriety of such action shall be subject to review, upon questions of law only, by the superior court.

[10-12] Assuming that the final action of the board was in fact a revocation of the license rather than a suspension, the question arises as to whether there was just cause for this action. The finding of the racing board that the horse was in fact drugged is binding upon this court. A

careful examination of the transcript of the evidence and proceedings as introduced before the lower court fails in its ultimate analysis to show that petitioner was guilty of any overt act in connection with the drugging of the horse. It is not for the courts in this proceeding to consider the circumstance that petitioner was the trainer of the horse on that particular day owing to the illness of the regular trainer but it was a circumstance which the racing board could consider in connection with all of the other facts and circumstances appearing before it in determining the proper action to be taken by it. Also, for the proper and effective regulation of horse racing where wagering is permitted, it is vitally necessary that the absolute final responsibility for the condition of the horses before entering the race should rest somewhere. The racing board has placed that absolute final responsibility upon the owner and trainer of the horse. We think this to be a reasonable and proper condition to be imposed and that in its imposition no constitutional right is violated.

[13] The meaning of the words "cause" or "just cause" as used in the statute exercising the police power in the state to regulate an occupation usually attended by acts inimical to the public welfare apparently has not been decided by the appellate courts of this state. If we accept the definition of the words "just cause" as meaning that there is required the presence of substantial grounds, especially by legally sufficient evidence as a basis upon which action by the racing board could be taken, still we think it cannot be here said, as a matter of law, that there was no just cause for the board's action. Also, we are satisfied that under the particular statutory enactment here involved, a use of the words "just cause" does not imply or require that charges should be made, notice of hearing given and an opportunity to be heard afforded. In matters of this kind the racing board acts only in an administrative capacity and is not vested with any judicial functions. It is authorized to exercise a wide discretion. In *People v. Monterey Fish Co.*, 195 Cal. 548, at page 558, 234 P. 398, 402, 38 A.L.R. 1186, it is stated: "The Legislature may, without violating any rule or principle of the Constitution, confer upon an administrative board or officer a large measure of discretion, provided the exercise thereof is guided and controlled by rules prescribed therefor."

In the case of *In re Halck*, 215 Cal. 500, 11 P.2d 389, 391, it is said that: "If the commissioner acts to the prejudice of an applicant, capriciously, arbitrarily, or solely without basis of right, his act may be supervised and controlled by the courts."

In the case of *McDonough v. Goodcell*, Commissioner, et al., supra, at page 1040, it is said: "It is the settled general rule of law in this state that where the legislature has by statute clothed an administrative officer with power to ascertain the facts with reference to the fitness of an applicant for a permit to engage in a business subject to regulation under the police power and has vested in such officer the discretion, based on the facts ascertained, to grant or deny a permit to engage in such business the courts will not interfere with the exercise of such discretion except in the case of an abuse thereof."

[14,15] The rules and regulations of the racing board having placed the responsibility for the condition of the horse upon the owner and trainer, those persons were thereby made insurers of the condition of the horse. Therefore, the racing board, having taken into consideration all of the circumstances appearing before it, together with the fact that petitioner was the trainer of the horse at the time, and that he was by reason thereof responsible for its condition and an insurer of such condition, had reasonable grounds upon which to base its action in suspending petitioner's license for the remainder of its period; that it did not act arbitrarily or abuse the discretion vested in it, and that it did not so act without just cause.

[16] The many very serious evils resulting from the indiscriminate wagering upon horse racing in this state prior to the enactment of legislation many years ago absolutely prohibiting such wagering, is well known. It is evident that it was the intention in the enactment of the horse racing act to prevent the recurrence of such evils, so far as it was humanly possible, and if the requirements of the horse racing act and the rules and regulations of the horse racing board are reasonable and necessary to prevent such evils attending horse racing where wagering is permitted under the law, it becomes a matter of the exercise of legislative discretion and one which may not be questioned by the courts. In the case of *In re Hall*, 50 Cal.App. 786, at page 789, 195 P. 975, at page 976, it is said: "There is no certain test whereby

the reasonableness of a police measure may be definitely measured in any given case. It is a matter resting in human judgment. So the line between what is reasonable and what is not, marking the bounds of the constitutional authority of the legislative department, is one often difficult of ascertainment, rendering it necessary, in all doubtful cases, for the judiciary to defer to the wisdom of the law-making body. But when the boundary has been plainly passed, the duty of the court to repel the encroachment and so uphold the Constitution is absolute. It has no discretion in the matter. 'Reasonableness' is not synonymous with 'expediency.' Matters of expediency are wholly for legislative cognizance; while reasonableness is subject to judicial inquiry. As applied to a law, 'reasonableness' is manifestly not what extremists upon the one side or the other would deem fit and fair. As it is well put in one of the cases, reasonableness is what 'from the calm sea level' of common sense, applied to the whole situation, is not illegitimate in view of the end attained. In *Ex parte Whitwell*, supra [98 Cal. 73, 32 P. 870, 19 L.R.A. 727, 35 Am.St.Rep. 152], the court said: 'Legislation of this character * * * cannot be justified by the mere possibility of the danger which it ostensibly seeks to avert. It must rest upon the fact that experience has demonstrated that such danger, in the absence of such legislative regulation, is one which may reasonably be anticipated as the probable result of conducting such business, notwithstanding the exercise of ordinary care to prevent it.'"

Measuring the question of the reasonableness of the requirements of the horse racing act and the rules and regulations of the racing board with the rule of reasonableness as defined in the foregoing quotation from *In re Hall*, supra, and considering the fact that experience has demonstrated that the danger in the absence of legislative regulation is one which may reasonably be anticipated as a probable result of permitting wagering upon horse racing, notwithstanding the exercise of ordinary care to prevent it, it seems clear that the conditions and requirements imposed by the horse racing act and the rules and regulations of the racing board are not only reasonable but are absolutely necessary.

[17] Reference is also made to the rule of the racing board requiring that horses entered in a race be placed in a receiving barn one hour before the race, under certain conditions and restrictions imposed by the rules of the racing board, and by reason of such fact, it is contended sufficient opportunity is not allowed the trainer, under the restrictions imposed, to afford a proper observation of the horse, and that thereby the effect of the rule making the trainer responsible is so modified that the trainer should not properly be held to be an insurer of the condition of the horse. We think that this was a matter addressed to the sound discretion of the racing board and does not constitute a question of law which may be reviewed by this court in this proceeding.

[18, 19] We have considered all of the questions raised and which we deem necessary to a determination of this appeal. We conclude that under the horse racing act it was not necessary to file any charges against petitioner, to give notice of hearing or to afford him an opportunity to be heard, and that the legislature, in dispensing with these requirements in the horse racing act, violated no constitutional rights to which petitioner herein was entitled; that the rules and regulations of the racing board applicable to the matters herein involved, including the rule delegating to the stewards the right to suspend, were reasonable and properly necessary to carry into effect the purpose and objects of the racing act. The racing act did not provide for the appointment of the stewards. That particular office was created by the racing board in its rules and regulations. The stewards are the creatures of the racing board and their acts must necessarily be under the supervision and control of the racing board. We have no doubt as to the authority of the racing board to vacate and set aside the action of the stewards in suspending petitioner if said board should, in the exercise of its discretion, deem it proper.

From these conclusions, therefore, it follows that the judgment requiring the California Horse Racing Board to rescind the action and resolution, both of itself and of the stewards involved herein, should be and the same is hereby reversed.

We concur: PULLEN, P. J.; TUTTLE, J.

**SOUTHERN PACIFIC CO. v. SUPERIOR
COURT IN AND FOR LOS ANGELES
COUNTY.**

Civ. 12397.

District Court of Appeal, Second District,
Division 1, California.

Aug. 23, 1939.

Rehearing Denied Sept. 12, 1939.

See 93 P.2d 1055.

1. Searches and seizures ☞7(1)

A judicial determination of the sufficiency of the affidavit required by statute before a subpoena duces tecum may be issued is required, since to allow a ministerial officer to pass on sufficiency of affidavit would violate constitutional provision guarding against unreasonable seizures and searches. Code Civ.Proc. § 1985; Const. art. 1, § 19.

2. Witnesses ☞16

An order of the superior court, based on a judicial determination of the sufficiency of the affidavit required by statute before a subpoena duces tecum may be issued, was a prerequisite to issuance of subpoena, regardless of rule of superior court of Los Angeles county requiring an order of presiding judge thereof unless cause in which subpoena is issued is actually on file, in which case order may be issued by trial judge. Code Civ.Proc. § 1985; Const. art. 1, § 19.

Original proceedings for a writ of prohibition by the Southern Pacific Company against the Superior Court of the State of California in and for Los Angeles County.

The alternative writ heretofore issued made peremptory.

W. I. Gilbert, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, Dunn & Sturgeon, of Monrovia, and Betts & Garrison, of Los Angeles, for respondent.

PER CURIAM.

[1,2] This matter came on for hearing before this court on August 21, 1939. The only return made to the alternative writ of prohibition which was issued herein was a general demurrer, no other return having been made. According to the allegations of the petition, the Superior Court of Los Angeles County has a rule requiring an or-

der of the presiding judge thereof before a subpoena duces tecum can be issued by the clerk of said court, unless the cause in which the subpoena is issued is actually on trial, in which case the order may be issued by the trial judge. However, regardless of whether such rule is, or is not, in force, it would be a violation of section 19, article I, of the Constitution of California, to-wit:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized" to allow a ministerial officer to pass upon the sufficiency of the affidavit required by section 1985 of the Code of Civil Procedure before a subpoena duces tecum may be issued. This would require a judicial determination as to the sufficiency of the affidavit before the court would have power to issue a subpoena duces tecum, and therefore the order of the court is a prerequisite to the issuance of a subpoena duces tecum.

The alternative writ of prohibition heretofore issued by this court is made peremptory, such writ to issue forthwith.



36 Cal.App.2d Supp. 760

PEOPLE v. CARPENTER.

Cr. A 1592.

Appellate Department, Superior Court, Los
Angeles County, California.

Aug. 16, 1939.

1. Criminal law ☞260(7)

Where defendant who was convicted of a misdemeanor failed to specify any grounds of appeal in his proposed statement on appeal, but before settling of statement by trial court offered an amendment specifying grounds, trial court did not exceed its jurisdiction by including such grounds in the statement it settled, since grounds of appeal in statement were not necessary to invoke appellate jurisdiction of Superior Court. Pen.Code, §§ 1467, 1468.

2. Criminal law §1165(2)

The policy of the law generally favors the hearing of appeals on the merits.

Appeal from Municipal Court of Los Angeles; Charles P. Johnson, Judge.

Dewey Carpenter was convicted of a misdemeanor, and within the time allowed by law served on the State and filed with the trial court a proposed statement on appeal, which was regular in every respect except that it failed to specify any grounds on which defendant intended to rely on appeal. From an order granting defendant's motion to include grounds of appeal and settling the statement, the State appeals.

Affirmed.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for appellant.

Leonard Wilson, of Los Angeles, for respondent.

SCHAUER, Judge.

Defendant, having been found guilty of, and sentenced for, a misdemeanor, duly filed Notice of Appeal, and within the time allowed by law (5 days after filing notice of appeal) served on the plaintiff and filed with the trial court a proposed statement on appeal. Such proposed statement was regular in every respect except that it failed to specify any grounds on which defendant intended to rely upon appeal, and plaintiff thereupon moved to terminate the proceedings on appeal on the ground that defendant "had failed to comply with the rules of the Judicial Council * * * in that he failed to serve upon the plaintiff and respondent in said action and file with the court within five (5) days after filing of Notice of Appeal or within the time allowed by the court for so doing a Proposed Statement on Appeal in which the appellant specified the grounds upon which he intends to rely upon appeal."

Plaintiff's motion was denied and the matter of settling the statement was set for hearing on April 5. At that time, the defendant made a showing of prior inadvertence, in omitting a specification of grounds of appeal and proposed an amendment, which the trial court in settling the statement adopted and included in it, setting forth in detail specifications of the grounds on which defendant intended to rely.

[1] From the order granting the defendant's motion to include such grounds of appeal in settling the statement, plaintiff appeals, contending, in substance, that the insertion of such grounds in the original proposed statement is mandatory, i. e., a jurisdictionally essential procedural step and, being mandatory, the court cannot relieve from default therein. Such contention cannot be sustained.

Section 1468 of the Penal Code provides (since the amendment of 1935, St.1935, p. 2146) that the records on appeals to the superior courts in criminal cases "shall be made up and filed in such time and manner as shall be prescribed in rules to be promulgated by the Judicial Council." Section 1467 of the Penal Code declares that such an appeal "may be taken by filing written notice of appeal with the court wherein the judgment or order appealed from is rendered, within five days after the rendition of such judgment or order." Rule 2 of the Judicial Council Rules provided for by section 1468 provides further: "The date of such filing shall be the effective date of the taking of such appeal. If such notice of appeal is not filed as aforesaid within the time required, such appeal shall be void and of no effect." Rule 3 prescribes that "The record on an appeal to a Superior Court from an inferior court in a criminal case shall consist of the following items or so many thereof as may exist in the particular case" and then enumerates various items including the complaint, plea, verdict, motions for new trial or arrest of judgment and orders thereon, minutes of the court, the judgment, the notice of appeal and "In addition thereto, the statement or transcript on appeal, or both, settled and certified by the trial judge as hereinafter provided for in Rules 4 and 7." Rule 4 requires that "the appellant shall, within five days after filing notice of appeal, serve on the respondent and file with the trial court a proposed statement on appeal" and, furthermore, that "In every such statement the appellant shall specify the grounds on which he intends to rely upon appeal and set forth so much of the evidence and other proceedings as are necessary for a decision upon said grounds. Said grounds of appeal shall be stated with sufficient particularity to apprise the court and the opposing party of the rulings or other matters of which the appellant intends to complain, but this may be done by any general description calling attention to the points to be made, without specifying each separate

ruling or other matter to be complained of.
 * * * No ground of appeal not so specified shall be considered by the Superior Court unless it shall appear to the satisfaction of said Court that the statement fairly and fully presents the evidence and other proceedings necessary for a decision thereon."

Rule 5 contains provisions for amendments to be proposed by respondent by way of alteration of or addition to the statement originally proposed by appellant, Rule 6 for extensions of time in making up the statement and Rule 7 for its settlement, engrossment and certification. It is significant here that said Rule 7 requires that "Upon the filing of such proposed amendments or the expiration of the time therefor without the filing thereof, the trial judge shall forthwith fix a time for settlement of the statement or transcript or both, * * * and cause notice thereof to be mailed, at least five days before the time fixed, to each party, or * * * his attorney * * *. The trial judge shall at the time fixed * * * settle the statement or transcript, or both, and the amendments proposed thereto, if any, correcting, altering, or rewriting such statement or transcript, or both, as may be necessary to make the same set forth fairly and truly the evidence and proceedings relating to the specified grounds of appeal or the matters set forth by the appellant in support thereof." Rule 8 declares the sanction that "If appellant fails to file such statement within the time required by these rules, such appeal shall be deemed abandoned and the trial court may on * * * motion * * * order all proceedings in connection with said appeal terminated * * *."

Thus we see that initially the appeal is accomplished by merely filing the notice of appeal within five days after rendition of the judgment or order complained of; no papers, however, will be transmitted to the superior court unless a proposed statement is filed within five days after filing the notice of appeal and if it is not so filed "such appeal shall be deemed abandoned." In the case before us, as heretofore noted, the notice of appeal was duly filed and a proposed statement was filed in time. Did the failure to include specified grounds of appeal in the proposed statement render it ineffectual for any purpose? The answer, as indicated, is negative.

Kazama v. Municipal Court, 1935, 10 Cal. App.2d 484, 490, 52 P.2d 489, was a manda-

mus proceeding by which an appellant sought to compel settlement of a statement on appeal, and is relied on by appellant as authority to the contrary. But in that case the appellant had wholly failed to serve on the respondent a copy of the transcript which he had attached to his original proposed statement. Since the law required that the proposed statement be both served on the respondent and filed, and since it did not appear from facts alleged that the appeal would have been effectual for any purpose without the transcript, it was held that a demurrer to the petition was properly sustained "for the reason that facts were not alleged therein which would give petitioner the right to have a statement on appeal settled, either with or without the evidence." The failure to serve the copy of the transcript was a "failure to take procedural steps necessary to invoke appellate jurisdiction" and, jurisdiction not having been acquired, neither the trial nor appellate court had power to relieve from such jurisdictional default. Here, however, the appellant failed in no jurisdictionally essential procedural step. He filed his notice of appeal and both served and filed the proposed statement within time. The statement without any grounds of appeal specified was nevertheless a "statement on appeal" and sufficient to invoke the appellate jurisdiction of the superior court and require it to determine whether as to any ground of appeal urged it appears "to the satisfaction of said Court that the statement fairly and fully presents the evidence and other proceedings necessary for a decision thereon", and to consider any such ground, if found. (Rule 4.)

[2] "The policy of the law generally favors the hearing of appeals on the merits". Manning v. Gavin, Cal.Sup., 1939, 92 P.2d 795, 796; see also *People v. Megugorac*, 1938, 12 Cal.2d 208, 82 P.2d 1108; *People v. Bryant*, 1929, 207 Cal. 450, 452, 278 P. 1025. As was pointed out in *People v. Appellate Department of the Superior Court*, 1936, 8 Cal.2d 56, 60, 63 P.2d 812, 813, "In the section as re-enacted [and in the rules which now govern] there is no provision that if a statement of the grounds of the appeal be not filed within the time prescribed, the appeal shall be ineffectual for any purpose," and it should also be observed that the rules contain no negation of the general power of the court to control or amend its process or records. It is true that section 473 of the Code of

Civil Procedure is inapplicable to criminal proceedings (*Kazama v. Municipal Court*, 1935, 10 Cal.App.2d 484, 485, 52 P.2d 489; *Gonzales v. Superior Court*, 1935, 3 Cal.2d 260, 44 P.2d 320) but the effect of the court's action here was not to relieve the defendant of a default and thereby recreate or restore him to a right of which he had been foreclosed, but rather, in the exercise of a jurisdiction which existed, to permit defendant to augment or modify a proposed statement which was jurisdictionally competent but not academically complete and which it was the duty of the court to complete and settle and then certify. Laws exist to promote justice; courts of appeal are provided to render justice doubly sure; in making up the record for presentation of a case on appeal the rules we are discussing provide for a final settlement of the statement only after notice to both parties. The object of the notice is to permit them to be present and it would be an incongruous thing to say to them that they could be present and participate in the effort to fully and fairly make up the statement but that the court had no power to include in that statement anything on the suggestion of appellant, which had not been included in his original proposed statement. Even the laws of pleading are not as exacting or inflexible as that and there is no necessity for such a rule. Both parties being present, the respondent can see to it that the record contains all the evidence and matters pertinent to a full presentation of his view of the point. In *People v. Megugorac*, 1938, Cal.Sup., 82 P.2d 1108, the defendant had duly given notice of appeal and within five days' time filed a statement which omitted "an application designating the portions of the phonographic reporter's notes necessary to be transcribed to fairly present the points he desired to urge on appeal, as required by section 7, rule II, Rules for the Supreme Court and the several District Courts of Appeal. * * * The designation was supplied some ten days later * * *. None of the parties appear to have suffered any prejudice by the brief delay." The supreme court discussed the cases of *People v. Lewis*, 1933, 219 Cal. 410, 27 P.2d 73, and *People v. Bryant*, 1929, 207 Cal. 450, 278 P. 1025, pointed out that in the *Lewis* case its "language should have been confined to the sole question there presented, to-wit: 'a tardy notice of appeal'" and followed the principles enunciated in the *Bryant* case wherein the appellants "did not file with the

clerk and present an application to the trial court which stated in general terms the ground of appeal and the points upon which the appellants rely" but notwithstanding which omission it was held that "there was a substantial compliance with section 1247 [Penal Code], for it is not disputed that the record on appeal is sufficient in every respect, excepting the failure on the part of appellants to comply with those particular portions of section 1247, Penal Code, which provide that the application filed with the clerk and presented to the trial court should contain a statement in general terms of the grounds of the appeal and the points upon which appellants rely." The court further suggested, in *People v. Bryant*, 1929, 207 Cal. 450, 452, 278 P. 1025, that "This provision is for the benefit of the appellate court to aid it in deciding the points raised upon appeal, and no one else is prejudiced by the omission in this case." Similarly it may be remarked in our case that no one has been prejudiced by the delay in specification of the grounds of appeal, because, while such specification in an appellant's proposed statement may be of significance to the trial court and respondent in correcting, augmenting and finally settling the same, it should be sufficient for those purposes that the grounds were disclosed prior to final settlement with reasonable opportunity to the respondent and the court to consider the state of the record in relation thereto.

If there was substantial compliance in the *Bryant* case with the rule involved therein, then there was substantial compliance in our case with the rule applicable here, and manifestly we cannot hold, under the circumstances shown here, that the trial court either exceeded its jurisdiction or abused its discretion by including in the statement it settled the grounds of appeal claimed by appellant to be pertinent to a fair presentation of the case.

The order appealed from is affirmed.

SHAW, P. J., concurs.

BISHOP, Judge.

I concur in the judgment. I agree with the conclusions of my associates that the appeal was effective, although the statement on appeal did not contain the grounds of appeal, and that the trial court had jurisdiction to settle the statement. If it was error, therefore, to insert in the statement as settled, grounds of appeal not in

it when the statement was proposed, the error was one of procedure, and in view of the fact that we are this day affirming the judgment on the defendant's appeal, it is apparent that the procedure of which the People complain did not work to their prejudice.



36 Cal.App.2d Supp. 754

PEOPLE v. McLACHLAN.

C. A. 1599.

Appellate Department, Superior Court, Los Angeles County, California.

Aug. 14, 1939.

1. Automobiles ☞11

Where pedestrians on crosswalk leaped backward toward center of highway to avoid being struck by one automobile and were struck by defendant's automobile, defendant's duty to yield pedestrians right of way could not be any greater, by reason of fact that he did not see pedestrians when they crossed in front of him, than his duty would have been if he had seen them. St.1935, p. 188, § 560(a).

2. Automobiles ☞335

Where pedestrians on crosswalk after crossing defendant motorist's lane on highway leaped backward toward center of highway to avoid being struck by an automobile being operated on defendant motorist's right, and were struck by defendant motorist who was driving within prima facie speed limits of Vehicle Code and was unable to stop before striking pedestrians, defendant motorist was not guilty under statute of failing to yield the right of way. St.1935, pp. 176, 188, §§ 511, 560(a); Pen.Code, § 26, subd. 6.

3. Automobiles ☞335

Where motorist did not violate any prima facie speed limits of Vehicle Code and was not charged with violating basic speed law or prudent driving provision of Code, conviction under Code of failing to yield right of way to pedestrians on crosswalk would not be sustained on theory he may have violated the basic speed law or prudent driving provision. St.1935, pp. 176, 188, §§ 510, 511, 560(a).

4. Automobiles ☞11

As respects question when one must yield right of way, questions of right of way arise between two users of highway only when there is danger of a collision between them if both proceed on their respective ways without delay. St.1935, pp. 99, 188, §§ 87, 560(a), 562.

5. Automobiles ☞11

When pedestrian crossing roadway on crosswalk is so far from path of an approaching automobile and proceeding in such manner that no interference between them is reasonably to be expected, motorist need not wait as respects his duty under statute to yield the right of way. St.1935, p. 188, § 560(a).

6. Automobiles ☞11

A motorist, after having allowed a pedestrian on crosswalk to proceed in front of him and to reach a place safely out of way of his automobile with no apparent further danger of conflict between them, may proceed without waiting until the pedestrian has cleared the roadway. St.1935, p. 188, § 560(a).

7. Automobiles ☞11

A motorist, after having allowed a pedestrian on crosswalk to proceed in front of him and to reach a place safely out of way of his automobile, with no apparent further danger of conflict between them, need not anticipate that pedestrian will suddenly change his mind and reverse his course of travel, in absence of circumstances reasonably suggesting such a course, as respects his duty under statute to yield right of way. St.1935, p. 188, § 560(a).

8. Automobiles ☞11

When it becomes, or in exercise of ordinary care should become, apparent to motorist that a pedestrian who has crossed in front of him has turned back, or will be compelled to turn back to escape danger, motorist must be careful to avoid a collision, and if it is possible, to yield right of way. St.1935, p. 188, § 560(a).

9. Automobiles ☞335

Where it becomes apparent to motorist that pedestrian on crosswalk who has crossed in front of him has turned back, or will be compelled to turn back to escape danger, when motorist is so close to pedestrian that he cannot stop before reaching pedestrian, motorist's failure to stop and allow pedestrian to pass is not a violation of statute

requiring motorist to yield right of way. St.1935, p. 188, § 560(a); Pen.Code, § 26, subd. 6.

10. Automobiles ⇐11

The statute providing that a motorist shall yield right of way to pedestrian on crosswalk does not require motorist to stop before entering crosswalk in all cases, but motorist must stop whenever necessary to discharge his duty. St.1935, p. 188, § 560(a).

11. Criminal law ⇐364(1)

In prosecution for violation of Vehicle Code in failing to yield right of way to pedestrian on crosswalk, state's inquiry into defendant's conduct may extend to matter of stopping as part of *res gestæ*, since motorist must stop whenever necessary to discharge his duty to yield right of way. St.1935, p. 188, § 560(a).

Appeal from Municipal Court of Los Angeles; Charles Newell Carns, Judge.

Charles McLachlan was convicted of violating the Vehicle Code, and he appeals.

Judgment reversed and cause remanded with directions.

Robert R. Ashton, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

SHAW, Presiding Judge.

The defendant was charged with violating subdivision (a) of section 560 of the Vehicle Code, St.1935, p. 188, and now appeals from a judgment of conviction entered against him. The code provision just mentioned reads as follows: "The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter." The terms "roadway" and "crosswalk" are defined in the Vehicle Code, but no questions arise here as to their meaning, and those definitions need not be copied.

[1-3] There is very little conflict in the evidence, but resolving such conflicts as there are in favor of the judgment, the following facts appear. The events on which the charge is based occurred at the intersection of Figueroa Street and Bishop Road. Figueroa Street here runs

in a northerly and southerly direction and is divided by a white center stripe; each half is further divided into two lanes by another line, the lane nearest the center line being 10 feet wide and the other lane, next to the curb, being 27½ feet wide. Bishop Road runs in a northwesterly and southeasterly direction, intersecting Figueroa Street diagonally, and a painted crosswalk 15 feet wide extends across Figueroa Street in line with the southerly curb line of Bishop Road. The defendant was driving his automobile northerly on Figueroa Street, after dark, at a speed of about 25 miles per hour, in the east half of the street, and as he approached this crosswalk he turned into the lane nearest the center line. There were other automobiles ahead of him on his right which obscured his view of the easterly 27½ feet of the crosswalk. While defendant was approaching the crosswalk, two pedestrians crossing Figueroa Street from west to east passed in front of him in the crosswalk, completely crossed the 10 foot lane in which he was driving, and reached a point several feet east of the easterly line of this lane, where other automobiles cut off defendant's view of them. As they reached this point, another automobile, in the lane to the right of defendant, came up to the crosswalk at a high rate of speed and bore down upon these pedestrians. Thereupon the pedestrians suddenly leaped backward to the west, directly in front of defendant's car, which was then 20 feet from them. He at once applied his brakes, turned hard to his left and skidded to a stop, but his car ran into the crosswalk and there struck the pedestrians before stopping. Defendant testified that he did not see these pedestrians when they crossed in front of him going easterly; but his duty to yield them the right of way cannot be any greater by reason of that fact than it would have been if he had seen them. It is our opinion that on these facts defendant was not guilty of the charge laid against him. While it does not appear that his speed violated any of the *prima facie* limits of section 511 of the Vehicle Code, St.1935, p. 176, a charge of violating the basic speed law of prudent driving laid down in section 510 might possibly have been supported here, but no such charge was made, and the conviction cannot be upheld on that theory.

Looking again at section 560 of the Vehicle Code, we note that its essential requirement is that the driver "yield the

right of way" to the pedestrian who is crossing a roadway in a crosswalk. The term "right of way" is defined by section 87 of the Vehicle Code as "the privilege of the immediate use of the highway." St. 1935, p. 99. What is meant by yielding this privilege, and when must it be yielded?

[4] Questions of right of way arise between two users of the highway only when there is danger of a collision between them if both proceed on their respective ways without delay. *Mitrovitch v. Graves*, 1938, 25 Cal.App.2d 649, 654, 655, 78 P.2d 227; *Cowan v. Market St. Ry. Co.*, 1935, 8 Cal.App.2d 642, 646, 647, 47 P.2d 752; *Switzer v. Baker*, 1916, 178 Iowa 1063, 160 N.W. 372, 375. The case of *Mitrovitch v. Graves*, supra [25 Cal.App.2d 649, 78 P.2d 231], involved the provision of section 562, of the Vehicle Code which requires a pedestrian crossing a roadway at a point not within a crosswalk to "yield the right of way to all vehicles upon the roadway," and the court said that it "merely means that when the course of an automobile along a highway meets with that of a person who seeks to walk across the street or roadway at a point other than along a marked crosswalk, under circumstances which render a collision likely, the pedestrian must stop and permit the vehicle to pass ahead of him. * * * The rule applies only under circumstances when the opposite courses of the vehicle and the pedestrian render it dangerous for both to proceed on their respective ways without delay. Under such circumstances the pedestrian must stop to permit the vehicle to precede him." In *Switzer v. Baker*, supra [178 Iowa 1063, 160 N.W. 374], the court had under consideration a city ordinance providing that "pedestrians are given the right of way over the crossings at street intersections," and said that such legislative regulations of the right of way mean "that, when two or more persons moving in different directions approach a crossing at the same time or in such manner that if both or all continue their respective courses there is danger of collision, then the one having the preference is entitled to the first use of such crossing, and it is the duty of others to give him reasonable opportunity to do so."

[5-7] Applying these principles to the statutory provision here involved, it is clear that when a pedestrian crossing a roadway in a crosswalk is so far from the path of an approaching automobile and proceed-

ing in such a manner that no interference between them is reasonably to be expected, the driver of the automobile need not wait for it to develop. It is equally clear that a driver, after having allowed a pedestrian to proceed undisturbed and unhurried in front of him and to reach a place safely out of the way of his automobile, with no apparent further danger of conflict between them, may proceed. He need not continue to wait until the pedestrian has cleared the roadway, nor need he anticipate that the pedestrian will suddenly change his mind and reverse his course of travel, in the absence of circumstances reasonably suggesting such a course. The latter contingency was dealt with in *Cline v. Bush*, 1935, 152 Or. 63, 52 P.2d 652, 654, and in *Switzer v. Baker*, supra, 1917, 178 Iowa 1063, 160 N.W. 372, 375, which were civil negligence cases, in each of which it appeared that a pedestrian, after safely passing across the path of an automobile, suddenly turned back in front of it. In *Cline v. Bush*, supra, the statute applicable to the case was in substantially the same words as section 560 of the California Vehicle Code, above quoted, and the court said [152 Or. 63, 52 P.2d 654]: "If the pedestrian stops or reverses his course and places himself in a position of peril in such close proximity to the driver's car so the driver would not have time to stop or change his course to avoid a collision, the driver would not be liable in the absence of other negligence on his part." In *Switzer v. Baker*, supra, dealing with the ordinance, already quoted, giving pedestrians the right of way over crossings at street intersections, which is practically the same as section 560 of our Vehicle Code, the court said that if the automobile driver "had his car under proper control and as he approached the intersection saw plaintiff crossing Locust street from the north to south and saw that she had proceeded far enough in that direction to permit him as a reasonably prudent person to drive over the crossing behind her, there is nothing in the rules of the common law or in the statute or ordinance which forbade him to do so, nor was he bound to anticipate that plaintiff, having safely crossed his line of approach, might suddenly change her mind or become panic stricken and turn back into collision with his car." Holding an instruction erroneous, the court further said: "Giving the instruction its strict literal effect, an auto driver approaching a crossing on which a woman is moving in either di-

rection could hardly hope to escape the imputation of negligence without stopping and waiting until she had fully cleared the entire length of the crosswalk and made it certain she would not turn back. Such is not the law and, were the ordinance to be so construed, it would be void for unreasonableness."

[8,9] When it becomes, or in the exercise of ordinary care should become, apparent to a driver that a pedestrian who has crossed in front of him has turned back, or will be compelled to turn back to escape danger, such driver must be careful to avoid a collision and if it is still possible for him to yield the right of way he must do so; but even then the law does not demand the impossible of him. If the driver is then so close to the pedestrian that he cannot stop before reaching the latter, his failure to stop and allow the pedestrian to pass cannot be regarded as a criminal violation of the statute here in question. In such a case, the driver comes within the saving grace of subdivision 6 of section 26 of the Penal Code, which declares incapable of committing crime "Persons who committed the act or made

the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." Such are the facts of this case. The defendant evidently did all he could to stop and yield the right of way to the pedestrians after he had an opportunity to know that they were coming back into his path. More was not required of him under the circumstances.

[10,11] Defendant complains of a ruling overruling his objection to a question asking whether he stopped before entering the crosswalk. While the statute does not require a driver to do this in all cases, even if a pedestrian is somewhere in the crosswalk, yet the driver must stop whenever that course is necessary to the discharge of his duty to yield the right of way, and the inquiry into his conduct may properly extend to the matter of stopping as a part of the *res gestæ*.

The judgment is reversed and the cause is remanded to the Municipal Court for a new trial.

BISHOP and SCHAUER, JJ., concur.

In re TOWLE'S ESTATE.**IRVING et al. v. SCRIPPS MEMORIAL
HOSPITAL et al.****L. A. 16775.****Supreme Court of California.****Aug. 25, 1939.****Rehearing Denied Sept. 21, 1939.****1. Wills ⇨302(6)**

Evidence justified judgment denying probate to instrument offered as holographic will on ground that instrument offered was not last will and testament of deceased and was not entirely written, dated and signed by hand of decedent but that there were on the instrument interlineations, additions and changes incorporated in provisions thereof not written by hand of decedent but placed thereon and incorporated therein by hand of another in presence of and with acquiescence and consent and direction of decedent. Probate Code, § 53.

2. Wills ⇨130

A document holographic in form to be effective as a valid testamentary disposition of a testator's property must strictly fulfill the mandatory requirements of statute. Probate Code, § 53.

3. Wills ⇨132

An instrument in form of holographic will on which testatrix and bank officer with her consent made cancellations, interlineations and additions for purpose of affording memorandum for use of attorney in drawing more formal will was not valid "holographic will," since not entirely written by hand of testatrix. Probate Code, § 53.

4. Wills ⇨206

A valid holographic will which was marked by third person unknown to testatrix and without her authority would be entitled to probate, with such alterations deleted, as originally executed by testatrix. Probate Code, § 53.

5. Wills ⇨130

The provision of statute that no address, date or other matter written, printed or stamped on holographic will which is not incorporated in provisions which are in handwriting of decedent shall be considered as any part of will does not involve doctrine of incorporation by reference relating to incorporation of separate extrinsic document already in existence by appropriate reference thereto by testator. Probate Code, § 53.

6. Wills ⇨130

The provision of the Probate Code that no address, date or other matter written, printed or stamped on holographic will which is not incorporated in provisions which are in handwriting of decedent shall be considered as part of will was intended to codify decision of court that mere presence of printed words on stationery used by persons for purpose of writing holographic will but not intended by him to form any part of will would not destroy effect of instrument as holographic will but was extraneous matter which could be considered nonexistent. Probate Code, § 53.

7. Wills ⇨130

The provision of statute that no address, date or other matter written, printed or stamped on document not incorporated in provisions which are in handwriting of decedent shall be considered as part of holographic will would not apply where interlineations, changes and additions were made by stranger subsequent to original execution of will with consent and acquiescence of testatrix and to express her ideas and wishes. Probate Code, § 53.

8. Wills ⇨130

Where testatrix and bank officer with knowledge and acquiescence of testatrix made interlineations, changes and additions on previously executed holographic will for purpose of affording memorandum for use of attorney and drawing more formal will, question of validity of will was not effected by sequence of time in which changes were made by testatrix or by bank officer. Probate Code, § 53.

9. Wills ⇨174

The making of any alteration or interlineation by a testator in his original holographic will in his own handwriting constitutes a re-execution and republication of such instrument and it is entitled to probate as offered. Probate Code, § 53.

10. Wills ⇨174

Where testatrix and bank officer with knowledge and acquiescence of testatrix as part of same transaction made interlineations, changes and additions in instrument offered for probate as holographic will, re-execution of instrument by testatrix by virtue of change made in her own handwriting subsequent to changes made in handwriting of bank officer would constitute attempted re-execution of instrument in its entirety including interlineations, changes and addi-

tions by bank officer invalidating will under statute. Probate Code, § 53.

11. Wills ⇐130

Under statute an holographic will is invalid when not entirely written, dated and signed by the hand of the testator. Probate Code, § 53.

12. Wills ⇐174

The statute providing that holographic will is one entirely written, dated and signed by hand of testator manifests legislative intent that slightest change by stranger with knowledge and consent of testator at any time during existence of document will completely vitiate any instrument as an holographic will. Probate Code, § 53.

13. Wills ⇐130

The statute providing that holographic will is one that is entirely written, dated and signed by hand of testator was enacted to afford protection from danger of forgery of such a will not protected by safeguard of requirement of due attestation by competent witnesses. Probate Code, § 53.

In Bank.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceeding in the matter of the estate of Helen M. Towle, deceased, wherein Chester D. Gunn, as coroner and public administrator, was petitioner and Scripps Memorial Hospital and another offered for probate as holographic wills two documents to which Josephine Irving, special administratrix of the estate of Carrie L. Towle, deceased, and Mary M. Towle, deceased, and others, filed objections. From a judgment refusing to admit the documents to probate, the proponents appeal.

Affirmed.

Prior opinion, 84 P.2d 555.

Hillyer & Boldman and Bertrand L. Comparet, all of San Diego, for appellants Scripps Memorial Hospital and Fine Arts Soc. of San Diego.

Arthur H. DeRiemer and Charles A. Brinkley, both of San Diego, for respondents Ralph W. and Lucy M. Queal.

Gray, Cary, Ames & Driscoll and Burton D. Wood, all of San Diego, for respondent Josephine Irving, special administratrix.

James B. Abbey, Dist. Atty., Sloane & Steiner, and Glen Munkelt, all of San Diego, for petitioner and respondent.

CURTIS, Justice.

This is an appeal from a judgment refusing to admit to probate two documents which were offered for probate as the holographic wills of Helen M. Towle, deceased, by the public administrator of the county of San Diego, of which county the decedent was a resident at the time of her death. No question is raised as to the correctness of the judgment in so far as it denied probate to the earlier will, dated May 21, 1932, which was denied probate upon the ground that it had been revoked by the express revocatory clause contained in the later instrument, dated September 19, 1933. But the correctness of the judgment in so far as it denied probate to the later document, dated September 19, 1933, has been challenged on appeal by Scripps Memorial Hospital and Fine Arts Society of San Diego, two of the charitable corporations named as residuary legatees in said purported holographic will. Respondents are cousins of the decedent who will be entitled to inherit property in California of the approximate value of \$60,000 in the event the decedent died intestate.

The document, as filed in the office of the county clerk of San Diego county, with the interlineations and alterations, is in the words and figures as follows:

"Oak Park, Illinois—Sep. 19—1933.

I, Helen M. Towle, of ~~La Jolla, San Diego~~
~~Co., Calif.~~ declare the following to be my last
will and testament, revoking all former wills
made by me.

1st: I direct that all my debts and funeral
expenses be paid.

2nd: I give to my Cousin, Carrie L. Towle, ^{Mishawaka, Ind.}
the sum of five thousand dollars (\$5000). In
case she dies before I do, this sum shall be given
to her sister, ^{for} Mary M. Towle. ^{Mishawaka}
^{or in trust (2+3) provided to legal heirs}
3rd: I give to my cousin Mary M. Towle, the
sum of five thousand dollars (\$5000).

4th: I give to my cousin ^{nephew} Herbert C. Towle
(^{nephew of Mary} ^{Jackson Mich})
the sum of five thousand dollars (\$5000). If he
should die before I do and leave surviving him
his son Herbert C. Towle, Jr., I give to Herbert
C. Towle, Jr., said sum of \$5000 and direct that
it be held in trust for him by my executor and
^{income for his use} trustee until he reaches the age of twenty-five
years, or else expended for his support and edu-
^{cation} cation.

If neither Herbert Sr. nor Herbert Jr. should
survive me, said sum shall revert to my estate.

5th: I give to my cousin Margaret Towle
^{EDRIS} ^{South Bend}
Edris the sum of twenty-five hundred dollars
(\$2500=). In case she does not survive me this
sum is to revert to my estate.

6th: I give to my friend Helen Barton Stillwell
^{BARTON STILLWELL}
^{\$1000}
the sum of ~~twenty-five hundred dollars (\$2500).~~
^{New York City}

7th: I give to my friend Helen Kellogg, of
^{La Jolla}
La Jolla, Calif. the sum of one thousand dollars
(\$1000)

8th: I give to my friend Charlotte Earle the
^{EARLE}
^{Oak Park}
sum of one thousand dollars (\$1000)

9th: I give to my friend Edith Ames English
^{Pasadena} ^{EDITH AMES}
the sum of one thousand dollars (\$1000)

10th: I give to my friend Laura C. Morey
^{La Jolla}
the sum of one thousand dollars (\$1000)

11th: I give to my friend Frances P. Elliott
^{San Diego} ^{Frances Elliott}
the sum of one thousand dollars (\$1000)

12th: I direct that my personal effects be
distributed among my friends and relatives named
in a letter enclosed.

13th: All the rest of my estate I give to
the following institutions, in the following
proportions:

1/4th (one fourth) to Northwestern University
to be used for the benefit of its Law School in
memory of my father, ^{as Ed shall determine}

^{HENRY SARGENT TOWLE}
3/4 The rest to be divided evenly among Scripps
Memorial Hospital located at La Jolla, Calif., for
^{Free Bed} the benefit of its Free Bed Fund; Wesley Memorial
^{Wesley} Hospital located in Chicago, Ills., to be used
for its Free Bed Fund, in memory of my Father;
and the San Diego Art Museum located in Balboa
Park for the purchase of works of art.

14th: I appoint the Northern Trust Co., of
Chicago, ^{under} the executor and trustee of my will
to take full charge of my estate and manage it
according to their best judgment.

Realizing that it is difficult to sell securities
and real estate because of the depression, I ask
them to take sufficient time to avoid sacrificing
what might become more valuable within a year
or two.

However, I would like to have the bequests to
my cousins paid as soon as possible.
^{near in} Helen M. Towle.

(May Cary to have cash as soon as possible)

I am cognizant of the fact
that I have named no other
first or second known relatives
mentioned in this will. I have
purposely not made such names
beneficiaries of my estate, as it
is not my desire or wish that
they share in my said estate.

With the exception of the cancellation of the words, "twenty five hundred dollars (\$2500)" in the sixth paragraph of said document in the bequest to Helen Barton Stilwell, which cancellation was made by the testatrix herself, and the insertion of the figure, "\$1000" above said cancellation by said testatrix, all the other interlineations, cancellations and additions were made by Mr. Chester D. Seftenberg, vice-president and trust officer of the Oak Park Trust & Savings Bank of Oak Park, Illinois. The cancellation of the words, "La Jolla, San Diego Co. Calif," and the cancellation of the paragraph in which the Northern Trust Co. of Chicago, Illinois was named as executor and trustee, were made by Mr. Seftenberg in black ink. The last paragraph which followed the signature of Helen M. Towle was written in by Mr. Seftenberg in pencil. The other interlineations and changes were made by him in red ink. No particular significance arises from the fact that in one instance Mr. Seftenberg used a pencil, or that he used different colored ink in making the changes.

The evidence with reference to these cancellations and interlineations is embodied in the deposition of Mr. Seftenberg, and is accepted by both sides as being a true and accurate account of the circumstances under which these cancellations and interlineations were made. According to the deposition of Mr. Seftenberg, Helen M. Towle came into his office at the bank in Oak Park, Illinois, on October 10, 1934, for the purpose of having him prepare a formal will for her. She had with her a document which was at that time entirely written, dated, and signed in her own handwriting, and which the probate court found was, on the date of its execution, a valid testamentary disposition of her property. She told Mr. Seftenberg that this was a temporary will and that the distribution of the property as set forth therein with a few modifications of detail was satisfactory to her. She also explained that her father had been an attorney and she was somewhat conversant with legal forms and phraseology, and that she understood a will entirely written, dated, and signed by a testator was valid as an holographic will. Mr. Seftenberg informed her that neither he nor the bank prepared wills, but offered to recommend an attorney to her who would handle the matter for her. He also offered to assist her in the preparation of her will

by preparing a memorandum of suggestions as to her desired scheme of distribution for submission to her attorney. They then sat down at an office desk in his office, he on one side of the desk and she on the other side, and discussed the provisions of her will. Using the holographic will which she had brought with her as the basis of the memorandum, he proceeded to make the cancellations and interlineations in said document which now appear thereon. His testimony is that he read over the document with her and as they took up each separate paragraph, he wrote the words and figures appearing thereon in his handwriting. It was during this conference that Helen M. Towle changed the bequest to Helen Barton Stilwell from \$2,500 to \$1,000, but it does not appear from Mr. Seftenberg's deposition whether she made the change prior to the time he made any changes in the document, or subsequent thereto. Many, if not most, of the interlineations made by Mr. Seftenberg were made simply for the purpose of clarifying the handwriting of the decedent and to make more certain the spelling of the proper names. Certain definite changes were, however, made by him in the provisions of the will. Thus, the provision whereby the Northern Trust Company of Chicago, Illinois, was nominated by the testatrix as her executor, was deleted by Mr. Seftenberg with the consent of the testatrix, with the idea of substituting the Oak Park Trust & Savings Bank in lieu thereof. Also the bequest to her cousin, Carrie L. Towle, which had theretofore been an outright gift to her cousin of five thousand dollars was changed to a bequest to Mary M. Towle in trust for the benefit of Carrie L. Towle. As Helen M. Towle was leaving Oak Park, Illinois, in a few days on a trip, Mr. Seftenberg offered to deliver said document with its interlineations, changes, and additions, to an attorney, to be used by the attorney as the basis for her proposed formal will. Mr. Seftenberg did turn the document over to an attorney who did prepare a formal will in accordance with the terms and provisions of said document as modified by the changes, interlineations and additions contained therein. Said will was never executed by Helen M. Towle, for the reason that after further discussing the matter with Mr. Seftenberg, she decided to execute, and the following day did execute, a declaration of trust whereby she conveyed to the Oak Park Trust & Sav-

ings Bank, in trust, all property owned by her in Illinois, which was of the approximate value of \$150,000. The property which she owned in California was not included in the trust document, and it is this California property, of the approximate value of \$60,000, which is the subject of the controversy involved in this appeal. It was decided at said time that she would dispose of her California property by a formal will wherein she would devise and bequeath said California property to the Oak Park Trust & Savings Bank, as trustee, to be distributed by said bank in accordance with the plan of distribution embodied in her declaration of trust. Such a will was prepared for her signature, but she died very suddenly and unexpectedly in Canada before said will was executed by her. The original document now presented for probate as the holographic will of Helen M. Towle was never returned to her, but after her death, was taken from the files of the Oak Park Trust & Savings Bank and forwarded to the clerk of the superior court of San Diego county.

It should be noted that the property conveyed by the decedent in the declaration of trust consisted of her Illinois property which was the bulk of her estate, but did not include the property owned by her in California. The declaration of trust contained identical provisions with reference to the bequests to friends and relatives as had been contained in her holographic will as modified by the interlineations, cancellations and additions, and the residue was likewise divided in the same proportions among the charitable corporations as it had been divided in her holographic will as modified. Due, however, to the fact that the holographic will made disposition of her entire estate, and the declaration of trust only provided for distribution of her Illinois property, it is apparent that the results of said identical scheme of distribution were not the same in so far as the residuary legatees were concerned. If the decedent had executed the formal will prepared for her by her attorney for the purpose of providing for the distribution of her California property prior to her death, the result would then have been the same.

The sole controversy involved in this appeal is the question of whether the probate court erred in refusing probate to the document, dated September 19, 1933, which when it was presented for probate was par-

tially in the handwriting of Helen M. Towle, deceased, and partially in the handwriting of Chester D. Seftenberg.

[1] The probate court as the basis of its judgment expressly found that, "It is not true that said instrument * * * was at the time of the death of said Helen M. Towle as aforesaid her last will and testament; that it is not true that at said time the said instrument was entirely written, dated and signed by the hand of the said Helen M. Towle; that it is true that at said time there were upon said instrument interlineations, additions and changes, incorporated in the provisions thereof not written by the hand of the said Helen M. Towle, but theretofore placed thereon and incorporated therein by the hand of another in the presence of and with the acquiescence and consent and at the direction of the said Helen M. Towle."

We do not think that this finding, which is supported by the undisputed evidence of Chester D. Seftenberg, embodied in his deposition, nor the judgment predicated thereon, can be successfully challenged.

[2] It is elementary that a document, holographic in form, to be effective as a valid testamentary disposition of a testator's property, must strictly fulfill the mandatory requirements of section 53 of the Probate Code. Estate of Rand, 61 Cal. 468, 44 Am.Rep. 555; Estate of Billings, 64 Cal. 427, 1 P. 701; Estate of Plumel, 151 Cal. 77, 90 P. 192, 121 Am.St.Rep. 100; Estate of Dreyfus, 175 Cal. 417, 165 P. 941, L. R.A.1917F, 391; Estate of Thorn, 183 Cal. 512, 192 P. 19; Estate of Bernard, 197 Cal. 36, 239 P. 404; Estate of Bower, 11 Cal.2d 180, 78 P.2d 1012.

Section 53 of the Probate Code reads as follows: "A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and need not be witnessed. No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will."

[3,4] Does the document offered for probate meet these statutory requirements? The answer must be, No. It is conceded by appellants, as indeed it must be, since it is self-apparent, that cancellations, inter-

lineations and additions in the handwriting of a person other than Helen M. Towle, appear upon the face of the document. It is true that if someone, unknown to the testatrix and without her authority, had marked up decedent's will, said instrument, as originally executed by the testatrix and with said alterations deleted, would be entitled to probate. *Musgrove v. Holt*, 153 Ark. 355, 240 S.W. 1068. But no claim is made in the instant case that these marks, interlineations and additions were placed on said instrument without the knowledge and consent of the testatrix. Of course, no such claim could be successfully made, since the evidence is undisputed that these marks, interlineations and changes were made by Mr. Seftenberg in the presence of the testatrix and with her knowledge and consent, and that whatever cancellations and interlineations were made which changed the terms and provisions of the original holographic will, expressed the testatrix's own ideas and wishes. In view of these uncontradicted facts, we are convinced that no amount of argument can offer escape from the simple, basic fact that the document presented for probate was not entirely written, dated and signed by the hand of the testatrix herself. The instrument, therefore, is not entitled to probate.

[5] Despite the admitted fact that the document presented for probate was not entirely written, dated and signed by the testatrix, it is argued that the concluding sentence of section 53 of the Probate Code saves it from being ineffective as a valid testamentary disposition of the property of the testatrix. Said sentence provides that, "No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will." There can be no question that the interlineations and cancellations made by Mr. Seftenberg were made by him in order to express the plan and wishes of the testatrix, and were intended by her to be incorporated in the terms of her formal will when drawn. A mere cursory glance at the face of the instrument demonstrates the truth of this assertion. It is difficult to conceive of any document in which the intent to incorporate the additional words and figures therein written would be more patent. It is insisted by appellants, how-

ever, that no writing or printing can be "incorporated" by a stranger, but must be incorporated by the testatrix herself. It is further argued that no printing or writing can be "incorporated" by the testatrix unless it was in existence at the time of the execution of the holographic will. It is apparent that this latter argument is attempting to read into said provision of the Probate Code the technical requirements of the doctrine of incorporation by reference. *Estate of Doane*, 190 Cal. 412, 213 P. 53; *Garde v. Goldsmith*, 204 Cal. 166, 267 P. 104; *Estate of Miller*, 128 Cal.App. 176, 17 P.2d 181. In view of the fact that this sentence was added to said code section for the purpose of making said code section conform to the holding in *Estate of De Caccia*, 205 Cal. 719, 273 P. 552, 61 A.L.R. 393, and the *Estate of De Caccia*, supra, in no way involves the doctrine of incorporation by reference, which relates to the incorporation of a separate extrinsic document already in existence by appropriate reference thereto by a testator in a will, we find no merit in this argument.

[6,7] There can be no question that said sentence was added to said code section to codify the holding in *Estate of De Caccia*, supra. The note by the code commissioners to section 53 of the Probate Code said: "The last sentence is new: 205 Cal. 719," which citation is the citation of the *Estate of De Caccia*. *Estate of Bower*, supra, expressly states that this sentence was added to the code section to codify the rule announced in the *De Caccia* case. Evidently, therefore, this provision was intended to apply to situations similar to that presented in *Estate of De Caccia*, supra. The holding in that case was to the effect that the mere presence of printed words upon the stationery used by a person for the purpose of writing his holographic will, but not intended by said person to form any part of his will, did not destroy the effect of the instrument as an holographic will, but was extraneous matter which could be considered nonexistent in so far as the holographic will was concerned. It follows, therefore, that this provision of section 53 of the Probate Code, which is intended to apply to certain instruments of the character of the one involved in the *De Caccia* case, was never intended to apply to a situation such as here involved, wherein the interlineations, changes and additions were made by a stranger subsequent

to the original execution of the will, but with the consent and acquiescence of the testatrix, and to express her ideas and wishes.

[8-10] We do not believe that the question of the validity of the holographic will here involved depends upon a determination of the sequence of time in which the changes were made by the testatrix or by Mr. Seftenberg. It has been held that the making of any alteration or interlineation by a testator in his original holographic will in his own handwriting constitutes a reexecution and republication of such instrument and it is entitled to probate as altered. *Estate of Finkler*, 3 Cal.2d 584, 600, 46 P.2d 149. Regardless of whether or not the change made by the testatrix was made prior to any changes made by Mr. Seftenberg, or was made in the order in which said paragraph was reached during the discussion, or after the marks upon the document had been completed by Mr. Seftenberg, the changes so made were made as part and parcel of the same transaction, and the testatrix undoubtedly intended the finished product of the discussion, that is to say, the document as changed and interlined by both herself and Mr. Seftenberg, to express her wishes as to the final disposition of her property. *Estate of Thorn*, supra. If, therefore, there was a reexecution by her by virtue of the change made in her own handwriting, it was a reexecution of the instrument in its entirety, including the interlineations, changes and additions by Mr. Seftenberg.

[11,12] It is true that the situation here presented is unique, and no case has been cited which involves a factual situation wherein the changes in an holographic will were made by a stranger thereto with the consent and acquiescence of the testator subsequent to the original execution of said will. It is likewise true, that all the cases cited to the effect that an holographic will is invalid when not entirely written, dated and signed, by the hand of the testator, are without exception cases where the foreign matter was included in the will at the time of its original execution, and not one of them involves a subsequent incorporation of foreign matter. But we think the obvious purpose and intent of the legislature of making an holographic will completely, entirely and wholly the exclusive act of the testator, leads necessarily to the conclusion that the slightest change by a

stranger with the knowledge and consent of the testator, at any time during its existence, will completely vitiate any instrument as an holographic will.

We have little doubt that in consenting to and acquiescing in the changes and alterations in her original holographic will by Mr. Seftenberg, the testatrix fully realized the result of her action which rendered said instrument ineffective as a testamentary disposition of her property. A will is a solemn instrument and is recognized as such by those desiring to make testamentary disposition of their property. We do not think it reasonable to suppose that the testatrix in the instant case permitted Mr. Seftenberg to make interlineations, changes, and cancellations upon the document before him, and at the same time expected said document to retain its character as a valid testamentary disposition of her property.

The fact that the decedent on the day following the conference in which her holographic will was marked up by Mr. Seftenberg made a declaration of trust in which she disposed of all her Illinois property in the same manner as that in which she had disposed of her estate in her holographic will as modified, would indicate that she had intentionally abandoned and discarded her holographic will. This conclusion is further strengthened by the fact that she had prepared by an attorney a draft of a formal will embracing all the terms and conditions of the holographic will as modified by the interlineations, alterations, and changes made by herself and Mr. Seftenberg.

[13] The refusal of the courts in the past to permit any deviation from the clear, plain requirements of the code section governing the due execution of holographic wills was based upon the theory that the rigid requirement that such wills be entirely in the handwriting of the testator was enacted by the legislature to afford protection from the danger of forgery of such a will, not protected, as is a formal will, by the safeguard of the requirement of due attestation by competent witnesses. *Estate of Dreyfus*, supra. In other words, the fact that a document is entirely in the handwriting of a testator offers an adequate guaranty of its genuineness. This same reasoning applies, and the same danger of forgery exists, we think, with reference to cancellations, interlineations, and

alterations made in an holographic will, and requires the changes, alterations, and interlineations to be made wholly in the handwriting of the testator. Such rigid and strict requirement is neither, in our opinion, unreasonable nor unwise.

We are satisfied that the conclusion reached by the probate court is correct.

The judgment is affirmed.

We concur: SHENK, J.; EDMONDS, J.; HOUSER, J.



33 Cal.App.2d 629

SCOTT v. McPHEETERS.

Civ. 6171 (3).

Supreme Court of California.

Sept. 7, 1939.

Courts 486

Where malpractice action was brought by infant by guardian ad litem, and not by infant's father or mother, alleged error in opinion of the District Court of Appeal concerning running of limitations against action by father or mother was not necessary to the decision, and did not affect the soundness of the conclusion reached by the District Court of Appeal.

HOUSER, J., dissenting.

— — — — —

In Bank.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Malpractice suit by Eleanor Catherine Scott, by and through her guardian ad litem, Kathryn V. Scott, against Earl Robey Mc-

Pheeters, for injuries suffered by plaintiff before her birth. From a judgment for defendant, plaintiff appeals; judgment was reversed by the District Court of Appeals, 92 P.2d 678, and defendant filed petition for hearing.

Petition denied.

Lercara & Nelle, of Oakland, and Francis O. Hoover, of Modesto, for appellant.

Griffin & Boone, and Thomas C. Boone, all of Modesto, Dearing & Jertberg, of Fresno, and Hartley F. Peart, of San Francisco, for respondent.

PER CURIAM.

The petition for a hearing is denied. In denying said petition, we expressly withhold our approval of that portion of the opinion found in the first two sentences of the fifth paragraph thereof, which portion seems to deal with the time when the statute of limitations would begin to run on an action which might be maintained by a father or mother in his or her own right under section 376 of the Code of Civil Procedure. This is not such an action but is an action brought by the child. The portion of the opinion above referred to was not therefore necessary to the decision and it does not affect the soundness of the conclusion reached by the District Court of Appeal.

HOUSER, Justice (dissenting).

I dissent.

Since according to my interpretation of the constitutional powers conferred upon this court,—on the hearing of a petition for the hearing of a cause after decision has been had therein by the District Court of Appeal,—no authority exists in this court other than either to grant or to deny such petition, I am constrained to dissent from that part of the foregoing order which in effect modifies the judgment that was rendered by the District Court of Appeal. Wires v. Litle, 27 Cal.App.2d 240, at page 245, 80 P.2d 1010, 82 P.2d 388.

34 Cal.App.2d 352

LARSEN v. VAN DIEKEN et al.

Civ. 2356.

District Court of Appeal, Fourth District,
California.

Aug. 25, 1939.

several years was insufficient to show a confidential relationship between them.

6. Deeds ⇨211(1)

Gifts ⇨82(2)

In action by estranged wife of deceased, as administratrix, to have conveyances of realty and transfers of personalty by deceased to defendants declared to have been held in trust by defendants for deceased and his estate, evidence supported determination of trial court that deceased had mental capacity to make conveyances and transfers.

7. Appeal and error ⇨877(2)

Where deceased conveyed realty to one of defendants by deeds absolute on their face, and it was determined that deeds were valid, administratrix of estate of deceased could not complain of trial court's construction of an arrangement between deceased and such defendant regarding rent and income from property conveyed as one for retention by deceased of life estate in the income, in view of absolute language of deeds.

8. Appeal and error ⇨877(2)

Estranged wife of deceased, suing in her capacity as administratrix of deceased's estate, and not in her personal capacity, could not complain of property settlement between deceased and herself, where estate could gain nothing by having transaction set aside.

1. Deeds ⇨211(3, 4)

In action by administratrix, to establish trust as to realty conveyed by deceased to one of defendants, evidence raised no necessary inference that conveyances were secured by fraud or undue influence, nor charged defendant to whom conveyances were made with complicity in any prearranged plan to induce their execution.

2. Appeal and error ⇨931(1)

In action by administratrix to establish trust in favor of deceased's estate as to realty and personalty conveyed by deceased to defendants, Court of Appeals would presume in support of trial court's finding for defendants that deceased intended that furniture in houses conveyed to one of defendants should go with the houses containing it.

3. Gifts ⇨62(2, 6)

If deceased a few days before going to hospital gave defendant key to trunk and told defendant that if he did not get better everything belonged to defendant, and if while deceased was in hospital defendant brought him contents of deposit box, and deceased handed back contents to defendant, telling him they were to be his, there was a "gift causa mortis" to defendant. Civ.Code, § 1149.

[Ed. Note.—For other definitions of "Gift Causa Mortis," see Words & Phrases.]

4. Gifts ⇨71

An innocent recipient of a gift procured through fraud of a third person cannot set up his innocence as a defense to an action by the donor to rescind the gift on account of the fraud.

5. Deeds ⇨211(3, 4)

As respects issue of fraud or undue influence of one of defendants in causing deceased to execute conveyance of realty to such defendant's daughter, evidence that defendant and deceased had been friends and members of same fraternal organization for

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Aranka Larsen, as administratrix of the estate of Fred Larsen, deceased, against H. H. Van Dieken and Fannie Van Dieken, husband and wife, Roy French and Marjorie S. French, to have all realty transferred by decedent to Marjorie S. French, as well as certain personalty in the hands of Marjorie S. French and of H. H. Van Dieken declared to have been held in trust by them for the decedent and his estate and to obtain an accounting for the same and the income therefrom. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Claude L. Chambers and George Westover, both of San Diego, for appellant.

Stearns, Luce, Forward & Swing, of San Diego, for respondents.

HAINES, Justice pro tem.

On December 29, 1936, the decedent Fred Larsen and the present appellant Aranka Larsen, then being husband and wife, entered into a written agreement reciting that differences had arisen between them rendering it impossible for them to continue to live together in that capacity and that it was their mutual desire to effect a settlement of their property rights and of all matters relating to their support and maintenance. The agreement went on to provide for the conveyance by Larsen to his wife of certain real property and furniture and, reciprocally, for her relinquishment to him of all her rights in certain other furniture and provided generally, that, except as stated, each party acknowledged that all property of every kind and character, "now held or which may be hereafter acquired by the other, shall be and is his or her sole and separate property and estate." By the further terms of the writing Mrs. Larsen undertook to waive all claim to support and maintenance from her husband and each party undertook to relinquish all right of inheritance in the estate of the other. It appears that at this time Larsen, who was a retired sea captain, was nearly 80 years old and his wife in her middle fifties; that they had been married only for something like three years, Larsen having theretofore been a widower.

The respondent H. H. Van Dieken (hereinafter referred to simply as Van Dieken) and Fannie Van Dieken are husband and wife. Respondent Marjorie S. French is the daughter of the Van Diekens and resides with them. Respondent Roy French is her husband. On January 2, 1937, Larsen signed, acknowledged and delivered to Van Dieken three grant deeds, in their terms absolute, in favor of Mrs. French, conveying to her sundry parcels of land in the City of San Diego. These had apparently belonged to Larsen prior to his marriage to appellant and were included among the properties recognized as his in the property settlement. On them were some three houses. These deeds Van Dieken recorded on January 11. On January 15 Larsen executed two other deeds, one affecting two vacant lots near La Jolla in said city in favor of Mrs. French and one affecting two other vacant lots there in favor of a daughter-in-law of Mrs. Larsen. Of these two deeds the former was delivered to Van Dieken who shortly after-

ward recorded it. The effect of these two conveyances was to divest Larsen of all record title to any real estate whatever.

Larsen having died on August 2, 1937, and a document propounded as his will having, for technical reasons, been rejected, appellant sought and obtained appointment as administratrix of his estate, and, having qualified as such, thereafter, as such administratrix, commenced the present action against the respondents to obtain a decree declaring all the real property so transferred and conveyed to Mrs. French, as well as certain personal property in the hands of Mrs. French and of Van Dieken, respectively, to have been held in trust by them for the decedent and his estate; to obtain an accounting for the same and the income therefrom and to obtain declaratory relief generally with respect to the effect of such conveyances and transfers.

The respondents in due course answered, the case was tried, findings made and judgment passed determining that the conveyances and transfers above recited invested Mrs. French with the absolute title to the real property affected, except as to a life estate in the income therefrom reserved to said Fred Larsen which terminated at his death, and determining further that the personal property in the hands of Mrs. French and Van Dieken respectively had been voluntarily transferred to them by Larsen and that they were the owners thereof. The evidence is brought up at large in the present record. It is claimed that it is insufficient to justify the findings and we are asked to reverse the judgment accordingly.

The complaint had alleged that for some years before his death Larsen had been in failing health; that during the last year and a half of his life and for sometime prior thereto, by reason of his age and physical condition, his mental faculties had become so impaired that he was easily influenced by those in whom he had confidence; that Van Dieken was a shrewd, experienced business man and had for many years been a member of the same fraternal order with Larsen and had acquired an accurate knowledge of the latter's financial affairs and property interests. It was with great elaboration alleged that the respondents conspired together to obtain possession of Larsen's property, said to have had a total value of about \$8,000 and to have yielded an income

of approximately \$50 a month. It was claimed that respondents' proceedings began with a studied and successful attempt to alienate Larsen's affections from his wife and to bring about a property settlement and separation between them. It was further claimed that respondents took advantage of Larsen's decrepitude and of his alienation from appellant, largely induced by themselves, and of his childish yearning to obtain from the public some sort of old age pension, and by adroit suggestions prevailed on him "to appear to divest himself of all his said property and to effect the property settlement" with appellant, "ostensibly to the end that he * * * might thus appear to have no property and thus be eligible to a state old age pension but actually to the end that they", that is, respondents, "might thereby wrongfully gain present control and subsequent possession and ownership of said property * * * together with the income therefrom, for themselves", in fraud of the rights of those interested in Larsen's estate and without adequate consideration.

These allegations, so far as they reflected upon respondents or their conduct were all denied by them in their answer and found to be untrue by the court.

So far as the activities attributed to the respondents in fomenting ill feeling between the Larsens and bringing about the property settlement and separation between them were concerned, the evidence in support of appellant's assertions consists for the most part of her own testimony. According to her account Van Dieken posed alternately as a confidant both of herself and her husband, during which time the latter had an obsession that she was trying to poison him and frequently absented himself from home, when there refused to eat what she cooked, and from time to time told her that she was a "gold digger". She said that on the day that the property settlement was signed she went, at her husband's insistence, to Van Dieken's office with him where she found Van Dieken and a lawyer named Dukette with whom he officed; that the agreement was placed before her and represented by Mr. Dukette as a mutual arrangement whereby whichever spouse should survive should have certain property left by the other; that her husband demanded that she sign it, saying that otherwise she would get nothing, and that Van Dieken told her to sign it; that she signed it without reading it. On cross-

examination, however, she admitted that before signing it she took it across the street to the office of Mr. Mott, an attorney, in the Spreckels Theatre Building, and showed it to him and that his only remark was "you better go and get the divorce". She said that she was excited and did not discuss the signing of the property settlement with Mr. Mott although that was her purpose in taking it to him. It was after this interview with Mr. Mott that she returned and signed it. She said that she continued to live with her husband until January 7, 1937; that in the meantime he discouraged her from reading the settlement agreement, but on that day required her to leave and threatened in case she refused, to have the sheriff oust her. She testified that while she and her husband were living together Mrs. Van Dieken called her up by telephone, inquired for her health, and abused her husband, telling her that nobody could get along with him and that she would do better to leave him; that Van Dieken soon after the property settlement had been signed called her up and advised that she divorce her husband and said that he could arrange to have it done for \$25, which sum she didn't have; that he promised to talk to his lawyer and get him to reduce the cost to \$15.

As against appellant's account Van Dieken, while he conceded that both Larsen and appellant from time to time discussed their troubles with him, claimed also to have tried to keep them together, and to have advised Larsen not to apply for a divorce but to make the best of the situation. As respects the separation agreement he claimed to have known nothing about it until Mr. Dukette called him into the latter's part of the office which they were occupying. There, he said, he found Mrs. Larsen, and the agreement already signed by her, and was merely asked as a witness to initial the paper, which he did. Otherwise he claimed to have had nothing to do with the transaction and said that he doesn't even remember that Mr. Larsen was present at the time.

As respects the property settlement, Mr. Dukette, the attorney referred to, testified that he was acting for Larsen, who had consulted him in the preceding spring about filing a divorce complaint against appellant; that the complaint had been prepared and sworn to but not actually filed. Both Mr. and Mrs. Larsen, accord-

ing to Dukette, from time to time called at his office during this period and, at that time, Van Dieken advised Larsen to drop the divorce for "the time being and go back and try it again", and on Larsen's instruction the matter was held up. According to Dukette's testimony Larsen came back in December of 1936 and again consulted him. Mr. Dukette testified that he advised a property settlement rather than a divorce; that Mrs. Larsen came in on December 24; that he talked with both the Larsens in his office, at which time the terms of settlement were verbally agreed upon; that he suggested to Mrs. Larsen that she get her own attorney but she expressed herself as satisfied with what he was doing. He said that, according to his impression, she came in again on December 28 and took out the paper with her overnight, although he is not sure about that. At any rate he said that on December 29 it was submitted to both the Larsens; that Mrs. Larsen insisted on having certain personal property, provision for which he interlined at her request; that she said she didn't believe she would sign it because she didn't think she was getting enough, whereupon Mr. Larsen said he would give her another piece of property so that her income would be greater than his, which was arranged; that he, Dukette, made it clear to her that she would get nothing additional at her husband's death; that Van Dieken had, up to this time, had nothing to do with the matter but was called in merely as a witness. Mrs. Van Dieken testified that she never had any telephone conversation at any time with Mrs. Larsen and never discussed Mr. Larsen with her.

With respect to the execution of the deeds to Mrs. French it was Van Dieken's testimony that Larsen came into his office late in the morning of January 2, 1937, and said to him, "I want you to make out three deeds for me"; that Larsen had some old deeds with him and that he copied them. Larsen, according to Van Dieken's testimony, instructed him to make out the new deeds to Mrs. French. When they were completed he took Larsen in to Mr. John H. Moore, an attorney and notary public, who also officed in the same suite, to have the deeds acknowledged, which was done. Van Dieken said that he had had no previous conversation with Larsen about deeding any property to his daughter and that nothing was said between himself

and Larsen in connection with the matter about the subject of old age pensions; also that he had had no previous talk with either Mrs. Van Dieken or Mrs. French about these conveyances. Van Dieken testified that, as already recited, he recorded the deeds. He said that on either January 11, 1937, or January 15, 1937, he is uncertain which, Larsen again came in and instructed him to make out the deeds for the lots near La Jolla, that is, the one to Mrs. French and the other to Mrs. Larsen's daughter, Catherine (the reference is really to her daughter-in-law); that at Larsen's suggestion they then went across the street to Joe L. Shell, now one of the Municipal Court judges, but then a Justice of the Peace, to have him take the acknowledgments; that Judge Shell said that, being on the bench, he could no longer act as a notary, but directed them to one Virginia Gore, who did take the acknowledgments to these deeds, one of which Van Dieken said that he then mailed to Mrs. Larsen's daughter (daughter-in-law), while he recorded the one to his own daughter. This testimony about what occurred in Judge Shell's presence is confirmed by Judge Shell's testimony.

Mr. Dukette testified that on January 2 as Van Dieken was making out the three first deeds he, Dukette, passed through the outer office where Van Dieken was and that in Larsen's presence Van Dieken said to him, "Mr. Larsen is giving Marjorie, my daughter, some property, and do you think I should put in Marjorie's husband's name?" Mr. Dukette replied that he thought the deed should read to the daughter as her separate property, and passed on.

Mrs. French testified that she was and is a teacher in the San Diego city schools; that Larsen had been a close friend of her family both before and after his marriage and had been often at their home; that she had known him for 15 or 20 years; that she first learned of Larsen's intention to deed her his property when her father, on coming home after the deeds were executed, told her about the occurrence. According to her testimony, "After the deeds were turned over, he", that is, Larsen, "came to my home and told me that he had deeded his property to me and that I was to turn over the rents to him". This, she thinks, may have been two or three days after she first learned that the deeds had been made. The deeds came to her from the recorder's office after

recordation. She had not seen them before. She said that the agreement between Larsen and herself was substantially that she was to collect the rents and look after him. "At present I was to give him the rent and then we were going to go into that later on, which we did." She said that Mr. Larsen took her out to the three houses and introduced her to the several tenants as the new landlady and instructed them thenceforth to do business with her; that from sometime shortly after receiving the deeds she proceeded to collect the rents, which after deducting expenditures, were from time to time either turned over to Mr. Larsen or applied by her or through the agency of her father to Larsen's expenses up to the time of his death. A Mrs. Meyers and a Mrs. Peterson, two of the tenants who testified at the trial, in substance confirmed the statement that Larsen told them to pay the rent to Mrs. French. Mrs. French named a Mrs. Wilde as one of those whom Larsen had instructed to pay the rent to her. According to Mrs. Wilde's testimony it was not Larsen but Mrs. French who so instructed her. There is to that extent, therefore, a conflict in their accounts. A tenant named Durloo testified that Larsen told him to pay the rent to Mrs. French and her husband, who, he said were good friends of his. "They were going to collect it and look out for it. He said he wasn't yet too old to run around himself and would probably go north". He claims that Larsen later talked about selling the property to him and that he asked Mrs. French about it and she said that it was Larsen's property but that she could handle it.

We think that the foregoing statement fairly summarizes the testimony in so far as it bears directly on the charge that the respondents were guilty of fraud and used undue influence to procure the conveyances of the real estate to Mrs. French. It is clear that if this evidence is to be considered by itself alone, the trial court was strictly within its rights in resolving any conflict that it might be deemed to present in respondents' favor and that the court's determination that no fraud was practiced and no undue influence used is one with which it is not our function to interfere.

Appellant, however, introduced a mass of testimony respecting other occurrences to some extent before and to some extent after these conveyances, the effect of which is apparently relied upon as raising

such inferences as to compel an opposite conclusion.

There seems to be no question that Larsen had made up his mind, in one way or another, to secure such old age benefits as he could from the public. Mrs. Larsen testified that the Townsend Plan was a constant theme of his conversation. One Golden, a real estate man with whom Larsen had listed his property, testified that during 1936 Larsen talked to him about the Townsend Plan; that he told Larsen that he had too much property to come under it; to which Larsen answered that he had a way of getting rid of his property; that he was going to get that \$200; that he was going to get the property out of his name. Finding no immediate prospect of getting anything from that source, Larsen apparently turned his mind to securing an indigent pension from the state, notwithstanding that he was already in receipt of a fair income of his own. A. V. Goeddel, a fellow member of the Eagles fraternity and secretary of its local association, testified to a conversation with Larsen in December of 1936. He said that at that time Larsen first asked him to help in the sale of his property, then suggested he would like to have Goeddel take it over and finally asked Goeddel if he, Larsen, could get an old age pension if he could get his property out of his name. One Howell, also a fellow member of the Eagles, testified that about Thanksgiving of 1936, Larsen had come over to his shop and asked him to take over his, Larsen's, property, and said that he, Larsen, would proceed to get an old age pension. Howell says that his answer was that if he were to take over the property and collect Larsen's rents and Larsen were then to apply for an old age pension it would land both of them in jail.

Mae Angelo, a social worker and supervisor in the San Diego County Welfare Department, testified that Larsen about February 10, 1937, came into her office and made affidavit to an application for an old age pension, a copy of which appears in the record, wherein he stated that he had made no assignment of his property in order to qualify for old age security, and that he did not own real property in excess of \$4,000 or personal property in excess of \$500. She said that the statements that went into the application were not made directly to her but to a Miss Hebb, who is a case worker in her department. Miss

Hebb testified that Larsen was in first on February 9 and again on February 10, and claimed that he had no bank account or securities; that Mrs. French had foreclosed a mortgage that she held on his home and that he had since been living on his savings, of which he had only \$75 left.

There is no dispute about the fact that after his separation from his wife, Larsen, until the middle of the following March, lived at hotels, that is, first at the Golden West and then at the Lindbergh Hotel in San Diego; neither is there any dispute that he entered the County Hospital on March 16, 1937. A Mrs. Pasich, housekeeper at the Lindbergh Hotel, testified that shortly before he went to the hospital she talked with him and that he then told her that his friends advised him to go to the County Hospital to cut expenses and that he was trying to do that because he had signed all his property over to his friends and had nothing and wouldn't need to pay the County Hospital bill; also that he said he had signed his property over to his friend or his friend's daughter, who was going to get a pension for him; that when he got the pension he was then going to get the property back so he could live better on his money. She also claims to have heard Van Dieken tell Larsen while the latter was sick in bed at her place that he was better off than those at home since Mrs. Larsen might poison him and was a "bad egg".

One Alma S. Gardner, a social worker employed by the county at the County Hospital for the purpose of interviewing incoming patients who were not able to pay their way, stated that on March 16, 1937, Larsen came to the hospital with Van Dieken, who was present during the interview; that she followed the regular routine of questioning; that Larsen said he was divorced from his second wife and had made application for an old age pension but action on it had not been completed; that he had no automobile, no property, no savings, owed no debts and carried no insurance; that he was entirely dependent on his friend Van Dieken who was taking care of him, had secured a little room for him and was providing him with means for his meals; that he had had marital difficulties and had been set out at home, and, being penniless, had turned to his friend Van Dieken. She says that Larsen stated that about three years before he had married a younger woman; that

he presumably did not die as soon as she expected; that she mortgaged his property consisting of two houses, then took all the assets available and set him out literally on the street. She testified that Van Dieken had verified these various statements and Larsen's entire dependence upon him.

It appears without conflict that on March 18, 1937, that is, two days after he had entered the County Hospital, Larsen signed the will already alluded to in this opinion, at the County Hospital, wherein he undertook to devise and bequeath to Van Dieken all property which he might own at the time of his death, and to nominate Van Dieken as his executor. Van Dieken claims that Larsen had talked to him about this will in his office just before entering the County Hospital and that he, Van Dieken, had prepared it in accordance with Larsen's instructions. At all events there is no dispute that Van Dieken took it to the hospital himself and that Larsen's signature was there affixed to it.

The testimony shows that Larsen remained in the County Hospital in a progressively weakening condition until the following summer. Mrs. Larsen has testified at great length about repeatedly seeing him there and about expressions made by him to her about wishing to resume their relations, and complaints on his part of his treatment at the hands of respondents. She says that, among other things, he complained that he was not allowed to see his friends, and says that the nurses discouraged her visits. Sundry of his friends did, however, visit him, including Mr. Goeddel of the Eagles' Hall. One Ethel Prihoda, a daughter of appellant, testified that she visited Larsen at the County Hospital and that he asked her to collect his rents for him, expressed discontent at being there and affection for her mother. It was shown that during this period Mrs. Larsen consulted Mr. Van Winkle, an attorney, about the advisability of getting a divorce from her husband, but that he advised her in substance that as her husband apparently would not live long it was not worth her while. At length Mrs. Larsen brought another attorney to the hospital to interview him. Soon after that Van Dieken arranged for his transfer to a private institution known as Frazer Hall where his bills were paid from the rental collections made by Mrs. French. Meanwhile Mrs. Larsen filed an application in the Superior Court to be appointed his

guardian. This, she testified, was according to Larsen's direction. However, under date of July 6, 1937, Larsen signed a nomination prepared by Van Dieken and witnessed by two of the nurses at Frazer Hall, requesting the appointment of Van Dieken as his guardian. Van Dieken testified that Larsen had been served with notice of his wife's application and told him that he did not want her made guardian but that he did want Van Dieken appointed.

[1] It may be conceded that there are aspects of the evidence recited which do indicate that Van Dieken by the spring of 1937 was not at all reluctant to humor Larsen in his plan to get money from the public, and was guilty of highly reprehensible conduct, especially in connection with Larsen's admission to the County Hospital. It may also be conceded that Van Dieken may have been anxious to keep Larsen, as he grew more and more feeble, from getting under the control, either of Mrs. Larsen or of any one else who would be likely to attack the conveyances made in January of 1937. Assuming however, that these are correct interpretations of Van Dieken's conduct, it still would not necessarily relate back to or characterize what occurred in the making of the conveyances themselves nor charge Mrs. French with complicity in any prearranged plan to induce their execution, and we cannot say that the trial court was wrong in the view which it apparently took that, whatever Van Dieken's conduct may have been, it raised no necessary inference that he had defrauded Larsen or used any undue influence to secure the conveyances themselves.

As respects Larsen's personal property, it included the furniture in one or more of the three houses conveyed to Mrs. French, an old automobile apparently of little substantial value, a trunk which, according to Van Dieken, contained only a little clothing, a few personal effects; and the contents of a box maintained by Larsen at the Eagles' Hall at San Diego. As respects the furniture Mrs. French has treated it as having been intended to go to her with the house or houses that contain it. The automobile is at Van Dieken's home, whether it be said to be there in the possession of Mrs. French or of Van Dieken. Van Dieken testified that half an hour before Larsen went to the hospital he gave him a key to the trunk and asked

him to take care of everything, saying, "If I don't get better everything belongs to you"; that accordingly he got the trunk from the Lindbergh Hotel and took it home. As to the deposit box Goeddel testified that Larsen himself opened it during the first ten days of March 1937, which would be shortly before he went to the County Hospital. This visit of Larsen to the box is confirmed by Miss Rossi, the immediate custodian of the box there. A bank pass-book which had been in the box was produced in court and showed a withdrawal of \$900 on or about March 1. This must, apparently, have been made by Larsen himself. Van Dieken testified that he knew nothing of this withdrawal and knows nothing of the disposition of the money withdrawn, and there is no evidence tending to show that he had any connection with either. He did have Larsen's key to the box later, after Larsen had gone to the hospital, and according to his testimony he went to the box, took out the contents and delivered the same to Larsen at the hospital. He says that Larsen handed these back to him and told him that they were to be his, that he kept them in his safe a while and then turned them over to his attorney. He says that he found no money.

[2,3] As to the furniture, we must presume in support of the trial court's findings that it believed it to have been Larsen's intention that it should go to Mrs. French with the house or houses containing it; and as to the other personal property in respondents' hands, if the trial court believed, as it had the right to believe, what Van Dieken testified that Larsen said to him about it just before going to the hospital and while there, the result, assuming that Larsen was at the time *compos mentis*, would amount to a gift *causa mortis*. Civil Code, sec. 1149.

[4] Appellant's counsel, under the authority of such cases as *Herbert v. Lankershim*, 9 Cal.2d 409, 471, 71 P.2d 220, insist that the rule forbidding disturbance of a trial court's findings when the evidence conflicts "does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence". It is

urged that Van Dieken occupied a confidential relation toward Larsen and that even though his daughter occupied no such relation it is the law that: "An innocent recipient of a gift procured through the fraud of a third person can not set up his innocence as a defense to an action by the donor to rescind the gift on account of the fraud" (citing *Simmons v. Briggs*, 69 Cal. App. 447, 231 P. 604.)

[5] With the propositions of law thus laid down we are in accord, but we do not think that they here control. Van Dieken's relation to Larsen could, prior to the transactions of January, 1937, hardly be said to be, in any strictness, confidential. He was, at most, a close friend. If the trial court believed, as it had the right to believe, that Larsen's estrangement from his wife was real, there would have been nothing particularly unnatural in his desiring that after he was through with his property it should belong wholly to Mrs. French, whom he had long known. As to his determination to get an old age pension, there is abundant evidence in the record that it was a fixed idea of long standing with him about which he talked to various persons other than Van Dieken. The evidence was manifestly not such as to compel the trial court to believe that Van Dieken had implanted this idea in his mind. While there is much in Van Dieken's later conduct that is far from creditable, it should not be forgotten that what the trial court had to deal with, so far as the real estate transactions were concerned, was not what happened at the county hospital or at Frazer Hall but what occurred in January, 1937, or theretofore. As respects the personal property, while the gifts *causa mortis* found to have been made were, indeed, of later date than the real estate conveyances, yet they too are said to have been relatively early and they are not in the circumstances entirely incredible, nor does the property affected by them appear to have had any considerable value.

[6] The trial court, of course, had before it not only the issue of fraud and undue influence just discussed, but also the question whether Larsen at the respective times when he executed the deeds to Mrs.

French, and is said to have made the gifts *causa mortis* of his personal property to Van Dieken, had the mental capacity necessary to give validity to his conduct. On that subject the testimony exhibits a wide difference of views, both between his close acquaintances and between the medical experts called to express their opinions. No useful purpose would be served by reciting this evidence here in detail. That he was rapidly failing both physically and mentally is patent enough, but how far the deterioration of his mind had proceeded at any given time was a question for the trial court to decide. Its determination that he had the mental capacity to do what it is found he in fact did in respect of these conveyances and personal property gifts, finds enough support in the record to require us to uphold it.

[7] There is, indeed, a certain vagueness about Larsen's statements to Mrs. French, recounted by her, about what he wanted her to do with the property which he had deeded to her. The trial court has construed the arrangement as one for the retention by him of a life estate in the income. If we are to sustain, as we must, the trial court's findings on the issues of fraud, undue influence and mental capacity, its construction of the effect of what was done is hardly one of which Larsen or his personal representatives, in view of the absolute language of the deeds, can well complain.

[8] We may add that so far as the property settlement between Larsen and his wife is concerned, we do not see that Mrs. Larsen in her capacity as administratrix of the decedent's estate has any standing here to complain of it. Mrs. Larsen is not here suing in her personal capacity and so far as her husband's estate is concerned *it* could gain nothing from having that transaction set aside. No proceeding appears to have ever been taken to rescind it and it figures in the instant case only for what light it sheds on the other matters that are really here involved.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIF-FIN, J.

34 Cal.App.2d 442

LABOZETTA v. CITY OF LOS ANGELES
et al.
Civ. 11814.

District Court of Appeal, Second District,
Division 1, California.

Aug. 31, 1939.

Rehearing Denied Oct. 30, 1939.

1. Municipal corporations ⇨747(2)

A complaint alleging that plaintiff, employee of an engineering corporation, while repairing a boiler in a jail building was injured when a city employee negligently permitted live steam to enter boiler in which plaintiff was working, did not state a cause of action against city for damages for injuries, since repairing of municipal property constituted a "governmental function" in exercise of which a city was not liable for negligence of its employee.

[Ed. Note.—For other definitions of "Governmental Function," see Words & Phrases.]

2. Municipal corporations ⇨747(2)

As respects liability of city for negligence of its employees, it is as much exercise of a "governmental function" to maintain and keep in repair property owned and used in performance of municipal powers and duties, as it is to acquire and utilize such property in first instance.

3. Municipal corporations ⇨724

A municipality is not liable for damage resulting from exercise of purely governmental activities.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by John Labozetta against the City of Los Angeles (a municipal corporation) and W. C. Lambert to recover damages for injuries. From a judgment for defendants, plaintiff appeals.

Affirmed.

Irving E. Read, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Leonard Husar and Bourke Jones, Deputy City Attys., all of Los Angeles, for respondents.

DORAN, Justice.

Plaintiff, John Labozetta, appeals from a judgment in favor of the defendant and respondent, City of Los Angeles, a municipal corporation.

At the trial an objection by respondent to the introduction of any evidence on the ground that the complaint did not state a cause of action was sustained, and a judgment in favor of defendant City of Los Angeles followed. As to the defendant, W. C. Lambert, a default judgment having been entered on March 2, 1934, and plaintiff having failed to have the judgment entered within three years after the service of summons, a separate judgment of dismissal was filed on November 17, 1937.

The issue presented is whether the complaint states a cause of action.

The complaint alleged, in substance, that the city was the owner of a building in which it operated boilers, engines and other mechanical appliances for the purpose of supplying heat, steam and power, either in whole or in part, to jail buildings of the city; that one of the boilers was out of use and in need of repairs; that plaintiff's employer, J. E. Webster, federal receiver for the Southwestern Engineering Corporation, entered into a contract with the city to repair this boiler; that pursuant thereto, plaintiff proceeded to work on the boiler and warned the defendant, W. C. Lambert, who was in charge of the boiler room, not to turn on any steam in the boiler as he was going to work inside of it, but that Lambert negligently turned on certain valves in said boiler room which permitted live steam to enter the boiler in which plaintiff was then working, thereby injuring the plaintiff.

The demurrer interposed by the defendant city raised the point that "the injury complained of was in the boiler room of a jail building of the City of Los Angeles and such buildings are used in the administration of governmental affairs of the City of Los Angeles and therefore there is no liability existing against the City of Los Angeles".

Appellant contends in effect, however, that although a municipality may be acting in a governmental capacity in maintaining jail buildings and the necessary adjuncts thereto, yet with respect to the repair of such structures and appliances it acts in a proprietary capacity upon the theory that the contracts of the city with respect thereto are governed by the law of contracts as

they relate to private persons, and that the repair of such structures is a ministerial act.

[1] Appellant's contention, in effect, that the nature of the city's relation to the property changes from that of governmental to proprietary for the reasons urged, as above noted, is clearly without merit. The objection was properly sustained.

[2] As pointed out by respondent in substance, it is not contended by appellant that the operation of the steam plant was not a necessary and incidental adjunct to the full and continued use of the property. And in that connection it is at once evident that it is as much the exercise of a governmental function to maintain and keep in repair property owned and used in the performance of municipal powers and duties, as it is to acquire and utilize such property in the first instance. The record herein repels appellant's effort to sustain the distinction relied upon. The mere repair of the property in question created no liability on the part of the city in connection therewith.

[3] It is too well settled to require citation of authority that a municipality is not liable for damage resulting from the exercise of purely governmental activities.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.



34 Cal.App.2d 383

**CUNHA v. ANGLO CALIFORNIA NAT.
BANK OF SAN FRANCISCO et al.**
Civ. 11069.

District Court of Appeal, First District,
Division 2, California.
Aug. 30, 1939.

Hearing Denied Oct. 26, 1939.

1. Trusts ⇨371(1)

In action against remainderman under a trust established for life of settlor to recover a sum of money allegedly received as stock dividends, a complaint alleging that

settlor of trust assigned to plaintiff's intestate accrued dividends of stock held in trust, that stock as result of merger was exchanged with its accrued dividends for other shares of stock, and that on death of settlor stock passed to remaindermen, was demurrable for failure to allege whether merger was consummated prior to death of settlor, whether accumulated dividends were ever paid in money, and whether trust was in existence at time of merger.

2. Dismissal and nonsuit ⇨53(1)

The statutory grounds for dismissing an action are not exclusive. Code Civ.Proc. §§ 581-581b.

3. Dismissal and nonsuit ⇨46

The same rules apply to a dismissal of an action at law or in equity unless modified by statute.

4. Dismissal and nonsuit ⇨67

A motion to dismiss an action is proper practice but in each case question arises whether specific facts presented constitute grounds for an order of dismissal. Code Civ.Proc. §§ 581-581b.

5. Dismissal and nonsuit ⇨71

On motion to dismiss an action to recover accrued stock dividend on ground that action was a sham, and based on false allegations and that interests of justice would be subserved by dismissal, the defendants had right to support their motion by affidavits. Code Civ.Proc. § 2009.

6. Dismissal and nonsuit ⇨53(2)

In action to recover accrued dividends on stock held in trust, which dividends were allegedly assigned by settlor of trust to plaintiff's intestate, trial court properly granted motion to dismiss action where demurrers to original and to two amended complaints had been sustained, and where affidavit in support of motion to dismiss showed that accrued dividends were neither declared nor paid to settlor during his lifetime, that settlor had only a life estate under trust, and that settlor had no title to any other dividends which he could have assigned.

7. Action ⇨68

Dismissal and nonsuit ⇨53(2)

Court has inherent power, in absence of any statute, to dismiss or perpetually stay groundless, vexatious, annoying, and harassing litigations.

8. Appeal and error ⇐1024(1)

On motion to dismiss an action as being groundless, vexatious, and harassing, the weight of evidence is to be determined by the trial court.

9. Dismissal and nonsuit ⇐71

On motion to dismiss an action to recover accrued dividends on stock held in trust, which dividends were allegedly assigned by settlor of a trust to plaintiff's intestate, plaintiff, if it were possible for him to do so, was bound to present documents controverting affidavits of defendants showing that settlor had only life estate in trust, and that accrued dividends on stock held in trust were neither declared nor paid to settlor during his lifetime.

10. Dismissal and nonsuit ⇐73

On motion to dismiss an action to recover accrued dividends on stock held in trust, which dividends were allegedly assigned by settlor to plaintiff's intestate, fact that complaint was drawn by attorney who had actually participated in framing agreements was not conclusive on whether contract of assignment had been fully and fairly pleaded, where defendants by uncontradicted affidavits proved that settlor had only life estate in trust, and that during settlor's life no accrued dividends were declared.

11. Appeal and error ⇐927(2)

Reviewing court on appeal from a judgment dismissing an action on ground that it was a sham and based on false allegations would assume that trial court accepted as true evidence introduced by defendants.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Dean Cunha, as executor of the last will and testament of Harry I. Stafford, deceased, against the Anglo California National Bank of San Francisco, as trustee, and others to recover accrued stock dividends allegedly assigned to plaintiff's intestate. From a judgment on orders sustaining defendants' demurrer to plaintiff's original complaint, first amended complaint, and second amended complaint, and granting defendants' motion to dismiss, the plaintiff appeals.

Affirmed.

Hearing denied; SHENK and CARTER, JJ., dissenting.

Edward A. Cunha, Dean Cunha, in pro. per. and Daniel R. Shoemaker, all of San Francisco, for appellants.

Philip S. Ehrlich, of San Francisco, for respondents Zellerbach,

Orrick, Dahlquist, Neff & Herrington, of San Francisco, for respondent Anglo California Nat. Bank of San Francisco.

STURTEVANT, Justice.

The plaintiff's decedent, on May 14, 1937, commenced an action against the defendants praying a judgment for money. The defendants appeared and filed demurrers which were both general and special. The demurrers were sustained. The plaintiff filed a first amended complaint which made no substantial change in the averments of the original complaint. The defendants interposed other demurrers that were both general and special and they were sustained. The plaintiff filed a second amended complaint which contains no substantial changes and again the defendants demurred. Those demurrers were also both general and special demurrers. At about the same time the defendants also filed a notice of motion to dismiss the action. The trial court entered orders sustaining the demurrers without leave to amend and granting the motion to dismiss. From the judgment entered on those orders the plaintiff has appealed. We will first take up the order sustaining the demurrers.

The second amended complaint may be summarized as follows: Harry I. Stafford died on March 10, 1938, his will was admitted to probate and Dean Cunha was appointed executor and the latter has been substituted as plaintiff in this action. The Anglo California National Bank is a corporation. Prior to October 5, 1935, Arthur Zellerbach, under written trust agreements, placed in trust 2,331 shares of the Class A preferred stock of the Crown Zellerbach Corporation, a corporation, and 11,665 shares of its common stock, reserving to himself the income from said trust estate and designating as the remaindermen of the corpus of said estate his nephews, the defendants, J. D. Zellerbach and Harold L. Zellerbach. On October 5, 1935, a written agreement was made and entered into between said Arthur Zellerbach, as first party, Philip S. Ehrlich, as second party, the said defendant Harold L. Zellerbach, as third party, the said defendant J. D. Zellerbach, as fourth party, the defendant I. Zellerbach, as fifth party, Dorothy Johnson Zellerbach, as sixth party, and Dorothy Ryan Zellerbach, as seventh party confirming in part and

modifying in part the aforesaid trust; and by said agreement the parties contracted and agreed there was then accrued but unpaid, dividends in the sum of \$17.50 per share on the said 2,331 shares of the Class A preferred stock of the said Crown Zellerbach Corporation, and that said accrued dividends belonged to and were owned by said Arthur Zellerbach, and that all of said arrearage of, or accrued dividends when paid, no matter when or how such payment should be evidenced or made, would be paid to said Arthur Zellerbach. Under the agreement of October 4, Philip S. Ehrlich was designated as the trustee and later resigned and the Anglo California National Bank of San Francisco was substituted in his stead. On February 10, 1937, Arthur Zellerbach assigned all of his interest in said accrued dividends to Harry I. Stafford. Arthur Zellerbach died on March 3, 1937. On February 13, 1937, Harry I. Stafford delivered to the Anglo California Bank of San Francisco and to Harold L. Zellerbach and J. D. Zellerbach, written notices of the assignment held by him. After proceedings duly and regularly had, commencing with February 9, 1937, and finally completed prior to the commencement of this action, the said Crown Zellerbach Corporation merged with Crown Willamette Paper Company and by virtue of the merger agreement between said corporations, the original Crown Zellerbach Corporation Class A preferred stock was exchanged for stock in Crown Zellerbach Corporation, the merged corporation, upon the following basis: One and $\frac{1}{40}$ th share of the \$5 cumulative convertible preferred stock of Crown Zellerbach Corporation, the merged corporation, and one share of common stock of the merged corporation, for one share of the said Crown Zellerbach Corporation, Class A preferred stock with its accrued dividends of \$17.50 per share. The 2,331 shares of Class A preferred stock of Crown Zellerbach Corporation, with accrued dividends in the amount of \$17.50 per share held under the trust referred to in said agreement of October 5, 1935, has been exchanged in accordance with the said plan of merger as aforesaid, and plaintiff is informed and believes, and so alleges, that all the stock of Crown Zellerbach Corporation, as merged, issued in exchange for the aforesaid Class A preferred stock, with accrued dividends of original Crown Zellerbach Corporation, has been delivered to, and is now held by, and is in the possession of, the defendants herein,

and by reason thereof, the accrued dividends of \$17.50 per share heretofore sold and assigned to said Harry I. Stafford by said Arthur Zellerbach as hereinabove set forth, have been paid to, and received by said defendants. Prior to the commencement of this action Harry I. Stafford demanded of said defendants that they pay to him the amount of said accrued dividends. At the time of the assignment to Harry I. Stafford the accrued dividends amounted to \$40,792.50. Then follows a prayer for said sum.

The defendants demurred to the foregoing second amended complaint. Among others they stated the following grounds:

"II. That plaintiff's second amended complaint on file herein does not state facts sufficient to constitute a cause of action against these defendants, or any of them.

"III. That plaintiff's second amended complaint is uncertain in each of the following particulars:

"(a) It does not appear therein, nor can it be ascertained therefrom, whether the merger between Crown Willamette Paper Company and Crown Zellerbach Corporation was consummated prior to March 3, 1937, the date of Arthur Zellerbach's death;

"(b) It does not appear therein, nor can it be ascertained therefrom, whether the accumulated dividends upon the 2,331 shares of Class A preferred stock of Crown Zellerbach Corporation were ever declared and paid by the Crown Zellerbach Corporation;

"(c) It does not appear therein, nor can it be ascertained therefrom, whether the trust described in paragraph 3 of plaintiff's second amended complaint was in existence at the time of the consummation of the merger between Crown Willamette Paper Company and Crown Zellerbach Corporation."

[1] It is alleged that Arthur Zellerbach placed his stock in a trust reserving to himself the income and designating his nephews as remaindermen. It is alleged that Arthur Zellerbach died March 3, 1937. Nothing to the contrary appearing, it may be assumed the remaindermen at the time of his death took the trust estate together with the income thereof. It is alleged that a merger between Crown Zellerbach Paper Company and Crown Zellerbach Corporation was effected. If so, it became material to know whether such merger was consum-

mated prior or subsequent to the death of Arthur Zellerbach. As plaintiff's action was an action for money, it also became material to know whether any dividends had been declared and paid. Assuming that some moneys were paid, under the allegations set forth in the second amended complaint the plaintiff could claim an interest in those moneys paid to or for the account of Arthur Zellerbach but not to moneys paid to or for the account of the remaindermen. For these reasons each of the specifications (a), (b) and (c) was well taken.

Under the allegations contained in the second amended complaint it appears the parties contemplated that at least some dividends might be paid in some manner otherwise than in money. Under other allegations it appears the accrued dividends were not paid in money but by the merger agreement the stockholders were given shares in the Crown Zellerbach Corporation in lieu of the payment of money. In other words, on the face of the pleading it appears the original contract between the stockholders of the Crown Zellerbach Corporation and the holders of the preferred stock thereof was modified by all parties in interest and to each stockholder shares of stock were issued for the accrued dividends. The parties anticipated such corporate action and they inserted in the trust agreement that the dividends should be paid to the trustor "* * * no matter when or how such payment should be evidenced or made * * *". If at the time of the merger the trustor had been alive, his right would have been to demand stock, not money. His assignee has no greater right. Assuming that the trust has not been terminated, the second amended complaint was insufficient because the trustor's assignee has not pleaded facts showing he is entitled to a judgment for money, and the trial court did not err in sustaining the demurrers.

We pass now to a consideration of the order dismissing the action. The notice of motion to dismiss set forth:

"Said motion will be made upon the following grounds:

"(1) As originally begun, the action was sham and based on false allegations, and the first amended complaint and the second amended complaint on file herein are, and each of them is, likewise sham and based upon false allegations;

"(2) The filing of said second amended complaint and the maintenance of the action in the circumstances herein appearing were and are an abuse of the process of the court by the plaintiff;

"(3) The second amended complaint is an abuse of the leave granted to the plaintiff to amend given in the order whereby these defendants' demurrers to plaintiff's first amended complaint were sustained;

"(4) The interests of justice will be subserved by the dismissal of said action.

"Said motion will be based upon this notice of motion, the affidavit of J. D. Zellerbach, served and filed herewith, and all the records, papers and pleadings on file in the above entitled cause, including the original and first amended complaint filed herein and the demurrers and answers thereto and the motions to strike portions thereof."

[2-4] It is obvious that the motion to dismiss was not made pursuant to the provisions of sections 581-581b, Code of Civil Procedure. But it is also true that, as to the power to dismiss, those sections are not exclusive. *People v. Jefferds*, 126 Cal. 296, 58 P. 704. The power to dismiss was formerly exercised by courts of chancery and later it was exercised in the law courts. 6 Am. & Eng. Ency. of Pl. & Pr. 910; 9 Cal. Jur. 505. By those courts it was exercised when it was shown that an action was fictitious or sham. 49 C.J. 701, and 18 C.J. 1180. The same rules apply to a dismissal at law or in equity under code procedure unless modified by statute. 6 Am. & Eng. Ency. Pl. & Pr. 910. No statute has modified the rule in this state. That a motion to dismiss is proper practice is settled law but in each case the question arises whether the specific facts presented to the court constitute grounds for an order of dismissal. Therefore the defendants had the right to make, and the trial court had jurisdiction to hear and determine the motion to dismiss.

[5] As the court had the jurisdiction to entertain the motion the defendants had the right to support their motion with affidavits. Code Civ. Proc. § 2009; *California Mortg. & Sav. Bank v. Graves*, 129 Cal. 649, 651, 62 P. 259; *Pacific Paving Co. v. Vizelich*, 141 Cal. 4, 10, 74 P. 352; *Guardianship of Van Loan*, 142 Cal. 423, 426, 76 P. 37; *Fuller v. Lindenbaum*, 29 Cal.App.2d 227, 230, 84 P.2d 155.

In the original complaint and in each amended complaint the plaintiff, by virtue

of a written assignment, asserted title to \$40,792.50, the amount of accrued dividends claimed to have been paid on certain shares of stock. In no one of those pleadings was there an allegation to that effect but each pleading contained intimations that Arthur Zellerbach held the title to and assigned to plaintiff's decedent (1) dividends payable after the death of the assignor, and (2) that such dividends were paid. The defendants contended that neither proposition was true and that they were not liable in any sum if the facts were fully alleged. In support of that contention they filed demurrers in which they made specific attacks. Their demurrers were sustained to the first complaint, their demurrers were sustained to the amended complaint, and they interposed similar demurrers to the second amended complaint.

[6] They also moved to dismiss on the ground above stated and in support of their motion they offered in evidence all the records and files and also the affidavit of J. D. Zellerbach. The plaintiff offered no evidence. The trial court granted the motion. The proof so offered by the defendants consisted of certain written agreements which showed that Arthur Zellerbach had only a life estate under certain trust agreements. The proof also showed that the accrued dividends were neither declared nor paid to or for the account of Arthur Zellerbach during his lifetime. It further showed he had no title to any other dividends which he could have assigned or that he ever attempted to assign. Therefore, in dismissing said action the trial court did not err. 6 Am. & Eng. Ency. Pl. & Pr. 910; 21 R.C.L. 452; 18 C.J. 1180; *Stewart v. Butler*, 27 Misc. 708, 59 N.Y.S. 573; *Scarcia v. United States Gypsum Co.*, 164 Misc. 825, 1 N.Y.S.2d 353; *Kirby v. Pease*, 33 Wash. 511, 74 P. 665; *Delahoyde v. Lovelace*, 39 N.M. 446, 49 P.2d 253, 257; *Heard v. McCabe*, 130 Ark. 185, 196 S.W. 917; *Rhea v. Hackney*, 117 Fla. 62, 157 So. 190; *Pueblo De Taos v. Archuleta*, 10 Cir., 64 F.2d 807, 812. In *Stewart v. Butler*, supra, an interesting discussion is found regarding the power of courts over litigation which is vexatious, clearly without merit, and not brought in good faith. 59 N.Y.S. on page 576, the court quotes with approval: "On principle, I am of opinion that where you find a litigant like Mr. Edmunds, who will have recourse to such a series of vexatious and improper litigations as he has had re-

course to, and, when a decision has been given against him, will persist in treating it as a mere nullity,—for he has considered the decision of the arbitrators as a nullity, he has considered my decision of January, 1876, a nullity, and he has considered the decision of Vice Chancellor Bacon, in February, 1877, a nullity,—when such a litigant is found I think it a most wholesome doctrine that any court should have the power of stopping such a litigation."

Having quoted the above with approval, the court continued:

[7, 8] "The same inherent power of the court was invoked and applied in *Jacobs v. Raven*, 30 Law T., N.S., 366. In each of the cases above cited the actions were disposed of, as is sought to be done in the present case, on motion based upon affidavits. The power of a court of equity to entertain an action to restrain vexatious, annoying, and harassing suits at law is well recognized (2 Story, Eq.Jur. (13th Ed.) p. 211), and such an action has been maintained in this state to restrain groundless and vexatious suits in other states. *Clafin v. Hamlin*, 62 How.Prac. 284. It is not necessary, however, to resort to an affirmative action in equity to accomplish the purpose. 'The more usual course in modern times, especially in this state, has been to grant the same relief on motion as might be obtained on formal suit.' *Lowber v. Mayor, etc., of City of New York*, 5 Abb. Prac. 325. There seems to be no doubt of the inherent power of the court, in the absence of any statute on the subject, to dismiss or perpetually stay groundless, vexatious, and harassing litigations." In some of the cases which we have cited the conduct complained of consisted of acts done in different independent actions, in others some acts were done in the pending action and some acts were done in other actions, and in still other instances the conduct was done in the pending action. However, the rule is the same. Such circumstances are but the evidence and, of course, the weight of the evidence is to be determined by the trial court that is called upon to determine whether the party complained against has been guilty of maintaining groundless, vexatious, and harassing suits.

In the instant case the plaintiff claims he pleaded the trust agreements by their legal effect. But he did not do so. He pleaded only a part of the legal effect. The demurrers to the first complaint specified the de-

fects. In his amended complaint the plaintiff did not cure the omitted portions but added a large amount of matter that was immaterial to the issue on trial. The demurrers of the defendants to the amended complaint made the same attacks. Again the plaintiff omitted to cure the defects when he filed his second amended complaint. The defendants repeated the same attacks. In pleading to the plaintiff's original complaint the defendant Anglo California National Bank filed an answer. That answer, among other things, set forth the facts showing that the trust under which this plaintiff claims he derived his title terminated on March 3, 1937, the date of the death of Arthur Zellerbach, that the administration of said trust was completed on April 21, 1937, that the Anglo California National Bank, the trustee, paid down to the date of March 3, 1937, all of the dividends received under said trust as therein provided, and that no part or portion of the said accrued dividends were paid to or for the account of Arthur Zellerbach during his life time or until after the said trust had terminated. That answer was filed June 7, 1937, whereas the second amended complaint was not filed until April 28, 1938. The affidavit of J. D. Zellerbach was filed May 16, 1938. It pleaded with meticulous care the facts showing that plaintiff had no cause of action. Notwithstanding these facts the plaintiff continued to press his claim. Under these circumstances the trial court did not err in dismissing the action as " * * * litigation which is vexatious, clearly without merit, and not brought in good faith".

[9] The plaintiff now asserts that, in effect, the trial court assumed the documents brought forward by the defendants were the only instruments of title. Perhaps it did. If there were others the plaintiff should have produced them in opposition to the motion. He was bound to meet the issue tendered by the motion or abide the results of the hearing thereon. *Meritt v. Merritt & Lyon*, 16 Wend. 405, 407, 408.

[10, 11] In defense of the motion to dismiss the plaintiff states the original complaint was drawn and verified by an attorney at law, who had actually participated in framing some of the written agreements and who was familiar with the facts. He then states that this court should conclude without any hesitation that the contract has been fully and fairly pleaded.

93 P.2d—37

He seems to conclude that a presumption arose in his favor. However, when the defendants introduced the affidavit of J. D. Zellerbach and all the records and files, the trial court was called upon to determine the issue before it on all of the evidence. In support of the order made by the trial court we must assume it accepted the evidence introduced by the defendants.

The court did not err in granting the motion to dismiss.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J., SPENCE, J.



34 Cal.App.2d 440

PEOPLE v. PHILBROOK.

Cr. 3222.

District Court of Appeal, Second District,
Division 2, California.

Aug. 31, 1939.

1. Criminal law Ⓒ53

Voluntary intoxication is not an excuse for crime.

2. Criminal law Ⓒ254

In prosecution for issuing checks without sufficient funds wherein defendant asserted that he was intoxicated at time he issued checks, it was duty of trial court to weigh evidence on subject of intoxication and determine whether defendant was in such condition that he could not form specific intent to defraud. *Pen.Code*, § 476a.

3. Criminal law Ⓒ570(1)

In prosecution for issuing checks without sufficient funds, evidence sustained finding that defendant was not so intoxicated at time of issuance of checks that he could not form specific intent to defraud. *Pen.Code*, § 476a.

4. False pretenses Ⓒ22

In prosecution for issuing checks without sufficient funds, it was no defense that defendant signed checks and delivered them to another person to be cashed. *Pen.Code*, § 476a.

5. Criminal law Ⓒ22

In prosecution for issuing checks without sufficient funds, it was no defense that defendant delivered checks to persons who cashed them at places other than bank upon which they were drawn. Pen.Code, § 476a.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Allen W. Philbrook was convicted of issuing checks without sufficient funds, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WOOD, Acting Presiding Justice.

Defendant was charged in three counts in an information with the crimes of issuing checks without sufficient funds. He was also charged with two prior felony convictions, one in Missouri and one in California. Defendant admitted the two prior convictions and upon trial by the court without a jury was found guilty on each of the three counts of the information.

[1-3] Defendant's counsel contends that "the judgment is contrary to the law and the evidence". It appears from the evidence that defendant and the parties to whom the checks were given were drinking liquor together and it is argued that defendant was in a state of intoxication. Counsel states in her brief: "It is not to be intended that intoxication is an excuse for a crime, but it should be in the law of this state such that it may be considered as affecting the mental condition of a person." It is conceded that the evidence on the subject of intoxication was conflicting. Voluntary intoxication is not an excuse for crime. It was the duty of the trial court to weigh the evidence on the subject of intoxication and determine whether defendant was in such condition that he could not form the specific intent to defraud. *People v. Murphy*, 1 Cal.2d 37, 32 P.2d 635. The implied finding of the trial court on this issue is amply sustained by the evidence.

[4, 5] It is also argued that an essential element of the offenses is lacking since

defendant signed the checks and delivered them to another member of the party to be cashed. There is no merit in this contention. The offense defined by section 476a of the Penal Code is the giving to another, with the intent to defraud, a check on a bank for the payment of money with knowledge on the part of the giver at the time that he has not sufficient funds in or credit with the bank to meet the check in full upon its presentation. *People v. Bercovitz*, 163 Cal. 636, 638, 126 P. 479, 43 L.R.A., N.S., 667. Defendant cannot escape the consequences of his acts by showing that the persons to whom he delivered the checks actually cashed them at places other than the bank upon which they were drawn.

The judgments are affirmed.

I concur: McCOMB, J.



34 Cal.App.2d 344

PURCELL v. GOLDBERG et al.

Civ. 10781.

District Court of Appeal, First District,
Division 1, California.

Aug. 25, 1939.

Hearing Denied Oct. 23, 1939.

1. Automobiles Ⓒ245(66)

In action for injuries sustained when a defendant's automobile suddenly came from behind preceding automobile and struck rear wheel of plaintiff's oncoming automobile causing it to overturn on a curve, whether driver of defendant's automobile was temporarily blinded by cigarette ashes which he was trying to flick from cigarette while rounding curve, so that he lost control of automobile making accident unavoidable, was for the jury.

2. Appeal and error Ⓒ999(3)

In action for injuries sustained when a defendant's automobile suddenly came from behind preceding automobile and struck rear wheel of plaintiff's oncoming automobile causing it to overturn on curve, jury's finding on issue of unavoidable accident was conclusive on appeal.

3. Automobiles ⚡245(35)

In action for injuries sustained when a defendant's automobile suddenly came from behind preceding automobile and struck rear wheel of plaintiff's oncoming automobile causing it to overturn on curve, whether alcoholic breath of driver of defendant's automobile was caused by something stronger than three brandied peaches which he testified he ate prior to the accident, was for the jury. Code Civ.Proc. § 2061, subd. 3.

4. Automobiles ⚡243(1)

In action to recover for injuries sustained in automobile collision, plaintiff is allowed to prove and the jury should consider all the circumstances present at the time of the happening of the accident which include the condition of both occupants of the automobile that caused it.

5. Trial ⚡296(12)

In action for injuries sustained when a defendant's automobile suddenly came from behind preceding automobile and struck rear wheel of plaintiff's oncoming automobile causing it to overturn on curve, instruction using the words "proximately contributed" instead of "proximately caused" was not erroneous, where the term "proximate cause" was clearly defined in other instructions and jury fully advised as to law relating thereto.

6. Appeal and error ⚡1066

Where so-called formula instructions, when separated from each other and from the general charge, omit some elements involved in the case, but the very method of giving thereof indicates plainly that they were never intended and do not purport to state all of the several elements involved in the case as such in detail, but instead those omitted are made the subject of separate specific instructions, the giving of so-called formula instructions does not constitute prejudicial error.

7. Trial ⚡253(4)

Where alleged "formula instructions" related to a single distinct element and did not purport to embody all necessary elements involved in the case with respect to contributory negligence which was specifically treated in other instructions, giving of so-called formula instructions which omitted reference to the defense of contributory negligence was not error.

8. Trial ⚡252(8)

In action for injuries sustained when a defendant's automobile darted from behind

preceding automobile and struck rear wheel of plaintiff's oncoming automobile causing it to overturn on curve, where there were no facts which would justify an inference of contributory negligence, defendants could not complain of instructions which omitted reference to contributory negligence.

9. Trial ⚡251(8)

Refusal to give instructions with regard to factors which were not made material issue in automobile collision case was not error.

10. Damages ⚡20

The damages a married woman may recover without joining husband as party plaintiff in automobile collision case include consequential as well as direct damages. Code Civ.Proc. § 370, as amended by St.1921, p. 102.

11. Damages ⚡172(2), 177

In married woman's action for injuries sustained in automobile collision, admission of testimony concerning special damages including physician's and surgeon's fees, expenses of a housekeeper, and loss of earnings was not error, as against contention that such items represented damages to the community which could be recovered only in an action in which the husband joined. Code Civ.Proc. § 370, as amended by St. 1921, p. 102.

12. Damages ⚡37, 42, 43

Recovery of special damages for physician's and surgeon's fees, expenses of housekeeper, and loss of earnings by married woman in action in which husband did not join as plaintiff was proper. Code Civ.Proc. § 370, as amended by St.1921, p. 102.

13. Damages ⚡46

Married woman was not precluded as matter of law from recovering amount of medical fees in action for injuries on ground that she belonged to an association with which physician was connected and which provided in its contract with its members that as such they were liable for the medical services only in case they recovered damages.

14. Appeal and error ⚡1004(1)

Damages ⚡96

Whether damages are excessive is committed to the discretion of the trial court, and its determination cannot be set aside on appeal unless it appears that the award is so disproportionate to the injuries received

as to indicate that the award was result of passion, prejudice or corruption of the jury.

15. Damages $\text{C}\approx 130(3)$

\$2,000 to married woman who was confined to her home under doctor's care for three weeks and suffered severe pains in back of neck and head and was affected with nausea and on account of "blinding headaches" and nervous shock was compelled to continue medical treatment for some time after being allowed to leave home, and who at time of trial was suffering from neurosis, was not excessive.

Appeal from Superior Court, City and County of San Francisco; Albert F. Ross, Judge.

Action by Hazel Purcell against Garrett M. Goldberg and another for injuries sustained when plaintiff's automobile was struck and overturned by an automobile owned by named defendant and driven by Roy T. Caler. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Redman, Alexander & Bacon, and Herbert Chamberlin, all of San Francisco, for appellants.

O'Brien, Dibert & Acton, and Lillian M. Wollitz, all of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiff brought this action to recover damages for personal injuries sustained when her automobile was struck and overturned by one owned by the defendant Goldberg and driven with his consent by the defendant Caler. The action was tried before a jury, and a verdict rendered in plaintiff's favor and against both defendants for \$2,840.50. Judgment was entered accordingly, from which defendants appeal.

The accident happened about nine o'clock at night on a wide curve on Market street extension in the vicinity of Twin Peaks in San Francisco. The highway in that locality is built on a grade, and divided by a white line into two traffic lanes. Caler, accompanied by a young lady companion, was ascending the grade, traveling up the inner lane at a speed of about thirty-five miles an hour, and following closely behind another car. As he was about to round the curve and when

approximately ten feet distant from respondent, who was descending the grade traveling down the outer lane at a lawful speed, he suddenly shot from behind the car he was following, headed across the highway, and struck the tire on the left rear wheel of respondent's car, causing it to overturn three times. Meanwhile Caler's car continued on and across the highway and crashed into an electric light transmission pole, breaking the pole. The doctor at the emergency hospital to which the injured parties were taken immediately following the accident testified that Caler's breath was more or less alcoholic; but Caler claimed at the trial that it was the result of having eaten three brandied peaches with his dinner.

[1,2] The first point urged in support of the appeal is that the accident was unavoidable. The contention made in this behalf is based on Caler's uncorroborated testimony that while rounding the curve he attempted to flick the ashes from the cigarette he was smoking, out of the partly opened window on his side of the car; that the ashes blew back into his eyes, temporarily blinding him and causing him to lose control of his car; and that he was not aware of the fact that he had collided with anyone until after he had crashed into the electric light pole. Manifestly, however, the question of the truth of the explanation so offered by him for having driven out of line and across the highway at that particular point was one exclusively for the determination of the jury. In other words, the issue of unavoidable accident raised by his testimony was submitted to the jury by appellants under appropriate instructions proposed by them, and the jury as sole judge of the evidence, the credibility of the witnesses and the weight to be given to their testimony, found adversely on that issue; and in view of all the existing conditions shown by the evidence it may well have concluded that it was a case of reckless attempt to pass another car traveling in the same direction, on a curve. In any event, the jury's implied adverse finding on the issue of unavoidable accident is necessarily final and conclusive on appeal.

[3,4] In establishing Caler's condition at the time of the accident it was disclosed incidentally that his companion (who was not called as a witness) had not dined with him that evening, but that she too had an alcoholic breath; and appellants

assign the admission of the testimony as error. It is quite evident, however, that in deciding the issue of unavoidable accident Caler's veracity as a witness as well as the extent of his alcoholic condition at the time he collided with respondent became of vital importance; and as declared by subdivision 3 of section 2061 of the Code of Civil Procedure, " * * * a witness false in one part of his testimony is to be distrusted in others". It would seem, therefore, as respondent contends, that the facts revealed by the disputed testimony related to matters the jury was entitled to weigh in determining whether, contrary to the story told by Caler, his alcoholic breath was caused by something stronger than three brandied peaches. In any event, and regardless of the purpose for which the testimony was offered, it is doubtless the law that in an action such as this, to recover damages based on alleged negligence, a plaintiff is allowed to prove and the jury should consider all of the circumstances present at the time of the happening of the accident (*Craig v. Boyes*, 123 Cal.App. 592, 11 P.2d 673), which here would include the condition of both occupants of the car that caused it.

[5-9] Appellants next complain of the giving and refusal to give numerous instructions; but we find nothing in the points so made which calls for reversal. The first two instructions challenged used the words "proximately contributed" instead of "proximately caused". It appears, however, that the term "proximate cause" was clearly defined in other instructions and the jury fully advised as to the law relating thereto; consequently no error is shown. *Miner v. Dabney-Johnson Oil Corp.*, 219 Cal. 580, 28 P.2d 23. Objection is made also to two instructions upon the ground that they were "formula" in character and omitted any reference to the defense of contributory negligence. We are satisfied that the omission complained of was not prejudicial. As held in substance in *Brower v. Arnstein*, 126 Cal.App. 291, 14 P.2d 863, in a situation quite similar to the one here presented, where said so-called formula instructions, when separated from each other and from the general charge, omit some elements involved in the case, but the very method of the giving thereof indicates plainly that they were never intended and do not purport to state all of the several elements involved in the case as such in detail, but instead those omitted are made the subject of separate,

specific instructions, the giving of such so-called formula instructions does not constitute prejudicial error. And in the present case, as will be seen from reading the entire charge of the court, the two instructions complained of were never intended as formula instructions. Each related to a single, distinct element; and neither purported to embody all of the necessary elements involved in the case. The subject of contributory negligence was specifically treated in other instructions, wherein the law relating thereto was completely and correctly stated; therefore it does not appear possible that the jury could have been misled by the two criticized. *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 264 P. 237. Moreover, appellants failed to prove any substantial facts which would justify an inference of contributory negligence; and that being so, there can be no foundation for the claim of prejudicial error with respect to instructions bearing upon that subject. Nor was there any error committed in giving the instruction regarding the application of the brakes of Caler's car, or the refusal to give those relating to statutory speed, because neither of those factors was made a material issue in the case. In any event, in view of the admitted fact that Caler lost control of his car and crashed into respondent's car on the other side of the highway, and the jury's apparent rejection of the explanation offered by him for his actions, it would seem obvious that none of the assignments of error regarding any of the instructions become important and in no event constitute ground for reversal.

[10-13] The next point urged relates to the question of special damages. In this regard the record shows that at the opening of respondent's direct examination it was brought out that she was a public school teacher, married, and living with her husband; but the fact that she was a married woman was nowhere stated in the complaint; nor did she join her husband as party plaintiff. It further appears that the jury's award included special damages, among the items alleged, proved and recovered being physicians and surgeons fees, expenses of a housekeeper, and loss of earnings. Appellants contend, therefore, that under the circumstances the allowance of those items and the admission of the testimony and the giving of instructions pertaining thereto constituted error, the basis of their contention being that said items represented consequential dam-

ages to the community, which could be recovered only in an action in which the husband joined as plaintiff, or one brought by him alone. Such is not the present law. Section 370 of the Code of Civil Procedure as amended in 1921 (St.1921, p. 102), declares in plain terms that "A married woman * * * may sue without her husband being joined as a party in all actions, including those for injury to her person * * *." (Italics ours.) Necessarily, therefore, the damages a married woman may recover in such an action include consequential as well as direct; and it was definitely so held in *Fassett v. Nascimiento*, 108 Cal.App. 14, 291 P. 269, wherein the factual situation was practically the same as the one here presented. The cases cited and relied on by appellants, including *Meier v. Wagner*, 27 Cal.App. 579, 150 P. 797, are not in point for the reason that they were based upon the law as it stood prior to the 1921 amendment to said section 370. Nor was respondent precluded as a matter of law from recovering the amount of the medical fee incurred for the services of Dr. Winternitz merely because she belonged to an association with which he was connected, and which provided in its contract with its members that as such they were liable for the medical services only in case they recovered damages. *Reichle v. Hazie*, 22 Cal.App.2d 543, 71 P.2d 849.

[14,15] The amount of general damages awarded by the jury was fixed apparently in the sum of \$2,000; and appellants' final contention is that the sum allowed is excessive. It is well settled, however, that this is a question that is committed largely to the discretion of the trial court and that its determination thereof may not be set aside on appeal unless it appears that the award is so disproportionate to the injuries received as to indicate that the award was the result of passion, prejudice or corruption of the jury. *Formosa v. Yellow Cab Co.*, 31 Cal.App.2d 77, 87 P.2d 716. Here the evidence shows that prior to the accident respondent enjoyed reasonably good health, and that as the result of her car being overturned three times while she was in it she was badly bruised and sustained a severe nervous shock. She was able to leave the emergency hospital on the night of the accident without surgical treatment, but the evidence shows that thereafter she was confined to her home under the doctor's care for three weeks; that she suffered

severe pains in the back of the neck and head, and was affected with nausea; and that on account of "blinding headaches" and nervous shock she was compelled to continue medical treatment for sometime after being allowed to leave home. In describing her condition at the time of trial, one of the medical witnesses stated that she was then suffering from neurosis, a condition in which the nervous system shows a low reserve; that she was unable to "pack the load" as formerly, and that spontaneously with every physical effort she immediately develops "symptoms of nervousness, irritability, and fatigability"; and that in his opinion such condition would continue for an indefinite period. In view of the foregoing facts and under the established rules limiting the powers of the reviewing court in dealing with the matter of damages, there is no legal ground upon which it may be held that the sum awarded is as a matter of law so excessive as to warrant interference on appeal.

The judgment is therefore affirmed.

We concur: PETERS, P. J.; WARD, J.



34 Cal.App.2d 159

**SAN JUAN GOLD CO. v. SAN JUAN
RIDGE MUT. WATER ASS'N et al.**

Civ. 6090.

District Court of Appeal, Third District,
California.

Aug. 21, 1939.

1. Appeal and error ⇨931(1)

On appeal from a judgment for the plaintiff, evidence would be viewed in the light most favorable to the plaintiff.

2. Waters and water courses ⇨232

Written lease of portion of water distribution system for domestic and irrigation purposes was presumed to be supported by valid consideration. Civ.Code, § 1614.

3. Waters and water courses ⇨232

Where owner leased portion of water distribution system for irrigation and do-

mestic purposes to association of consumers, burden of showing want of consideration rested upon consumers who challenged validity of the lease. Civ.Code, § 1615.

4. Waters and water courses Ⓒ232

Where owner leased portion of water system for domestic and irrigation purposes to association of consumers who recognized the validity of the lease for the purpose of gaining possession and control over system, consumers were estopped to deny the relation of landlord and tenant in so far as it related to their actions and rights at that time.

5. Waters and water courses Ⓒ232

Where owner leased portion of water distribution system for domestic and irrigation purposes to association of consumers through trustees, and consumers signed by-laws which constituted at least among themselves a contract for the operation of the property and recognized membership roll and owner recognized members of association as parties beneficially interested under the lease and permitted them to gain control and operate system, consumers were estopped from denying that they had no legal rights as members of association.

6. Associations Ⓒ15(3)

A valid grant may be made to trustees for an unincorporated voluntary association.

7. Associations Ⓒ19

Where property is leased to trustees for the benefit of members of an unincorporated association, members of association become tenants of the lessor.

8. Landlord and tenant Ⓒ62(1)

Generally, a tenant entering premises under a lease is estopped to deny landlord's title.

9. Landlord and tenant Ⓒ63(2)

Where landlord by his pleadings seeks to recover possession and also to quiet his title to premises, tenant is not estopped to deny landlord's title but may set up his own superior title.

10. Waters and water courses Ⓒ232

Where owner leased water distribution system for domestic and irrigation purposes to trustees for benefit of association of consumers and subsequently instituted action to recover possession and to quiet title, consumers were not estopped to deny owner's title.

11. Waters and water courses Ⓒ152(8)

Where owner leased water distribution system for domestic and irrigation purposes to association of consumers who used water for mining purposes and claimed right to do so by prescription, evidence sustained finding that consumers did not use water for mining purposes prior to execution of the lease without consent of owner's predecessor in title and did not acquire prescriptive right to system.

12. Waters and water courses Ⓒ232

That an instrument purporting to be a lease of water distribution system was so denominated was some evidence of its character.

13. Licenses Ⓒ44(2)

The test to determine whether an agreement for the use of realty is a license or a lease is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a "lease," or whether it merely confers a privilege to occupy under the owner, in which case it is a "license," and such question is one of law arising out of the construction of the instrument.

[Ed. Note.—For other definitions of "Lease" and "License," see Words & Phrases.]

14. Licenses Ⓒ44(2)

An instrument granting all right, title and interest in water system to lessees who hired it for term prescribed for domestic and irrigation purposes without reservation of right to possession for any purpose except that lessors could enter for purpose of making repairs and inspections, and providing that unless lessors or persons acting under their authority had use for property for mining purposes they could not cancel the lease except after six months' notice, was a "lease" for a term of years of the water system for a limited purpose and was not a mere "license."

15. Licenses Ⓒ44(2)

A lease for a term of years is more than a mere license to enter and occupy for a given purpose, but it has the effect of a conveyance for the term specified.

16. Waters and water courses Ⓒ152(8)

Where owner leased water distribution system to voluntary association of consumers for domestic and irrigation purposes and no provision was made for use by consumers

of water for mining purposes and consumers went into possession as tenants under lease and exercised control by virtue of their positions as members and officers of the association, evidence would not sustain finding that use by consumers of water for mining purposes established right by prescription to the use of the water for such purposes.

17. Adverse possession Ⓒ112, 114(1)

The burden of proving all the essential elements of adverse possession or prescriptive title is upon the party relying upon it, since the doctrine of adverse possession is to be construed strictly, and such possession cannot be made out by inference, but only by clear and positive proof.

18. Waters and water courses Ⓒ127

Where owner leased water system for domestic and irrigation purposes to voluntary association of consumers and consumers went into possession under terms of lease executed on their behalf by trustees, consumers' use of the premises even for mining purposes was presumed to be at least by acquiescence of the owner and owner's knowledge, if any, of the use for mining purposes raised no presumption of a hostile or other claim of right.

19. Waters and water courses Ⓒ127, 152(10)

Where owner leased water distribution system for domestic and irrigation purposes to trustees for benefit of members of voluntary association of consumers, occupancy was presumed to be under the lease until some unequivocal act gave notice of a changed attitude which was a question of fact for trial court.

20. Waters and water courses Ⓒ247(2)

In suit to quiet title to and to enjoin use of water distribution system leased to defendants for domestic and irrigation purposes, allegations that use of system for mining purposes by defendants caused irreparable injury were mere conclusions and to be sufficient to show irreparable injury or damage or waste should have stated how and why injury would result.

21. Waters and water courses Ⓒ247(2)

In suit to quiet title to and to enjoin use of water distribution system leased to trustees for benefit of voluntary association of water consumers for domestic and irrigation purposes, complaint alleging that consumers entered property contrary to terms of lease, broke gate and used water for mining purposes, and threatened by forceful

means to continue to do so, and that plaintiff would not only be deprived of water but that the taking for such purpose would ripen into an adverse right, unless restrained, was sufficient for injunctive relief.

22. Appeal and error Ⓒ837(4)

While the evidence and the whole record may be considered for purpose of determining whether error, if any, is prejudicial, the evidence plays no part in determining the correctness of ruling on demurrer which is based solely upon the facts as alleged in the pleading, which facts are assumed to be true for purposes of demurrer.

23. Property Ⓒ4

Water for irrigation, while in ditches and reservoirs, is generally considered as "realty" and appurtenant to the land.

[Ed. Note.—For other definitions of "Realty," see Words & Phrases.]

24. Property Ⓒ4

In suit to quiet title to and enjoin the use of water distribution system where it was alleged that consumers entered property contrary to the terms of their lease, broke gate and used water for mining purposes and threatened by forceful means to continue to do so unless restrained, and complaint showed that plaintiff owned dam and reservoir and that water was being taken from them forcibly by defendants, trial court had right to assume that water contained in the reservoir and which was being wrongfully used was "real property" appurtenant to the reservoir subject to disposition under lease.

[Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

25. Injunction Ⓒ48

An injunction will lie to prevent a wrongful act if the continuance of such act will in time ripen into an easement in favor of the defendant which will operate to deprive the plaintiff of the use of his property or some part thereof, or where it takes from him the substance of his estate, whether or not the immediate damage inflicted by the act is appreciable.

26. Pleading Ⓒ403(2)

Where owner leased water distribution system for domestic and irrigation purposes to trustees for benefit of members of voluntary consumers' association and sought to quiet title to and to enjoin use of system for mining purposes and consumers claimed a prescriptive right to the use of the system,

general demurrer on ground that there were no appropriate allegations showing hostile claim of consumers or that such claim was without right and was unfounded was properly overruled, where such issues were supplied by defendants' answers. Const. art. 6, § 4½.

27. Appeal and error ⇨1071(5)

Where owner sought to quiet title to and to enjoin use of water distribution system leased to trustees for benefit of consumers for domestic and irrigation purposes, consumers could not complain of trial judge's findings which would have made no change in the judgment.

28. Trial ⇨400(1)

In owner's suit to quiet title to and to enjoin use of water distribution system, finding "that plaintiff is the owner and entitled to the water stored in said reservoir and in said dam" and that "defendants have no right, title, interest or estate in or to the use or ownership of the water accumulated or stored in said reservoir and dam" would be stricken where issue relating to such water was eliminated by statements of counsel on both sides that no question concerning the water was involved.

29. Trial ⇨397(1)

Court's failure to make specific finding on material issue which was covered by implied findings adverse to defendants was not error.

30. Trial ⇨397(1)

In suit to quiet title to and enjoin use of water distribution system containing storage reservoir for mining purposes, which system was leased for domestic and irrigation purposes to trustees for benefit of voluntary water users association which claimed prescriptive right where it was alleged that association disbanded and never acted as an association after a certain time, failure of court to make finding on such issue was not error where the evidence was conflicting on such issue and did not support claim of prescription.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by the San Juan Gold Company, a corporation, substituted for Lindley C. Morton, original plaintiff, against the San Juan Ridge Mutual Water Association, a corporation, and others to quiet title to and

enjoin the use of certain portions of a water distribution system known as the Shady Creek dam and the Pine Grove reservoir. From a judgment for plaintiff, defendants appeal.

Modified and, as modified, affirmed.

Walter M. Gleason, of San Francisco, for appellant.

Jones & Finnegan, of Nevada City, and Carl A. Onkka, of San Francisco, for respondent.

PAULSEN, Justice pro tem., delivered the opinion of the court.

This action was instituted to quiet title to and enjoin the use of certain portions of a water distribution system known as the Shady Creek dam and the Pine Grove reservoir. From a judgment granting such relief defendants prosecute this appeal.

Appellants admit respondent's ownership of the property but claim that they have acquired a prescriptive right therein for the diversion, conveyance and temporary storage of waters owned and used by them for hydraulic mining operations. The principal questions involved arise out of the assertion of such rights by the defendants Moulton, Clerkin and Harris, who, for convenience, will be referred to herein as the appellants. The other defendants claim under them and as to most of the points raised no separate discussion of their problems is required.

[1] The trial court found, in substance, that appellants had entered the property as tenants of respondent's predecessors in interest under and by virtue of a lease granting the use of said facilities for domestic and irrigation purposes and that no rights to use them for mining purposes had been gained. Appellants have directed their major attack against these findings, arguing that the "indisputable evidence" compels a contrary conclusion. Stating the evidence in the light most favorable to the respondent, as we must on this appeal, the following statement of the facts appears to be clearly justified:

Lying between the middle and south forks of the Yuba river in Nevada county is a mountainous region commonly known as the San Juan ridge. This area is traversed by several streams and in it are a number of small communities. Respondent's predecessors in interest were the owners of an extensive water system which consisted of ditches, tunnels, flumes and other such

works and included the dam and reservoir involved in this action. The system was originally constructed to furnish water to the many hydraulic mines then operating in the section. After the decline of this type of mining following the issuance of an injunction against the filling of rivers and valleys with tailings, this system was operated as a public utility and was used to furnish water to the inhabitants of the San Juan ridge for domestic, irrigation and mining purposes. In time the revenues of this service diminished to such an extent that after a contested hearing before the California Railroad Commission that body issued an order allowing the public utility to discontinue it. As part of that order the commission approved a proposal to lease the system to the consumers of the area.

Prior to the hearing before the railroad commission, said consumers started to form an organization called the San Juan Water Users Association. To distinguish this organization from the corporate defendant in this action, it was referred to throughout the trial as the "Old Association" and when necessary will be so referred to herein. It was represented at the hearing before the commission and after the order was made recommending the lease the organizers of the association met and elected E. B. Dudley, Kate Sullivan and I. W. Musfield to take the lease for the benefit of the members of the association, its being understood and recognized by all the parties concerned that in so doing the persons so named as lessees were to act simply as trustees for all the members. On June 6, 1927, the lease was executed as planned. Omitting the descriptions, names of parties and other matters not material to the consideration of this appeal, the lease provides:

"'Lessors' hereby lease * * * and the undersigned Lessees take and hire from the Lessors, for the term and on the terms and conditions hereinafter set forth, * * *

"For the term of one year from date of this lease and thereafter from year to year, until terminated as hereinafter provided, upon the following terms and conditions, to which the Lessors and Lessees hereby agree:

"(1) This lease is made for the sole purpose of enabling Lessees to provide for the continuance of a water supply for domestic and irrigation purposes to water users on the San Juan Ridge, and it shall be-

come terminated as to all or any part of the leased properties if and whenever the Lessees shall cease to use the same for such purpose. The Lessors agree that the Lessees shall not pay any money rental under this lease to the Lessors or either of them.

"(2) Lessees will hold the Lessors harmless of and from * * * any work or labor done or materials furnished in or about the maintenance or repair of the said leased properties, * * *

"(3) It is expressly understood and agreed that Lessees do not undertake any obligation or liability to Lessors or either of them to keep up, maintain, repair or reconstruct said leased properties, either in their present condition, or otherwise, or at all, and that the Lessees may in their discretion and without responsibility, or liability to the Lessors or either of them, determine what, if any, upkeep, maintenance, repair and/or reconstruction shall be done or undertaken by them, and may make and install repairs and structures of a different size and/or character for the conveyance of water, or may permit said system to fall into a state of disrepair; provided only Lessees shall pay for all such work, labor and materials as they may in their discretion provide or install or undertake to provide or install upon the leased premises, and shall hold the Lessors and the leased premises harmless against any lien or liability therefor or arising therefrom; and provided, further, that Lessees agree to repair and make good all damage and injury caused by wanton and malicious acts of Lessees or of said water users or any of them, and to be responsible and liable to Lessors therefor.

"(4) Lessors reserve the right, for themselves, their successors and assigns, to enter upon said leased premises at any and all times, for the purpose of inspecting the same, or for the purpose of doing any work of maintenance, repair or reconstruction thereon they may consider desirable. The cost of any such inspection or work done by Lessors during the term of this lease shall be borne solely by Lessors, their successors or assigns, and shall not be charged or chargeable to Lessees or to the water users taking water from said system for domestic or irrigation use. It is, however, definitely understood and agreed that Lessors do not agree or undertake to make any such inspections or do any such work whatsoever.

"(5) In case Lessors, their successors or assigns, shall desire to use the said leased properties or any part thereof, in connection with any mining operations upon properties now or hereafter owned by or under lease to the Lessors or either of them, or owned by or under lease to any corporation, partnership or person affiliated in interest with the Lessors or either of them, or to make any lease thereof in connection with such mining operations, then Lessors, their successors or assigns, at their option may retake possession of all or any part of the said premises upon six (6) months' notice in writing to the said Lessees, and thereupon this lease shall be and become forthwith terminated and cancelled as to such property so retaken by Lessors, their successors and assigns. Upon any termination of this lease, Lessees shall surrender to Lessors, their successors or assigns, possession of all or such part of the leased properties as may be designated in such notice. Provided, however, that in the event of the termination of this lease upon the circumstances hereinbefore in this paragraph (5) provided, and the retaking of possession of all or any part of the said premises pursuant to such provisions, the Lessors, their successors or assigns, shall nevertheless permit the conveyance of water, in the amounts theretofore conveyed, by means of said canal system from the point or points of intake to the most westerly point on that part of the canal system which shall have been retaken, and the delivery at such points to the Lessees, it being expressly understood, however, that the Lessors, their successors and assigns, shall not thereby become obligated to maintain said canal system or to keep the same in repair; provided, further, that the Lessees shall pay annually to the Lessors, their successors or assigns, such reasonable charge for the conveyance and delivery of said water as may be agreed upon between the parties or, upon their failure to agree, as may be determined by the Railroad Commission of the State of California.

* * * * *

"(7) Neither this lease nor any interest thereunder shall be assignable by the Lessees or any of them without the written consent of the Lessors first had and obtained; provided, however, that the Lessors hereby agree to give their written assent to the assignment of this lease to such association or corporation as may be formed

or organized by or in the interest of the water users on the San Juan Ridge and for the purpose of supplying water for domestic and irrigation purposes to such water users. This lease shall bind and inure to the benefit of the successors and assigns of the Lessors and the permitted assigns of the Lessees; but it shall not pass by will or inheritance to the heirs, legatees or devisees of any of the Lessees."

It will be noted that although the lease contains no provision designating the lessees as trustees it is clearly indicated that its purpose was to provide for the continuation of the water service to the consumers. Shortly thereafter, by-laws were adopted and signed by a large number of said consumers, including the appellants and the lessees named. The by-laws set forth the essential features of the organization, named the officers to be elected, specified their duties and made provision for the distribution of water by the association. Appellants took an active part in these proceedings. Moulton was president and later Clerkin was elected to succeed him and there was evidence to the effect that he held this office as late as 1930. There was also, it is true, evidence offered to show that the association was disbanded in 1929 but in sharp conflict with it was very convincing testimony that it functioned until 1935 or later. There was also testimony that Moulton was elected water supervisor and in that capacity was given full control and supervision over the water system; that he was elected to this position again in 1931. The by-laws provided that such officers should hold office until their successors were elected. Our attention has been called to no evidence showing that Moulton ever resigned from that office and there was testimony to the effect that a meeting was held in July, 1935, and a new water supervisor was then elected.

[2-4] Appellants contend that the lease was void for want of consideration and that no legal organization of the association was ever perfected capable of taking title as lessees thereunder. As to the question of consideration, the lease being in writing, it is to be presumed that there was a valid consideration for it. Civ.Code, sec. 1614. The burden of showing a want of consideration rested upon appellants. Civ. Code, sec. 1615. So far as we are advised there was no evidence to support appellants' position, other than the lease it-

self, and this alone was not sufficient. Moreover, it is immaterial under the facts shown here whether there was a valid consideration or not. Inasmuch as appellants recognized the validity of the lease for the purpose of gaining possession and control over the water system they are estopped to deny the relation of landlord and tenant in so far as it related to their actions and rights at that time. 15 Cal.Jur. 642; 35 C.J. 1249.

[5-7] Nor are we impressed with the argument that no legal organization capable of taking the lease was ever formed. Appellants and others brought about the execution of the lease through trustees for their own benefit; they signed by-laws which constituted—at least as among themselves—a contract for the operation of the property; they had a recognized membership roll. Respondent and its predecessors have at all times recognized the members of the association as the parties beneficially interested under the lease and thereby permitted them to gain control and operate said property. Under these circumstances, appellants are estopped from taking the position that they had no legal rights as members of the association. 15 Cal.Jur. 648. Furthermore, it is well settled that a valid grant may be made to trustees for an unincorporated voluntary association. *Ruddick v. Albertson*, 154 Cal. 640, 98 P. 1045. It has also been held that where property is leased to trustees under such circumstances the members of the association become tenants of the lessor. *De Motte v. Arkell*, 77 Cal.App. 610, 247 P. 254.

[8-10] As to the question of prescriptive rights, respondent contends that as appellants entered the premises under the lease they are now estopped to deny their landlord's title. But while this is the general rule, there are well-recognized exceptions to it. By its pleadings respondent has done more than assert its right to possession; it has tendered the issue of title not only at the time of the execution of the lease but also at the time of the commencement of the action and has demanded that appellants set forth their adverse claims, if any they have. Respondent has at all times contended that this is an action to quiet title and, as will more fully appear hereafter, has defended the provisions of the judgment on that theory. When a landlord by his pleadings not only seeks to recover possession, but also to

quiet his title, the tenant is not estopped to deny his title but may set up his own superior title. *Hambey v. Wise*, 181 Cal. 286, 184 P. 9; *Collier v. Johnson*, 79 Cal. App. 322, 249 P. 217. It should also be observed that appellants have not denied the ownership of respondent as of the date of the lease.

[11] Turning now to the question of the sufficiency of the evidence to support the claim to prescriptive rights we find it unnecessary to discuss the evidence as it related to the whole period under consideration. In November, 1931, the corporate defendant herein, San Juan Ridge Mutual Water Association, was organized by appellants. It is conceded that this corporation was not in existence long enough to acquire adverse rights and for the purposes of this discussion it may be assumed that it would otherwise have done so. It is admitted that if Moulton, Clerkin and Harris did not hold adversely prior to November, 1931, then the case must fall as to all the defendants in the action. We may, therefore, confine our consideration of the evidence to the period ending on that date.

It was contended by appellants that they had used these water facilities adversely and under claim of right for mining purposes even prior to the execution of the lease and that this applied in particular to appellant Moulton, but their testimony on this point is directly and positively contradicted by the testimony of Herbert Thomas, who had been in charge of the water system for respondent's predecessors for many years and up to the time of the execution of the lease. Thomas testified that none of the appellants ever used water from the dam or reservoir without his expressed permission. If the trial court believed this witness it was justified in holding that appellants had not used the water under an adverse claim prior to the execution of the lease and this court would be bound by such a finding.

As to the period between June 6, 1927, and November, 1931, it has been demonstrated that appellants went into possession as tenants under the lease and that there was ample evidence to support the conclusion that they exercised complete control over it by virtue of their positions as members and officers of the association, entirely negating their claims to a hostile and adverse possession.

[12] Appellants attempt to meet this situation by arguing that the instrument was not a lease at all but simply a revocable license by which they had possession for limited uses; that is, domestic and irrigation purposes; that this was a license to use the dam and reservoir for these purposes only and that when they asserted a right to use them for mining purposes they acquired an easement not contemplated or provided for by the license. While we are of the opinion that this theory, if correct, would not, in the light of the evidence adduced, establish their claims, or prove that the use was other than permissive, we do not rest our conclusions solely on that basis. We are satisfied that this instrument is what it purports to be—a lease. It is so denominated and this is some evidence of its character. *Harrelson v. Miller & Lux, Inc.*, 182 Cal. 408, 188 P. 800. But it meets the other requirements of such an instrument.

[13] "The test to determine whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument." *Shaw v. Caldwell*, 16 Cal.App. 1, 115 P. 941, 943.

[14-16] The instrument under consideration grants all the right, title and interest in the property to the lessees who hire it for the term prescribed. While the purposes of the use are set forth no right to possession *for any purpose* is reserved to the lessors. Provision is made for the right to enter for the purpose of making repairs and inspections. Unless the lessors or persons acting under their authority have use for the property for mining purposes they cannot cancel the lease, and then only after six months' notice. Even in that case they recognize the rights of the lessees to the water under certain conditions. These and other provisions show conclusively that the instrument is a lease for a limited purpose. A lease for a term of years is more than a mere license to enter and occupy for a given purpose, but it has the effect of a conveyance for the term specified. *Chandler v. Hart*, 161 Cal. 405, 119 P. 516, Ann.Cas.1913B, 1094. It must be admitted that by implication the use of

the premises for mining purposes is prohibited, but there is no provision that such use of itself terminates the lease and there is no evidence that respondent has attempted to do so. Assuming, without deciding, that under proper circumstances, it might be possible for a lessee who holds for a limited purpose, to gain a prescriptive right to use the same premises for another purpose, there can be no question but that the evidence in this case falls short of the requirements.

[17] "Inasmuch as the doctrine of adverse possession is to be construed strictly, and such possession cannot be made out by inference, but only by clear and positive proof, the burden of proving all the essential elements of adverse possession or prescriptive title is upon the party relying upon it." 1 Cal.Jur. 636, sec. 95; *Clarke v. Clarke*, 133 Cal. 667, 66 P. 10.

[18, 19] We need not discuss all the essential elements here; or the evidence relating to them. Respondent contends that the evidence shows that the possession and use were either permissive or clandestine and with this we agree. The burden was on appellants to prove otherwise and this was an issue of fact for the trial court. As appellants went into possession under the terms of the lease, their use of the premises, even for mining purposes, was presumed to be at least by acquiescence of the owner and its mere knowledge, if any, of the use for mining purposes raised no presumption of a hostile or other claim of right. Occupancy is presumed to be under the lease until some unequivocal act gives notice of a changed attitude, and these are questions of fact for the trial court. *Clarke v. Clarke*, supra; *Storrow v. Green*, 39 Cal.App. 123, 178 P. 339. There was no evidence that the appellants had done anything to communicate their claim of right to the owners prior to November, 1931, but they rely upon the fact that certain of their acts must be held, as a matter of law, to have put the owners on notice as to the hostile nature of the use for mining purposes. These acts consisted of improvements made by appellants on the water system and the use of said water for mining purposes. It will be observed that the lease provided for the making of such improvements and it is obvious that acts performed by permission under the lease could not be considered hostile. We have already shown that the use for mining purposes raises no presumption

of a hostile claim in the absence of other evidence and it must be recalled that if appellants were lawfully in possession of the dam and reservoir their presence there and their use of such facilities could not be construed as hostile acts. Inasmuch as we are satisfied that the evidence supported the implied finding that appellants' claims were not hostile and that their use of said facilities was by permission of the owners, the claims of appellants cannot be upheld.

Before taking up the other points raised, it should be pointed out that while the dam and reservoir involved in this action are, and for many years have been, used as parts of the whole water system, respondent claimed no interest in the rest of the system or in the water rights. Some time after the execution of the lease it acquired title to the dam and reservoir only.

A demurrer, both general and special, was interposed to the complaint and the overruling of it is assigned as prejudicial error.

The complaint sets up two counts, the first against Moulton, Clerkin and Harris, and the second against the remaining defendants. In the first it is alleged, in substance, that plaintiff is and for a long time has been the owner of the property, describing it; that one of plaintiff's predecessors was a corporation; that its predecessors executed the lease in favor of the named lessees and consented to the assignment of it to the consumers; that the lease is marked as an exhibit and is made a part of the complaint; that the association and the members thereof, including the defendants, entered into possession by permission and under the terms of the lease; that the permission given was for use of the water facilities for domestic and irrigation purposes only. The complaint then continues:

"V. That defendants, W. E. Moulton, W. P. Clerkin and F. M. Harris, their known agents and servants, did on or about the 17th day of February, 1936, and on various other days between that time and time of commencement of this suit, forcibly enter upon the Pine Grove Reservoir, contrary to the terms of said lease, and forcibly break the gate to said reservoir and the chain and padlock holding said gate, and used and continued to use the water stored in said reservoir for mining purposes.

"VI. That daily since on or about the 17th day of February, 1936, the said defendants, W. E. Moulton, W. P. Clerkin,

and F. M. Harris, have entered upon the said Pine Grove Reservoir and the Shady Creek Dam and broke the gate and dams of said reservoir and dam, and used the water stored therein for mining purposes and otherwise suffered and committed waste on the premises in violation of the terms of said lease and without the consent of plaintiff.

"VII. That the said defendants, W. E. Moulton, W. P. Clerkin and F. M. Harris, are about to, and will unless restrained by this Court, commit further waste in this, the said defendants threaten to continue to forcibly enter upon said premises and to use the water and real property stored therein and to drain the said Dam and Reservoir against the permission and consent of Plaintiff.

"VIII. That said entry of defendants and the use of said real property has caused and does cause to this plaintiff continuous and daily damage, the amount thereof, plaintiff is unable to determine or calculate."

In the second count the facts of ownership are stated as in the first count and it is then alleged as follows:

"II. That on or about the 17th day of February, 1936, the defendants, San Juan Ridge Mutual Water Association and Frank Homer and John Doe Furness, their known agents and servants forcibly entered upon said Pine Grove Reservoir and Shady Creek Dam and forcibly opened and broke the gate to said reservoir and the dams of said reservoir and dam, and took and used water therefrom.

"III. That said defendants continue to enter and to use the water stored in said reservoir and to trespass on said real property and unless enjoined, threaten to continue to so trespass to the irreparable damage of defendant.

"IV. That the continuance of said acts of said defendants San Juan Ridge Mutual Water Association, Frank Homer and John Doe Furness aforesaid, will enable said defendants, unless restrained therefrom, to acquire an easement in and upon the said land and premises, and the use thereof for said purposes, adverse to this plaintiff.

"V. That the said entry of defendants last named and the use of said real property has caused and does cause to this Plaintiff continuous and daily damage, the amount thereof plaintiff is unable to determine or calculate.

"VI. That the acts aforesaid of defendants are unlawful and if they are permitted to continue their acts aforesaid, great and irreparable injury will be done to plaintiff."

Certain other allegations are made but as they are not material to the consideration of the points raised they have been omitted. By the prayer, plaintiff, after asking for a temporary restraining order and a preliminary injunction, demands that defendants be required to set forth the nature of their respective claims; that defendants and each of them and all persons claiming under and through them be forever debarred, restrained and enjoined from entering upon the land and premises described in said complaint, and breaking the gates and dams of plaintiff's said reservoir and dam and drawing off the water and using the same for mining purposes, and for such other and further relief as the court shall deem meet in the premises.

[20] Appellants earnestly attack these pleadings upon the ground that no facts are stated sufficient to constitute a cause of action for injunction against trespass, for damages, or otherwise. It is argued that no facts are set forth to show irreparable injury or damage or waste or that plaintiff has no plain, speedy and adequate remedy at law. It must be conceded that as far as the allegations of irreparable injury are concerned that the allegations contained in the complaint are mere conclusions. To be sufficient, facts should be stated showing how and why injury would result. *Randall v. Freed*, 154 Cal. 299, 97 P. 669; *Willis v. Lauridson*, 161 Cal. 106, 118 P. 530. Concerning the question of waste, we find a different situation. The complaint charges that defendants have entered the property contrary to the terms of the lease, have broken the gate and used the water and threaten by forceful means to continue to do so unless restrained. Appellants insist that as the evidence shows that respondent did not own the water rights such allegations cannot be considered.

[21-24] It must be remembered that while the evidence and the whole record may be considered for the purpose of determining whether error, if any, is prejudicial, the evidence plays no part in determining the correctness of a ruling on a demurrer. At the time of such a ruling the trial court does not have the evidence before it and its ruling is based solely up-

on the facts as alleged in the pleading and for the purposes of the demurrer these facts are assumed to be true. The complaint showed on its face that plaintiff owned the dam and reservoir; that water was being taken from them forcibly by the defendants and that they would continue to do so unless restrained and that plaintiff would not only be deprived of the water but that the taking thereof would ripen into an adverse right. It is well settled that water for irrigation, while in ditches and reservoirs, is generally considered as real property and appurtenant to the land. *Relovich v. Stuart*, 211 Cal. 422, 295 P. 819; *Fawkes v. Reynolds*, 190 Cal. 204, 211 P. 449; *Copeland v. Fairview Land & Water Co.*, 165 Cal. 148, 131 P. 119; *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 725, 93 P. 858, 15 L.R.A., N.S., 359. At the time of the ruling on the demurrer and in the light of the allegations of the complaint, the trial court had a right to assume that the water contained in the reservoir and which was being wrongfully used was real property appurtenant to the reservoir, subject, of course, to disposition under the lease. In 14 California Jurisprudence 221, section 34, it is said:

[25] "An injunction will lie to prevent a wrongful act if the continuance of such act will, in time, ripen into an easement in favor of the defendant which will operate to deprive the plaintiff of the use of his property or some part thereof, or where it takes from him the substance of his estate, whether or not the immediate damage inflicted by the act is appreciable." Cited in support of this are a number of water cases, including *Pabst v. Finmand*, 190 Cal. 124, 211 P. 11.

[26] The general demurrer was properly overruled. At all times since the commencement of this action and during this appeal respondent has taken the position that the action is one to quiet title and that so considered it states a cause of action. Appellants complain that there are no appropriate allegations showing that they are asserting some claim to the property hostile to the plaintiff's title or that such claim is without right and is unfounded. Without taking time to discuss these points or the questions raised by the ruling on the special demurrer, and assuming, for the sake of argument, that the complaint did not state a cause of action for injunctive relief against a trespass, we are, nevertheless, of the opinion that appellants

are in no position to rely upon any error that might have occurred because of the order overruling their demurrer. By their answer appellants set up a claim to a prescriptive right to use the dam and reservoir. The complaint and answer taken together then presented clearly all the issues necessary to an action to quiet title. When the trial opened, the court stated that inasmuch as the title of the plaintiff was admitted by the pleadings the burden of showing a prescriptive right rested upon the defendants. The defendants thereupon offered evidence in support of their claims. The case was tried upon this theory and appellants have made no attempt whatever to show this court that they were prejudiced in any way by the rulings on the demurrer. Section 4½ of article VI of the Constitution was adopted to meet just such situations as this. Speaking of it, the Supreme Court has said in the case of *Etienne v. Kendall*, 202 Cal. 251, 259 P. 752, 755:

"Under the terms of this section when the attack upon the judgment is based upon an error in the pleadings, it is incumbent upon the appellant to demonstrate before the appellate court that the error complained of has resulted in a miscarriage of justice. But even in such a case the appellate court may not reverse the judgment except upon an examination of the entire cause, including the evidence. Where, therefore, upon an examination of the evidence, the appellate court is satisfied that the error complained of has not resulted in a miscarriage of justice, but that in fact, it has not affected the substantial rights of the appellant in any particular it would be a distinct violation of this section of the Constitution to reverse the judgment solely upon the ground of the error occurring in the pleadings." See, also, *Langstaff v. Mitchell*, 119 Cal.App. 407, 6 P.2d 546.

The record before us shows that whatever defects may have existed in the complaint, the missing or deficient allegations were supplied by the answer and that the trial was conducted with no more harmful results to appellants than if these issues had been tendered by the complaint. We are satisfied that no miscarriage of justice has resulted and that the rulings have resulted in no prejudice to any substantial rights of any appellant.

[27] It is next contended that the court erred in finding that the allegations of paragraphs V, VI and VII of the first count

and paragraphs II, III, IV, V, VI, and VII of the second count were true. The last-mentioned paragraph alleged the incorporation of the corporate defendant and was admitted by a failure to deny it. It will be noted that the other paragraphs, as shown above, all relate to acts of damage or waste. The judgment made no provision for the recovery of damages. If contrary findings had been made the judgment would have been the same. Therefore, appellants have not been prejudiced by said findings and cannot complain thereof.

By finding IV, relating to the second count, the court found "*that plaintiff is the owner and entitled to the water stored in said reservoir and in said dam.*" By finding V, relating to the second count, it was found "*that defendants have no right, title, estate, interest or claim in or to said dam and reservoir, or in any part thereof; that the defendants have no right, title interest or estate in or to the use or ownership of the water accumulated or stored in said reservoir and dam.*"

[28] Appellants contend that the italicized portions of said findings are erroneous and prejudicial to their rights. They argue that if they ever attempt to litigate the water rights used in connection with the whole system these findings will be used against them to show a binding adjudication of such rights. We are not impressed with this argument as it clearly appears that the water mentioned in the findings is the water that was in storage in the reservoir. A water right is to be distinguished from the water itself and from the right to use a ditch, dam or reservoir as a conduit or place of storage for it. Here the findings clearly involve the title to the water in storage—the corpus of the water; not the usufructuary right. These findings were made in connection with the second cause of action and do not relate to the rights of Moulton, Clerkin and Harris as members of the association; they relate only to the rights of the remaining defendants, who were not members, and, as we have pointed out, concern only the water in storage. By their answer these defendants claimed ownership of the water in storage and thus raised the issue. At the trial, however—if we interpret the record correctly—this issue was eliminated by repeated statements of counsel on both sides that no question concerning the water was involved. It is therefore ordered that the italicized portions of said findings be stricken.

en out. It may be added, parenthetically, that inasmuch as practically a year and a half has elapsed since this case was instituted, the water mentioned in said findings was probably used for domestic and irrigation purposes many months ago and the question raised is now probably moot. However, we cannot be sure of this and do not rest our decision on that ground.

[29] It is next contended that the court failed to find on material issues presented. By paragraph III of count I of the complaint it was alleged that certain persons, including the appellants Moulton, Clerkin and Harris, "went into possession and have since held possession of said reservoir under the permission granted in said lease as aforesaid". It is true there was no express finding on this point but there were implied findings directly to the contrary.

[30] In their answer appellants alleged that "said lease was never assigned to the said San Juan Ridge Water Users Association and that said Association disbanded and ceased to function in the year 1929 and never acted and/or functioned as an association thereafter". It is now complained that no findings were made on the issues thus presented. We have heretofore pointed out that the other findings do not rest upon a formal assignment, but upon other grounds. Hence, a finding upon this issue is not material, nor can we see how the failure to find on the issue of disbandment could have harmed appellants in any way. If the association was disbanded, it simply went to the weight of the evidence adduced to show whether or not appellants' possession was hostile or permissive. The evidence on the point was conflicting, and even if the court had found that the old association was disbanded in 1929 and ceased to function thereafter, there was still evidence to support the court's findings against the claim of prescriptive right. Moreover, if there was such a disbandment, there was no evidence, so far as we are advised, that this fact was brought to the attention of the lessors or their successors before November, 1931, or later.

Directing their attack against the judgment, appellants contend that it improperly contains provision for injunctive relief. However, as we have held that the action, as framed and tried, was to quiet title, this provision was proper. That such relief is proper in an action to quiet title is too

well settled to require citation of authority.

Finally, appellants complain that the judgment goes far beyond the issues raised or the facts found, and we are of the opinion that this complaint is justified as far as the defendants Moulton, Clerkin and Harris are concerned. As it now stands, the judgment quiets respondent's title and enjoins said defendants from using the dam and reservoir for any purpose whatsoever. But in its first cause of action, against these defendants, respondents recognized their rights, as members of the old association, to use said property for domestic and irrigation purposes. As to them, the action was limited to questions arising out of mining uses only and the judgment should, therefore, be limited to the same questions.

The cause is remanded to the trial court and that court is directed to modify the judgment so as to limit its provisions, to the extent that they relate to defendants Moulton, Clerkin and Harris, to the use of said facilities for mining purposes. As so modified, the judgment is affirmed. Respondent to recover its costs on appeal.

We concur: PULLEN, P. J.; THOMPSON, J.



34 Cal.App.2d 201
FELDMIEIER et al. v. MORTGAGE SECURITIES, INC., OF SANTA BARBARA
et al. and five other cases.
Civ. 2428.

District Court of Appeal, Fourth District,
California.
Aug. 21, 1939.

Rehearing Denied Sept. 15, 1939.

Hearing Denied Oct. 19, 1939.

I. Corporations 473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence sustained trial court's finding that company which issued the certificates was, when certificates sought to be canceled were issued, in imminent danger of bankruptcy.

2. Appeal and error ⇨994(3)

The credibility of the witnesses was for the trier of the facts.

3. Corporations ⇨432(4, 12)

Though corporate seal on assignment attached as a rider to contract to buy land from corporation afforded some evidence that assignment was executed by competent authority, it was not conclusive proof thereof.

4. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence sustained finding that officer of company issuing certificates sought to be canceled issued them without notice to other officers or directors of the company.

5. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence sustained trial court's finding that fictitious contract for sale of realty by company, which issued certificates sought to be canceled, was executed and deposited with depositary company to secure payment of certificates sought to be canceled.

6. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence sustained trial court's finding that an officer of the company which issued the certificates procured a journal entry to be made on company's books to transfer a number of uncertain and questionable accounts credited against the company, to the defendant to whom the certificates sought to be canceled were thereafter transferred, and credited her with trust deeds and mortgages belonging to company and mortgage certificates, including those sought to be canceled.

7. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence sustained trial court's finding that the certificates in question were never paid for by the defendant to whom they were issued.

8. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants in consideration for money allegedly owed to that defendant by the company which issued the certificates, evidence sustained trial court's finding that no

agreement was ever made between that defendant and the company regarding any financial relationship between them, that no demand was ever made on the company for money allegedly owing to that defendant, and that no report or accounting was ever furnished to that defendant by the company.

9. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence sustained finding that the certificates sought to be canceled were used by an officer of the company which issued them, as collateral for a loan to the officer, and were not in possession of the defendant to whom they had been issued.

10. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence sustained trial court's finding that certificates sought to be canceled were not issued for cash or other consideration, but were issued for a pretended cancellation of certain accounts owed by the company.

11. Corporations ⇨471

The mere existence of mortgage certificates in the hands of others than the corporation issuing them is some evidence of a consideration paid to the corporation for the certificates, but such evidence is not conclusive.

12. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence sustained finding that certificates sought to be canceled were issued when there was insufficient collateral on deposit with depositary company to permit issuance of those certificates, and that there was at no time thereafter sufficient collateral to permit the issuance of those certificates.

13. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence sustained trial court's finding that fictitious contract for sale of realty by company which issued certificates sought to be canceled, and which was executed and deposited with depositary company to secure payment of certificates sought to be canceled, and that certificates sought to be canceled were issued while company which issued them was in-

solvent to the knowledge of the company's officer who procured the issuance of the certificates.

14. Principal and agent ⇨169(2), 175(3)

Where woman, to whom mortgage certificates which were sought to be canceled were issued, relied on what officer of company which issued the certificates did with reference to the issuance of those certificates, she, in effect, ratified his agency for her, and the ratification related back to the time when the officer undertook to act in her behalf. Civ.Code, § 2307.

15. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence sustained trial court's finding that officer of company, which issued certificates, in procuring fictitious contract for sale of realty by company for deposit with depository company to secure payment of certificates sought to be canceled, injured the creditors of the company which issued the certificates, and its stockholders, and the holders of valid certificates.

16. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence sustained trial court's finding that defendant whose certificates were sought to be canceled had no right, title, or interest in or to those certificates.

17. Corporations ⇨471

Mortgage certificates, which were sought to be canceled on ground that they were issued without consideration, were not within the purview of statute providing that a voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general, except that a consideration is not necessary to its validity, since certificates represented sales merely of a right to participate pro rata in the security, and holders of certificates acquired no interest in specific notes, mortgages, or trust deeds. Civ.Code, § 1040.

18. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of the defendants canceled, evidence as to lack of consideration for issuance of certificates was not inadmissible because of the fact that defendant to whom certificates were issued was not a party to alleged fraud

in issuance of those certificates, where she sought to take advantage of the alleged fraudulent issuance of the certificates, since her action was tantamount to a ratification of the alleged fraud.

19. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to one of defendants canceled, company which issued the certificates was not precluded from seeking relief on ground that the company was, in consequence of its complicity in alleged fraud in issuance of certificates, particeps criminis, and, therefore, in no position to complain of alleged fraud, where issuance of certificates was the unauthorized act of an officer of the company.

20. Corporations ⇨473

Holders of mortgage certificates were entitled to sue in equity to have canceled certificates issued to one of the defendants without consideration. Civ.Code, §§ 3439, 3440, 3441, 3442.

21. Corporations ⇨473

Where the law in effect at the time when holders of mortgage certificates invested in their certificates was to the effect that they had the right to treat any issue of certificates not made in substantial conformity with permit of the corporation commissioner as void, it became part of their contracts, and hence a subsequent amendment which allegedly resulted in making certificates immune from attack based merely on violations of the permit, unless the holder chooses to make such attack, did not preclude the holders of certificates from seeking cancellation of certificates subsequently issued without being in conformity with commissioner's permit. St.1917, pp. 679, 680, §§ 12-14; St.1931, pp. 949, 950, §§ 16-18.

22. Corporations ⇨471

Where company which issued mortgage certificates received full value for them, it could not question the validity of the certificates on ground that they were issued in consideration of the surrender of earlier certificates, or were issued in consideration of delivery of trust deed, or were not fully paid for until after delivery.

23. Corporations ⇨473

In suit in equity by holders of mortgage certificates to have certificates issued to another canceled, defendant was in no position to question validity of plaintiffs' certificates, where company which issued certificates had

received full value for plaintiffs' certificates, and defendant's certificates were not issued with a single exception, until all certificates had been issued to plaintiffs.

24. Appeal and error ⚡418

Where notice of appeal was, in terms, from the judgment "and from the whole of the said judgment," the District Court of Appeal was invested with jurisdiction to review any and all features of the judgment that might affect the appellants.

25. Corporations ⚡472

Where mortgage certificates provided that they were issued under and subject to all terms, conditions, and provisions of indenture, the effect was to incorporate the indenture in each mortgage certificate, to make each purchaser of a mortgage certificate a party to the indenture itself, and to charge him with notice of its contents and bind him by its terms.

26. Corporations ⚡472

The fact that indenture, which was incorporated by reference in mortgage certificates, provided that depositary should be relieved from any responsibility for passing on the validity of securities deposited with it by the company issuing the certificates, and permitting the depositary to rely conclusively on affidavits by officers of company issuing certificates, did not require purchasers of certificates to make their own investigations of the character of the securities on deposit.

27. Corporations ⚡472

A representation in a certificate of a depositary of securities for mortgage certificates should not be held to mean more than it says nor less than it says.

28. Banks and banking ⚡315(1)

The fact that indenture which was incorporated by reference in mortgage certificates, provided that depositary should not be responsible for passing on validity of securities deposited and permitted the depositary to rely conclusively on affidavits by officers of company issuing the certificates, would not authorize the depositary to state that securities were of a description and class authorized by the indenture, when they did not even purpose to be of that description and class.

29. Banks and banking ⚡315(1)

Where depositary certified that it held securities required by indenture, though it did not, depositary was guilty of culpable

negligence and actual fraud within meaning of statute, and breach of warranty, notwithstanding that indenture, which was incorporated by reference by the mortgage certificates, provided that the depositary could rely conclusively on affidavits of officers of company which issued the certificates, with reference to the securities, and was not responsible for passing on validity of the securities. Civ.Code, § 1572, subd. 2.

30. Banks and banking ⚡315(1)

Holders of mortgage certificates could complain of false representation of depositary that securities deposited with it complied with indenture, only if they relied on the representation.

31. Banks and banking ⚡315(1)

In suit by holders of mortgage certificates to enforce their rights under certificates against depositary which had certified that securities deposited with it complied with indenture, evidence sustained trial court's finding that certificate holders relied on depositary's certification.

32. Corporations ⚡472

Investors in mortgage certificates had no duty to audit securities deposited with depositary by company which issued the certificates, in order to determine whether securities complied with indenture.

33. Banks and banking ⚡315(1)

Where indenture required company issuing mortgage certificates, to deposit notes secured by mortgages or trust deeds theretofore owned by it with the depositary, the deposit with depositary of note of company which issued the certificates did not conform to the requirements of the indenture, nor supply deficiency in earlier deposit, so as to relieve depositary's liability to holders of certificates.

34. Corporations ⚡473

Where company which issued mortgage certificates, did not deposit with depositary the type of securities required by the indenture, it was liable to holders of certificates for such damages, if any, as they may have sustained.

35. Banks and banking ⚡315(1)

Where depositary certified that securities deposited with it by company issuing mortgage certificates complied with indenture, though they did not, the depositary was liable to the holders of certificates for such damages, if any, as they may have sustained.

36. Banks and banking ⇨315(1)

In suit by holders of mortgage certificates against depository which had certified that securities deposited with it by company issuing mortgage certificates, complied with indenture, though they did not so comply, trial court did not err in refusing to ascertain at the trial whether the certificate holders had been damaged, before the end of the process of realizing on the securities.

37. Banks and banking ⇨315(1)

A trust relation cannot arise in favor of a purchaser of mortgage securities, until the purchase is made, where the certification by the depository of securities precedes the purchase.

38. Corporations ⇨472

One who makes representations knowing that the purpose for which the representations are sought must be to induce others to buy securities, such as mortgage certificates, is in the position of having made a continuing offer of a warranty that the representations are true.

39. Banks and banking ⇨315(1)

A certification that securities deposited by a company issuing mortgage certificates are sufficient is no guaranty of the sufficiency of the legality of the securities, unless the certificate contains such a warranty in terms.

40. Banks and banking ⇨315(1)

A representation by a depository that securities deposited by a company issuing mortgage certificates, comply with indenture, is unilateral on the part of the depository, and when accepted by those who, in reliance on it, buy the mortgage certificates, becomes a binding contract.

41. Contracts ⇨52

Consideration need not involve a benefit to the promisor, but it is enough that it be a detriment to the promisee.

42. Banks and banking ⇨315(1)

The liability of a depository which falsely represented that company which issued mortgage certificates, had deposited with it securities required by indenture, would be measured by statute providing that the measure of damages is the amount which will compensate an aggrieved party for all the detriment proximately caused by the breach or which, in the ordinary course of things, would be likely to result therefrom. Civ. Code, §§ 3300, 3301.

43. Appeal and error ⇨1071(5)

In suit by holders of mortgage certificates against depository which had falsely represented that securities deposited with it by company which issued the certificates, complied with indenture, depository could not complain of the finding that no accounting was made by it prior to the trial, since, though the finding was not strictly necessary to the decision, it tended to show the difficulty of establishing the extent, if any, to which certificate holders were prejudiced by depository's conduct, had been rendered greater by depository's failure to keep a record of exchange of securities.

44. Banks and banking ⇨315(1)

Where depository was held liable to holders of mortgage certificates for any deficiency which might result after liquidation of securities deposited with depository by company which issued mortgage certificates, because depository accepted securities which did not comply with indenture, and liability of company which issued certificates, to depository for its services, was fixed at \$10,000, trial court properly refused to permit depository to claim compensation for services and for attorney's fees out of trust fund resulting from liquidation of securities.

45. Banks and banking ⇨315(1)

Where depository was held liable to holders of mortgage certificates for any deficiency which might remain after liquidation of securities deposited with depository by company which issued mortgage certificates, because depository accepted securities which did not comply with indenture, depository would be held liable for interest at 6½ per cent., the rate fixed by the certificates, from the end of the period for which interest was last paid by company issuing certificates until end of period fixed by court for liquidation of securities, and for 7 per cent. interest on deficiency, if any, from that date.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by L. P. Feldmeier and others against Mortgage Securities, Inc., of Santa Barbara, the Security Title Insurance & Guarantee Company, Jane V. Reinert and others, to enforce what the plaintiffs deem to be their rights as holders of mortgage certificates issued by the Mortgage Securities, Inc., of Santa Barbara, wherein Alice W. Jackson filed a complaint in interven-

tion, and wherein Jane V. Reinert, the Security Title Insurance & Guarantee Company, and others filed cross-complaints. From the judgment, Jane V. Reinert and the Security Title Insurance & Guarantee Company appeal.

Judgment affirmed as to Jane V. Reinert, and judgment as to the Security Title Insurance & Guarantee Company reversed with instructions.

T. H. Canfield, of Santa Barbara, for appellant Jane V. Reinert.

Heaney, Price, Postel & Parma, of Santa Barbara, for appellant Security Title Ins. & Guarantee Co.

Morin, Newell, Brown & Hammill, of Pasadena, for respondents L. P. Feldmeier and others.

J. F. Goux and E. W. Squier, both of Santa Barbara, for respondents Mary K. McCaffrey and others.

HAINES, Justice pro tem.

The record in this case is a ponderous one. The pleadings begin with a complaint on the part of L. P. Feldmeier and others, who are respondents here, to enforce what they deem to be their rights as the holders of mortgage certificates issued by defendant and appellant Mortgage Securities, Incorporated, of Santa Barbara, to which, following the designation adopted in the findings of the trial court we shall hereinafter, for convenience, refer to as the "Company". The defendants include also appellant Security Title Insurance & Guarantee Company, the assignee of certain assets deposited with it to secure the said certificates, to which, following again the designation used by the trial court in its findings, we shall hereinafter refer as the "Depository". Sundry recognized holders of mortgage certificates, who are respondents here, were named in the complaint as defendants together with appellant Jane V. Reinert, who figures largely in the case as the claimant of certain further mortgage certificates, purporting to be issued by the Company, but found by the trial court to be void, and County National Bank and Trust Company of Santa Barbara, as pledgee of the certificates last referred to. Three successive additional pleadings designated as amendments and supplements to the complaint were filed. Answers were in due course filed by the Company, the Depository, Jane V. Reinert, the County National Bank and Trust Company of Santa Barbara and various other

defendants. A complaint in intervention was filed by Alice W. Jackson asserting title to one of the mortgage certificates which was answered by the plaintiffs and certain of the defendants. A cross-complaint was filed by Jane V. Reinert in which her claims were set up. A cross-complaint in which the Company and sundry individual certificate holders named as defendants in the plaintiffs' pleadings joined was filed, in which most of the other parties to the action were made cross-defendants, as were a number of new parties included by order of the court, among whom was Fred D. Jackson and Alice P. Jackson. A further cross-complaint for declaratory relief was filed by the Depository, in which Jane V. Reinert, Associated Almond Growers of Paso Robles, a corporation, County National Bank and Trust Company and various others were made cross-defendants, and this cross-complaint was later amended. These several cross-complaints were answered by most of the parties named therein as cross-defendants. Sundry parties were served with pleadings and, having failed to respond to them, are in default. We shall not attempt to restate at large the contents of these various pleadings. Suffice it at this point to say that they fill the greater part of the three large volumes making up the clerk's transcript. We shall, in proceeding to discuss the case, make such allusions to them as the situation requires.

The original complaint appears to have been filed in December, 1933, but various delays attended the making up of the issues and bringing the cause to trial, and the trial itself was prolonged and various continuances found necessary so that findings were not signed and filed until October 2, 1937. On the same day the judgment was rendered and on October 6, 1937, entered. From this judgment two appeals have been taken and are now before us, one by the said Jane V. Reinert and the other by the Depository, Title Insurance and Guarantee Company.

The said Mortgage Securities, Incorporated, of Santa Barbara, referred to as the "Company" and the said Security Title Insurance and Guarantee Company, above and hereinafter referred to as the "Depository", were, at all of the times here involved, California corporations, the latter being authorized by its articles to transact the business of a title insurance and guarantee company, though there seems to be no evidence in the record as to whether or not it was generally authorized to act as a de-

positary or trustee. However that may be, there was in fact executed on January 24, 1925, pursuant to a permit of that date issued by the state commissioner of corporations, a contract in the court's findings and hereafter described as the "Indenture" dated back as of October 6, 1924, between said two corporations, reciting that the Company had assigned to the Depositary certain notes and the debts evidenced thereby, secured by mortgages or deeds of trust and proposed thereafter to assign to the Depositary other notes and the debts evidenced thereby, in each case to be accompanied by certified guarantees, abstracts of title or policies of title insurance, evidencing that said mortgages or deeds of trust should be first liens upon the property therein described, and also be accompanied by proper indorsements and assignments of the instruments evidencing the security for such notes and debts, with the policies of fire insurance covering the improvements on the properties involved, which insurance the Company covenanted to keep in effect. It was agreed that the unpaid balance in each case amount to not more than 40 per cent of the appraised value of the property by which the debt should be secured. The purpose of these transactions according to the recital in the Indenture was to facilitate "sales by the Company of parts or shares of said securities to be evidenced by mortgage certificates, each certificate representing such part or share as may be in such certificate described, said certificates evidencing the ownership by such purchasers of undivided parts or shares respectively in said securities". It was further recited that in executing the Indenture each of the parties respectively represented "all parties in privity with them or either of them". It was agreed that the Company had executed and would execute assignments of the securities and that the Depositary had accepted and would accept the title thereto "for the benefit and account of the Company and each and every person or corporation that may be or become the owner of an undivided part" of said securities. The Company was to reserve and have the right "to sell undivided parts or shares of said securities and to issue and deliver to the purchasers of such parts or shares, respectively, mortgage certificates each representing a part or share of the whole of said securities equal to the proportion which the purchase price named in the certificate issued therefor respectively is of the total amount of said securities". The form of

mortgage certificate contemplated was set out in the agreement. This form of certificate contained inter alia the following stipulation:

"The Company reserves the right to collect the interest of said securities and to receipt therefor, but of the interest money received by it the Company will pay semi-annually, on the first days of March and September in every year, to the registered holder thereof, a sum equal to _____% of said purchase price from the date hereof until _____ and thereafter a sum equal to _____% of said purchase price, and it shall retain as its own all interest collected on the part or share of said securities represented by this certificate in excess of the part of said interest to be so paid to the registered holder hereof."

Provision was, in the form of certificate, made for the repurchase at certain times and upon certain notice, by the Company from the individual investor at the option of either of any such mortgage certificate or certificates "for a sum equal to said purchase price, together with the registered holder's share of all interest accrued on the securities from the date of this certificate, less all payments made prior to the consummation of said purchase to any registered holder of this certificate * * * on account of collection of principal or interest under any of the securities * * *."

The Indenture went on to provide that each certificate issued in accordance with its terms "must be authenticated over the signature of an officer of the Depositary" and that the form of authentication should be substantially as follows:

"Authentication

"This certifies that the within is one of a series of first mortgage certificates issued by Mortgage Securities, Incorporated of Santa Barbara, under the escrow agreement therein referred to, and that as depositary under said escrow agreement, the undersigned holds the securities referred to in the within certificate in the proportion of One Hundred Ten Dollars of said securities for each One Hundred Dollar interest as represented by this certificate; said securities being held in accordance with and subject to the terms and conditions of said agreement.

"Security Title Insurance and
Guarantee Company

"By _____
"Assistant Secretary."

The Indenture provided that:

"The depository shall keep a book of registry and account which will show at all times the names and addresses of the persons to whom, the time when, and the purchase price for which, all Mortgage Certificates are issued in accordance with this agreement; and the aggregate amount of the purchase price named in Mortgage Certificates outstanding at any one time shall not exceed the sum of Two Hundred and Fifty Thousand Dollars.

"It will be the duty of the depository to authenticate, on demand of the company, Mortgage Certificates as described herein in conformity with the terms and conditions of this agreement."

The Company was, by the further terms of the Indenture entitled to present to the Depository for cancellation any mortgage certificates previously issued and authenticated and to issue and have authenticated in their place others in lieu of those so surrendered. By the terms of the Indenture (article VI) the Company reserved to itself, so long as it was not in default the right and power:

"(a) To collect the interest of said securities and to receipt therefor.

"(b) To decide when and how any provision of any of said securities shall be enforced and of enforcing it accordingly.

"(c) To extend or change the time of payment of any of said securities.

"(d) To substitute or exchange other securities for the securities deposited with, or for money paid to, the depository, as provided for in the next Article."

With respect to the substitution of securities the Indenture provided as follows:

"If the company, for any reason, desires to exchange any of said securities, substituting others therefor, written notice of its desire shall be given to the depository, and the company shall deposit with the depository other securities of such amounts as may be necessary, provided that after such substitution is completed the aggregate unpaid principal amount due on all secured notes, which shall constitute the collateral security for the Mortgage Certificates, shall not at any time be less than one hundred ten (110) per cent of the aggregate par or face value of the Mortgage Certificates issued and outstanding; and of like kind, similarly assigned, similarly protected by fire insurance, and accompanied by Certificates, Guaranties or Abstracts of Title

or Policies of Title Insurance evidencing that said mortgages or deeds of trust are first liens upon the property therein described and do properly secure the payment of the notes described therein respectively, provided, however, that no security shall be accepted by the depository in consummation of any such substitution or exchange, unless the same shall be of such class and character that the company might at the time invest its capital or accumulations therein consistent with the laws which shall be then in force in this State as well as with the laws now in force therein; thereupon the company shall be entitled to make the desired exchange and substitutes, receiving such written transfer or conveyance from the depository as may be necessary to transfer to the company complete title to the securities so withdrawn. Said securities so substituted shall be and become subject to the provisions of this agreement, the securities so withdrawn being thereafter not subject to the provisions of this agreement or of any certificate issued thereunder."

All securities deposited from time to time by the Company with the Depository were to be accompanied by schedules giving certain detailed information about the same and it was agreed (in article VII) that:

"At the time of the deposit of such securities covered by any such schedule, there shall be filed therewith an affidavit to be appended to said schedule or schedules and signed by the President or Vice President and Secretary or Assistant Secretary of the company, to the effect:

"1. That the said securities are, in the opinion of said officers absolute securities for the amount then owing thereon;

"2. That no interest is delinquent upon any securities and that all taxes and assessments and charges of every kind against the property described in such securities, which are due and payable, have been paid;

"3. That the indebtedness *then* owing upon each of said securities, as set forth in said schedule, is the correct amount of said indebtedness, and it is the bona fide debt for full value received;

"4. That an appraisal of the property encumbered by said securities has been made by the appraiser appointed herein, or his successor, and that the property is ample and sufficient security for the then unpaid and outstanding principal amount owing thereon."

The Company reserved the right, subject to the approval of the corporation commissioner to name its own appraisers.

The Company agreed in the event that securities deposited by it should get into default, that it would upon certain notice substitute others "so that the total unpaid and outstanding principal amount of the securities shall, at all times be not less than one hundred ten (110) per cent of the face or par value of all of the outstanding Mortgage Certificates".

The Indenture stipulated (in article X) that the happening of any of the following events should constitute a default on the part of the Company:

"(1) The failure of the company to pay at its office in Santa Barbara, to the registered holder of any of said Mortgage Certificates out of the interest received, the sum or amount to which said registered holder is entitled in accordance with the terms of the certificate held by him, such failure continuing for a period of ten (10) days after the date on which said sum should be paid in accordance with the terms of said certificate and after written demand on the company and notice to the depositary by said registered holder that said payment be made.

"(2) The failure of the company to purchase any of said Mortgage Certificates when required by the registered holder thereof, in accordance with the terms of said certificates, said failure continuing for a period of ten (10) days after written demand on the company and notice to the depositary by said registered holder.

"(3) The failure of the company to fully and promptly perform every or any obligation imposed upon it or assumed by it under the terms, and in accordance with the provisions of this agreement, said failure continuing for a period of thirty (30) days after written notice thereof or in regard thereto given by the depositary to the company."

It is provided that in case of a default, and upon certain notice from the Company to the Depositary, the Company "shall relinquish and be divested of all its rights and powers specified and reserved under article VI hereof" (that is, its right to collect interest, to make determinations respecting the enforcement of the secured obligations deposited, to extend the times for the payment thereof and to substitute other securities for those deposited), "and

of any interest it may have in said securities" (with certain exceptions not of present importance), "and the Depositary shall, in such case be vested with all the rights and powers of the Company so relinquished by it and shall hold the securities as herein described for the account and benefit of the Company and the registered holders of the mortgage certificates then outstanding hereunder as their respective interest may appear, and the Depositary and not the Company shall be the agent of the Company and the registered holders of said certificates for the purpose of collecting the interest accruing on said securities and of discharging, satisfying, enforcing, foreclosing and extending or anticipating time of payment of any and all of said securities. The Depositary shall, in such case, enforce and have the right to enforce, all the provisions of any of said securities and all and any other things that may be for the benefit and account of, or for the protection of the interests of the Company and the registered holders of said certificates.

As any money comes into the hands of said Depositary by virtue of the power vested in it, as described in this paragraph, the Depositary shall pay said money to the registered holders of said mortgage certificates and to the Company as their interest respectively may appear * * *."

Other provisions (contained in article XIV of the Indenture) that have been considerably discussed in the briefs are as follows:

"The Company covenants and agrees to hold and save the Depositary free and harmless from all loss, cost, damage or expense occasioned by reason of the performance of any and all acts which may be performed by the Depositary in accordance with the terms of this agreement, so long as such acts are performed by said Depositary in good faith and with due diligence.

"The Company agrees that it will pay from time to time the reasonable compensation of the Depositary for all services rendered hereunder.

"The Depositary shall be under no obligation to pass upon the validity of the securities deposited with it or of the validity of any Policies of Insurance, Certificates, Guaranties or Abstracts of Title, part of or accompanying said securities, as to their binding force upon the companies or persons issuing them.

"The Depositary may conclusively rely upon the affidavit referred to in Article VII hereof as being filed by the Company with the securities deposited and will not be required to obtain any further evidence concerning such securities.

"The Depositary does agree, however, that it will promptly notify the registered holders of Mortgage Certificates issued in accordance with this agreement of its actions in case of any default hereunder as defined in Article X and its reasons therefor.

"The Depositary shall not be responsible in any manner whatsoever for any recitals or any statements of fact herein contained, all of which are made solely by and on behalf of the Company; nor for the validity of this agreement; nor shall it be liable in any way for the consequences of any breach on the part of the Company of the covenants herein contained.

"Unless and until an event of default, as defined in Article X, shall have happened, the Depositary shall be under no obligation to collect the principal sums of said securities as they respectively mature, or to present any claims therefor against the estates of any deceased, bankrupt or insolvent debtors thereunder, or to collect any fire insurance that may be payable for the destruction by fire of any buildings or improvements on lands covered by said securities, or to do or to refrain from doing any other act or thing whatsoever in relation to said Certificates, Guaranties, Abstracts of Title and Securities, so deposited, unless and until it shall be requested so to do in writing by the Company a reasonable time before it shall be required to take such action requested by the Company."

It was agreed that:

"The Depositary, by the execution of these presents, accepts the duties and conditions herein set forth and imposed upon it, and agrees to hold the said securities in accordance with the terms hereof, and to perform its duties and offices as set forth herein in accordance herewith, and to regulate its acts and deeds accordingly."

While there were numerous other provisions in the Indenture we think the foregoing a sufficient recital of its contents for our present purposes. The said Indenture was executed in behalf of the Company by one William S. Porter as its president and one Winsor Soule as its secretary and

by the Depositary by the same William S. Porter as its vice-president and one E. S. Porter as its assistant secretary.

According to the findings of the trial court, as soon as the corporation commissioner's permit, hereinbefore referred to, had issued, the Depositary began the exercise of its functions as contemplated by the above recited Indenture and continued to do so until June 4, 1932, when it gave to the Company a notice of default "and has ever since last mentioned date continued in the exercise as hereinafter set forth, of its functions and powers as 'Depositary' pretending to act under said Indenture and permit and none other".

The court found that from the date of the organization of the Company, which occurred in 1922, until February 11, 1930, the said William S. Porter was its president, and one Fred D. Jackson its vice-president; that on that date Jackson succeeded Porter as president and continued as such until January 8, 1934; that Porter and Jackson owned all the common stock of the Company and together dominated and controlled its affairs from the time of its organization until February 11, 1930, after which and until January 8, 1934, Jackson dominated and controlled its business and affairs. According to this finding Porter, as a vice-president of the Depositary, was manager of its Santa Barbara office until he was transferred to Los Angeles late in 1928 or early in 1929, and up to the time of his transfer the business of the Company was conducted within the Santa Barbara office of the Depositary, and, indeed, Porter continued to be a director of the Company until 1932.

According to the findings a large number of certificates known as first mortgage certificates were from time to time issued by the Company, certified and authenticated by the Depositary and sold for cash then paid to the Company "in the amount in each case equal to purchase price of each certificate, by the various purchasers who were in each certificate named and to whom they were in each instance sold and issued respectively". A schedule of them numbered I headed "Valid Certificate Holders" is set out in the findings and it is found that subsequently and during the year 1933 all of the certificates included in that schedule were sold to the plaintiffs (respondents here) who now own them. Other certificates found to have been simi-

larly issued for full value are contained in a second schedule numbered 1-A and headed "Schedule of Other Valid Certificate Holders". These latter certificates stand on the same basis as those described in the first schedule, except that they have not been assigned to the plaintiffs-respondents. It is found that as respects the certificates listed in the said schedule I the plaintiffs-respondents exercised their option in manner and form as provided in the Indenture to require the Company to purchase "the part or shares of said securities represented by said various certificates for a sum equal to the respective designated purchase prices of said various certificates * * * together with the registered owners' shares of all interest accrued on the securities from the sale of said respective certificates * * *." It is found that, though duly notified of the exercise of this option the Company failed to repurchase any of said certificates and is in default for such failure, in consequence of which the Depositary, as above stated, served upon it on June 4, 1932, a notice of such default, as well as of its default, also found to exist, in the non-payment of interest in accordance with the terms of the certificates and agreement. The finding is that the Company admitted the default and that, with its consent, the Depositary entered upon its duties as provided for by the Indenture in case of such default. In one of its further findings the trial court sets forth a further schedule entitled "Schedule II", in which, with respect to each of the mortgage certificates still outstanding, there is noted its face value, which, except in the case of certain certificates issued to one Jane V. Reinert, hereinafter to be referred to, is the price for which it is found to have been sold by the Company, and there is also noted the date when it issued, the total amount of the certificates outstanding on that date, the figure which would represent 110 per cent of that amount and the aggregate par value of the securities on that date on deposit with the Depositary to secure the then outstanding issue of certificates. The effect of this appears to be to show that there were always securities on deposit sufficient in par value to meet the requirements of the Indenture that they amount to not less than 110 per cent of the amount of the outstanding certificates, had they in fact been all first mortgages or first trust deeds as the Indenture contemplated, but

the actual fact as found and also shown on this schedule is that a large proportion of the securities deposited was made up not of first mortgages and first trust deeds, as stipulated, but of second trust deeds or of the vendors' rights under executory contracts of sale of land, which latter were in at least a few instances subject to prior incumbrances. If all these were left out of account, the securities deposited would fall largely below the requirements. The trial court's finding is that, except for the said Reinert certificates, all the outstanding certificates were bought in good faith and for full value and that the purchasers were not aware of any deficiencies in the deposits of collateral required by the Indenture under which their certificates issued. It is found that "no collateral securities or assets was, or were at any time deposited with or held by said Depositary as security for said certificates, other than the collateral mentioned and shown in said schedule except such collateral as was deposited and withdrawn prior to June 4, 1932, without any record thereof being made or kept, but said collateral so deposited and withdrawn without any record thereof being made or kept did not at any time provide or constitute either by itself or combined with all other collateral on deposit, collateral either in amount or character, sufficient to secure the valid outstanding certificates as required by the terms of said Indenture and Permit".

Among the mortgage certificates listed as valid was one numbered 441 in the sum of \$2,000 in the name of Jane V. Reinert. As to it no dispute arises, but the trial court found invalid certain others numbered 444 to 450, both inclusive, purporting to have been issued to her and now amounting in the aggregate face value to \$52,150.00. As to this latter group of certificates, the trial court's findings 17 to 28, both inclusive, reveal a devious series of transactions, as to which that court's view can hardly be stated without quoting somewhat extensively from what is there said about them. These findings include, *inter alia*, the following:

"17. The Court finds the facts and conditions governing the issuance of the so-called Reinert Certificates Nos. 444 to 450, inclusive, purporting to be issued to Jane V. Reinert and embraced in said schedule, to be as follows: that on and for months prior to September, 1931, during which months the so-called Reinert Certificates

Nos. 444 to 450, inclusive, (purporting to have been issued to Jane V. Reinert and embraced in said schedule) were issued, defendant Mortgage Securities, Inc. of Santa Barbara, referred to herein as the defendant 'Company' had incurred serious deficits in its operations and was in imminent danger of bankruptcy; that on and prior to September 25, 1931, said corporation was indebted to the County National Bank and Trust Company of Santa Barbara and the First National Trust and Savings Bank of Santa Barbara in sums amounting in the aggregate to approximately \$80,000.00, unsecured, and also in various sums owed to individuals amounting in the aggregate to more than \$10,000.00, all unsecured; that on or about said date, demand was made on said defendant 'Company' by executive officers of said County National Bank and Trust Company of Santa Barbara and said First National Trust and Savings Bank of Santa Barbara for payment of said indebtedness due to said banks, respectively, and thereupon a conference occurred on or about September 25, 1931, in the City of Santa Barbara, California, between directors Wm. S. Porter, Fred D. Jackson, and others of the board of directors of defendant 'Company', at which meeting the indebtedness of defendant 'Company' to its various creditors herein referred to was discussed, but said 'Company' was unable to pay said indebtedness, or any part thereof, or to make any adjustment satisfactory to said banks, or either of them, at said conference, or at a meeting of the board of directors of said defendant 'Company' which occurred on the morning of September 28th, 1931, with directors Fred D. Jackson, Wm. S. Porter, and Winsor Soule and Donald W. Montgomery present at said meeting.

"The Court finds that after said conference of September 25, 1931, said Fred D. Jackson without notice to any of the other officers or directors of said defendant 'Company' caused one J. F. Ewing to execute an agreement between said defendant 'Company' and said J. F. Ewing purporting to be an executory contract to purchase from said 'Company' at the price of \$54,465.80, nineteen parcels of real property of defendant 'Company', which nineteen parcels of real property were practically all of the unencumbered assets of defendant 'Company'.

"The Court finds that said morning meeting of the board of directors of defendant

'Company' of September 28, 1931, was recessed to the afternoon of that same day, at which afternoon meeting representatives of said two banks were to be present and it was anticipated said representatives of said banks would insist upon being made members of the board of directors of said defendant 'Company', in order that said banks might exercise control over said 'Company' and its affairs in the interests of said banks as creditors of said 'Company'.

"The Court further finds that said Fred D. Jackson on said 28th day of September, 1931, without notice to the other officers, or directors of defendant 'Company' and without notice to either of said banks, caused said Certificates Nos. 444 to 450, inclusive, known as the Jane V. Reinert certificates, to be issued and the entries in the ten accounts hereinafter mentioned in Finding 20 hereof to be made, all as hereinafter set forth and found and on said day in the interval between said morning and afternoon sessions of said board of directors of said defendant 'Company', caused said pretended agreement with J. F. Ewing to be filed and deposited with defendant 'Depository' as collateral under said Indenture and thereupon caused defendant 'Depository' to certify and authenticate and thereupon on said day defendant 'Depository' did certify and authenticate, under its corporate seal in the form provided by said Indenture, First Mortgage Certificates in the aggregate sum of \$68,500.00 purporting to be issued by defendant 'Company' to Jane V. Reinert, which said certificates included those designated as Nos. 444 to 450, inclusive, mentioned above and in said Schedule II."

"18. The Court further finds that at and prior to the time of the execution of said pretended agreement of sale said J. F. Ewing was a personal employee of Fred D. Jackson and that nothing was paid down, nor expected to be paid at any time, upon the said contract; that said Jackson represented to said Ewing and it was understood and agreed between them, that said Ewing was signing and he did sign said contract merely as an accommodation and without expectation or intent of being called upon to make any payments thereon, and the Court finds that said contract and the whole thereof was fictitious and sham; that said property covered by said pretended contract included all the unencumbered real estate

and substantially all of the unencumbered assets of defendant 'Company' and was carried by the defendant 'Company' on its books at its cost which was \$51,501.50. No title certificate, or other evidence of title was procured or filed or deposited with said 'Depository' as to the title of any of the real property covered by said pretended agreement filed and deposited as aforesaid, with the defendant 'Depository'. That an appraiser was procured by said Fred D. Jackson, named W. C. Paulton, to make and furnish and who did make and furnish a pretended appraisal in writing of said nineteen parcels of real property covered by said agreement, representing said nineteen parcels of real property to be of the value of and purporting to appraise said property at \$115,000.00, and said Fred D. Jackson caused the same to be deposited with said 'Depository' at or about the time of the pretended issuance of said certificates. That said Paulton was not a disinterested appraiser; that he was at that time indebted to defendant 'Company' to the extent of several thousand dollars; that said certificates were certified and authenticated in the form provided by said Indenture in the office of 'Depository' in the City of Santa Barbara, California, by an assistant secretary of defendant 'Depository' at the request of said Fred D. Jackson, while the Santa Barbara executive manager of said defendant 'Depository' was absent from the said office of 'Depository'; and that at and prior to the time of the pretended certification and authentication of said alleged certificates, as aforesaid, said Santa Barbara executive manager of defendant 'Depository' had been and was ordered by the executive officers of defendant 'Depository' in charge of the principal office of defendant 'Depository' in the City of Los Angeles, California, and who had control and supervision of said Santa Barbara office, not to certify or authenticate any more or additional First Mortgage Certificates issued or sold by defendant 'Company' because and on account of the unstable financial condition of defendant 'Company'; that the executive manager of defendant 'Depository' in charge of its Santa Barbara office was not informed and did not learn of the issuance, certification and authentication of said certificates, or any of them, or of the deposit of said fictitious and sham agreement of sale to secure payment thereof until some weeks thereafter and Wil-

liam S. Porter, who was at that time executive vice-president of defendant 'Depository' and who had his headquarters in the Los Angeles office of defendant 'Depository' in Los Angeles, California, and who was also at the time a director of defendant 'Company' first learned, or was informed of the issuance and authentication of said certificates by defendant 'Depository' and the deposit with said 'Depository' of said fictitious and sham agreement of sale about three weeks after September 28, 1931, but, upon the discovery by said Santa Barbara executive manager and said Los Angeles executive officers of defendant 'Depository' of the issuance and authentication of said certificates and of the nature of the pretended collateral deposited to secure payment thereof, to-wit: said fictitious and sham agreement of sale, no demand was made by 'Depository' upon any person, or persons, for, and nothing was done, and no steps of any kind were taken by said executive officers or by defendant 'Depository' to procure the cancellation of said certificates, or any of them, or of its authentication on the same, or on any of them, at any time, and no notice of the issuance or authentication of said certificates, or of the deposit of said fictitious and sham agreement of sale, was given to any of the holders and owners of any of the other outstanding First Mortgage Certificates issued by defendant 'Company' and authenticated by defendant 'Depository', and nothing was done in reference to said pretended collateral, to-wit: said fictitious and sham agreement of sale, except that said 'Depository' did, on or about May 4, 1932, procure the execution and deposit with it of the promissory notes and trust deeds to secure same, hereinafter mentioned in Finding 31 hereof.

"19. The Court further finds that no statement or reference was made in the minutes of the defendant 'Company' to the Jane V. Reinert transaction in any of its aspects, nor was the said transaction or Jane V. Reinert herself referred to either in the conference of the directors or the defendant 'Company' on or about September 25, 1931, or in the meeting of the board of directors held in the morning of September 28, 1931, nor at the meeting following the recess, in the afternoon of September 28, 1931, and that although the deposit of said Ewing contract and the issuance of said Reinert certificates had been accomplished immediately prior to the

afternoon meeting of the board, the said representatives of said banks present at the afternoon meeting were not advised of the transaction nor did they learn of the same until late in the year 1931 in the month of December when, upon their suspicion being aroused, an audit of the books and records of defendant 'Company' by independent auditors was made at their instance. Said audit was begun on or about December, 1931, and was completed on or about January —, 1932. The circumstances and facts as to the issuance of Certificates Nos. 444 to 450, inclusive, known as the Jane V. Reinert certificates, in so far as the deposit of the Ewing contract and the entries made closing the ten accounts referred to in the next succeeding finding, and the contemporaneous issuance of the said Jane V. Reinert certificates, together with the transfer to said Jane V. Reinert of certain trust deeds, were set forth in the report made by said auditors and the said representatives of defendant County National Bank and Trust Company of Santa Barbara, and of the First National Trust and Savings Bank of Santa Barbara, read said audit either in the month of December, 1931, or in the month of January, 1932. Neither the contents, nor the result of this audit, or the report thereof, made by said auditors were furnished to the certificate holders, nor were they or any of them informed of the pretended issuance and authentication of said Reinert certificates, or of any of them, or of any of the facts and circumstances connected with the issuance of said Reinert certificates, or any of them.

"20. The Court further finds that upon the 28th day of September, 1931, and immediately preceding the issuance of said Reinert Certificates Nos. 444 to 450, inclusive, there were upon the books of the defendant 'Company' a series of uncertain and questionable accounts, 10 in number, each with a separate account number, seven of which were in the name of Associated Almond Growers of Paso Robles. Some of these accounts purported to be debit accounts and some purported to be credit accounts. These ten accounts included two accounts carried on the books of defendant 'Company' at the direction of Fred D. Jackson in fictitious names, and one account in the name of Jackson's wife, Alice P. Jackson; that Fred D. Jackson had an interest in some of these accounts and that upon the said 28th day of September, 1931, and in anticipation of the

action of the bankers hereinabove referred to, the said Jackson, who was president both of defendant 'Company' and defendant Associated Almond Growers Company of Paso Robles, did order and procure a journal entry to be made upon the books of the defendant 'Company' purporting to transfer the entire net credit balance amounting to \$125,000 purporting to exist against the Mortgage Securities Company as a result of said 10 accounts, to said Jane V. Reinert, and did thereupon enter to her credit the amount of \$53,000.00 in accounts receivable, that is, trust deeds and mortgages belonging to the defendant 'Company', and \$68,500.00 in mortgage certificates including said Certificates Nos. 444 to 450, and thus did at that time obliterate and close said accounts, as they stood before the said journal entry of September 28, 1931.

"21. The Court finds that up to the said 28th day of September, 1931, and prior to said journal entry there had been no transactions between the defendant 'Company' and said Jane V. Reinert entered or shown in any of the books, records or papers of said defendant 'Company', except in one instance as hereinafter noted in this finding, that the said Jane V. Reinert and her husband, Nels P. Reinert, were old personal friends, and business associates of the said Jackson from a period running back at least as early as 1918, and that the said Nels P. Reinert and the said Fred D. Jackson were at the time of the trial, and had been continuously for seven years or more, vice-president and president, respectively, of the Associated Almond Growers of Paso Robles.

"The Court further finds that said Jane V. Reinert did not at any time ever purchase any mortgages or deeds of trust of the defendant 'Company'. The Court finds that at no time did the said Jane V. Reinert ever purchase or pay for any mortgage certificates, except one certain mortgage certificate No. 441 of the par value of \$2,000.00, which was issued and sold for cash paid to it at the time, by or on behalf of Jane V. Reinert on said 25th day of September, 1931.

"22. The Court further finds that the said Jane V. Reinert executed a general power of attorney to Duncan P. Jackson, son of Fred D. Jackson and associated with Fred D. Jackson in the office of the defendant 'Company', on the 20th day of September, 1931, in the County of Santa

Barbara; but no conference occurred and no understanding or agreement was had or made between the said Jane V. Reinert and the said Fred D. Jackson, or the defendant 'Company', or said Duncan P. Jackson on that occasion, or upon any other occasion regarding any financial relationship, or any financial transactions, personal, or otherwise, between the said Jane V. Reinert and the said defendant 'Company'. No Demand upon defendant 'Company' was ever made by or on behalf of Jane V. Reinert for money, evidence of investment, or of any financial transaction between herself and the said defendant 'Company' either before September 28, 1931, on that date, or at any time thereafter, nor was any statement, report, or accounting ever furnished or made to her before September 28, 1931, or on said date, or thereafter up to the beginning of this action.

"The Court further finds that no interest was ever actually paid to Jane V. Reinert, or to any one else, purporting to have accrued, or which did accrue, upon said ten accounts, or any of them, referred to in Finding 20, nor did said Jane V. Reinert actually pay at any time to the defendant 'Company' any sum or sums, except for Certificate No. 441, the sum of \$2,000.00, or make any deposit whatsoever with the defendant 'Company', nor did she ever loan any money to the defendant 'Company'.

"23. The Court finds that the so-called Reinert Certificates Nos. 444 to 450 turned up in the spring of 1933 when they were used by Fred D. Jackson as collateral for a loan to said Jackson which had been made by the County National Bank and Trust Company of Santa Barbara to him in 1930, and there they remain.

"24. The Court finds that Certificates Nos. 444 to 450, inclusive, purporting to have been issued to Jane V. Reinert were not, nor was any one of them issued for cash or for other consideration, but each and all of them were issued for a pretended cancellation of certain purported mutual open and current book accounts, mentioned above, which prior to the journal entry of September 28, 1931, referred to in these findings, appeared to exist upon the books of the defendant 'Company' between the defendant 'Company' and the Associated Almond Growers of Paso Robles, N. F. Thompson, Thomas B. Jones, and Alice P. Jackson, both N.

F. Thompson and Thomas B. Jones being fictitious names; and the Court finds that the credits purporting to exist or shown upon said 10 accounts against the said defendant 'Company', were shown by the books of defendant 'Company' as resulting from purported transactions extending over a period from the year 1927 to the early part of 1931, inclusive.

"25. The Court further finds that said certificates so issued to Jane V. Reinert, as stated in the preceding finding, were, and each of them was issued at a time when there was insufficient collateral on deposit with the defendant 'Depositary' to permit the issuance of any of said certificates, to-wit: Nos. 444 to 450, inclusive, in accordance with and as required by the terms of the Indenture and Permit, nor has there at any time been sufficient collateral on deposit to permit the issuance of the said certificates, or of any of them.

"26. The Court finds that the said Ewing contract was deposited and said certificates last mentioned were issued while defendant 'Company' was insolvent and known by Fred D. Jackson to be insolvent and at the instance of said Fred D. Jackson and that the issuance of said purported certificates was procured by said Fred D. Jackson and was done in the full knowledge of Fred D. Jackson as agent of the said Jane V. Reinert, of all the facts herein set forth bearing upon the infirmity and invalidity of said certificates and with the full knowledge that said certificates were issued without payment of cash or other consideration and without the support of collateral required by the Permit and said Indenture.

"27. (The Court finds that the action of Fred D. Jackson in procuring the pretended execution of the so-called Ewing contract and its deposit as collateral with the defendant 'Depositary', was done and made to the prejudice and damage of the creditors of the defendant 'Company', its stockholders and the holders and owners of said valid certificates.)

"28. The Court finds that the said Jane V. Reinert had no right or title or interest or property in or to said Certificates Nos. 444 to 450, inclusive, or in any of them."

The trial court went on to find that between the late fall of 1931 and the spring of 1932 the executive officers of the Depositary, having discovered that these Reinert certificates had been issued and authenticated and the fictitious Ewing

contract deposited as collateral for the same, instituted an investigation of the condition generally of the collateral in the Depository's hands as security for the Company's outstanding certificates and discovered that instead of having exclusively first mortgages and first deeds of trust as required by the Indenture and corporation commissioner's permit there were really on hand numerous executory contracts of sale and "insufficient collateral of the character required" by said contract and permit, upon which the outstanding certificates could have issued. Thereupon it is found that, though the Company was not indebted to the Depository it was required by the latter, on or about May 4, 1932, to execute to the Depository and did execute to it, its own promissory notes for \$51,015.32 payable on or before three years after that date with interest, and to execute, to secure the same, a deed of trust covering the identical property involved in the purported Ewing contract, all as further collateral security for the mortgage certificates; and that the Depository also required the Company for the same purpose, to execute sixteen further promissory notes in favor of it—the Depository—aggregating \$33,412.17 and to execute deeds of trust to secure them affecting the properties covered by sundry of the executory contracts of sale theretofore delivered to the Depository as collateral for the certificates. It may be gathered from the findings that the Depository proceeded to foreclose these latter sixteen trust deeds; for it is found that it took title to all of the property described therein and has since collected the rents, issues and profits thereof and claims to hold the title to the land as security for the outstanding mortgage certificates.

It is found that, though the Depository became aware of all the facts concerning the Reinert and Ewing transactions prior to May 4, 1932, it failed to notify the holders of the valid certificates of any of them but instead issued, both on June 4, 1932, and on October 13, 1932, communications to the certificate holders representing that it held policies of title insurance with each item of collateral deposited with it, showing the same to be secured by first mortgages or first trust deeds, though such was not the fact. It is found that the Depository knowingly permitted the Company to issue to various of the plaintiffs-respondents' assignors mortgage certificates after it had knowledge that the same

were not secured by the collateral required by the Indenture or by the state corporation commissioner's permit, and that all this was done in order to induce the purchasers to buy the mortgage certificates. It is found that the Depository never made any accounting of the collateral in its hands to the certificate holders except as it did so in court after the present action was instituted. The findings proceed to detail all of the property, real and personal, derived from the Company and now in the hands of the Depository, all of which is found to be subject to a lien for the benefit of valid certificate holders as of date September 21, 1936. This consists of \$32,270.44 in cash, a considerable number of trust deeds, certain other items of personal property, and numerous parcels of real estate found to be derived from foreclosure by the Depository. There are various other particulars in which the Depository is found by the trial court to have been guilty of irregularities and to have fallen short of performing its duties. It is found to have failed to keep records of securities deposited and withdrawn, to have failed to secure the deposit of sundry schedules, appraisals and affidavits, and, when it surrendered collateral deposited with it, to have failed to keep any record of the schedules, appraisals or affidavits that it did get when it originally received the securities so surrendered. It is found to have allowed sundry notes and deeds of trust purporting to be deposited with it as collateral to remain in the actual custody of the Company. It is found, in foreclosing securities in its hands, in certain instances not to have required cash from the purchaser but to have permitted him to execute trust deeds for the purchase money to the Company and then to have taken assignments of these from the Company. It is found to have brought about the termination of the rights of purchasers under executory contracts of sale, irregularly deposited with it as collateral, and then, instead of itself realizing cash for the lands, to have instigated the making by the Company of new contracts of sale for the same land to new purchasers and irregularly and outside of any authority from the corporation commissioner, to have accepted as collateral a redeposit of these new executory sales contracts. It is found without authority to have applied to its own use of funds received by it as Depository an aggregate of \$2375, and, likewise without authority, to have paid from

such funds to its attorneys the sum of \$450.

There are many other matters embraced in the findings but we do not find it necessary to detail them.

The trial court concluded *inter alia*, as matters of law, that under its agreement with the Company and the permit issued to the Company by the corporation commissioner upon the issuance and sale of the Company's mortgage certificates and the Depositary's authentication of them the latter "became a trustee of and for the holders of valid certificates"; that the effect of the Depositary's action was to represent, guarantee and warrant to the bona fide purchasers of such certificates that it held collateral for the same in accordance with the terms of the above recited Indenture; and that, in that it did not hold the same, it violated its terms and thereby became chargeable, together with the Company, with the total purchase price paid by the bona fide purchasers of the certificates found to be valid, with interest thereon at 7 per cent per annum from December 1, 1931; that such holders of valid mortgage certificates are entitled to a first lien on the assets deposited with the Depositary to satisfy so far as may be the sums due them; that said Depositary is under obligation to liquidate the assets in its hands under the court's supervision and make pro rata payments to the said purchasers from the proceeds of the liquidation; that, as against the Company, the Depositary is entitled to compensation for its services to the extent of \$10,000 and to a lien for that sum, with interest, on the assets in its hands junior and subordinate to the lien of the mortgage certificate holders for the amounts due them, and to a judgment against the Company for any deficiency in said compensation that may result from the liquidation of the assets and the application of the proceeds as ordered by the court; and also to have included in its judgment against the Company a further amount equal to such sums as such Depositary may be itself required to advance to satisfy any deficiency in the proceeds to be derived from liquidating the said assets in the amounts due the valid certificate holders, with interest thereon; that except for the said certificate 441 for \$2,000 Jane V. Reinert is not the owner or holder of any valid mortgage certificate or certificates of the Company and that such certificates 444 to 450, both inclusive, are

void; that the Depositary is also entitled to such additional compensation for carrying through the liquidation as may be hereafter allowed by the court; that the Company is entitled to any proceeds of the liquidation of the assets, if such there be, after satisfaction of the sums due to the valid certificate holders and the Depositary respectively; that in addition to the cash sums in its hands from deposited assets, the Depositary is chargeable with the \$2,825 applied to its own uses and paid to its attorneys between June 4, 1932, and September 21, 1936; that all cash in the Depositary's hands from deposited assets, including said \$2,825, should be ordered immediately paid by it to the valid certificate holders in respective amounts set out.

The judgment entered pursuant to these findings provided in detail for putting the court's determination into effect; calling for a further accounting by the Depositary within thirty days thereafter to bring its statements of assets held by it up to date, directing it to proceed with the liquidation, foreclose upon delinquent securities, and make sales of assets subject to supervision by the court, for completing which liquidation it was allowed a period of four years during which time the holders of valid certificates were to be entitled to interest on balances from time to time unpaid of the amounts due them. The Depositary is required at intervals to account to the court for its proceedings taken to carry out the liquidation and the court reserves the right to terminate the period allowed for liquidation at any time for failure to properly and diligently conduct the same. At the end of the liquidation or its earlier termination by the court the Company and the Depositary are made unconditionally liable for any sums remaining unpaid upon the indebtedness to the holders of valid certificates and judgment is to be entered thereon for any such deficiencies accordingly upon which execution is to issue on the order of the court.

The Reinert Appeal.

Mrs. Reinert attacks the judgment on various grounds, asserting that the findings of fact are not supported by the evidence; that the conclusions of law are not supported by the findings of fact; that the judgment is against law; that she is entitled to relief in equity and that the judgment should be reversed with instructions to the trial court to enter judgment in her favor.

With respect to the consideration claimed to have been given by Mrs. Reinert for the issuance of the certificates other than that numbered 441 to her, she relies on the testimony of the said Fred D. Jackson and that of one George Giovanola, one of the firm of Giovanola & West, auditors, appointed by the trial court, given with relation to his audit, as well as upon her own testimony given in the form of a deposition. The books of the Company and the audit made by the Giovanola-West firm show, to use the language of counsel for this appellant "ten accounts carried under the contract section of the system of bookkeeping employed by the Company. These ten accounts consisted of seven accounts carried in the name of Associated Almond Growers of Paso Robles, one account carried in the name of Thomas Jones, one account carried in the name of N. F. Thompson, and one account carried in the name of Alice P. Jackson." The Company books, insofar as entries made prior to September 28, 1931, are concerned, do not, otherwise than such light as the use of those names may be thought to shed on the matter, show the sources of the bulk of the money deposits carried in these ten accounts, through which, during the several years in which, up to that time, they were carried, there appears to have passed an aggregate of no less than \$536,395.03, though no such amount was ever in the ten accounts taken together, on deposit with the Company at any one time.

Some items, indeed, are of clearly ascertainable origin, as, for example, that during the time the accounts were kept there was credited to them a net aggregate of \$19,515.46 as interest, in addition to which it is made to appear that in the Alice P. Jackson account there was included a credit of \$8,010, of which \$3,500 was salary accrued to Fred D. Jackson as an officer of the Company, \$3,960 from the sale of 36 shares of stock apparently belonging either to Fred D. Jackson or to Alice P. Jackson, and \$550 on account of certain funds collected for A. P. Jackson. With relatively minor exceptions, however, the source of the large sums that were deposited in the Company's bank account and credited to these ten accounts cannot be ascertained from anything entered on the Company's books prior to September 28, 1931. According to the books the net credit balance in favor of the several customers in whose names these accounts were carried was,

as of September 28, 1931, \$133,770.50. The claim made by appellant, Jane V. Reinert, before the trial court and on this appeal is that, except for the item of salary of Fred D. Jackson, just referred to, and the other two items above specified from the Alice P. Jackson account, and an interest that Fred D. Jackson claims to have had in the account carried in the name of Jones, which excepted items will be hereinafter discussed, all of the credits carried in these ten accounts are derived from initial deposits of her own moneys made by her or in her behalf with the Company, increased by the Company's operations in handling these funds for her.

The system of bookkeeping employed by the Company is thus described in the opening brief of Mrs. Reinert's counsel:

"The Company maintained in its bookkeeping system a master contract receivable account. This account carried the total balance due to the Company on outstanding deeds of trust, mortgages, and contracts. In other words the balance appearing in the master contract receivable account represented the total amount of deeds of trust, mortgages and contracts owned by the Company. As credit balances appeared on the accounts under which the Reinert funds were kept, the control contracts receivable account of the Company was decreased by the amount of such credit balances, and the account under which the Reinert balances were carried reflected that contracts in the amount of such credit balance had been allocated generally to the ten accounts. Thus the bookkeeping system of the Company always reflected that the funds on deposit with the Company under the said ten accounts above mentioned had been applied to the purchase of trust deeds, mortgages, etc. Specific mortgages and deeds of trust were not allocated at any time to Jane V. Reinert, by reason of the fact that the accounts varied in credit balances from time to time, and it was impracticable to allot specific deeds of trust and mortgages to the balance appearing on the said accounts. The total amount of deeds of trust and mortgages allotted to these accounts always appeared, however, on the control contracts receivable account in the bookkeeping system of the Company. These ten accounts, or the credit balances thereof, were never carried on the books of the Company as accounts payable but as hereinabove set forth, always appeared and were reflected as purchases of deeds

of trust and mortgages. As a result of the various deposits and accruals to these ten accounts, the accounts reflected at all times a large credit balance, to which credit balance a similar sum in deeds of trust and mortgages was always allocated on the control contracts receivable account in the books of the Company."

It is, in the opening brief for Mrs. Reinert, conceded that the "records were kept under the direction and control of Fred D. Jackson" and that "the Jones and Thompson accounts were carried under fictitious names, both Jones and Thompson being nonexistent persons." Alice P. Jackson is the wife of Fred D. Jackson. According to counsel for Mrs. Reinert:

"The various accounts were carried in this manner for the purpose of identification and classification by reason of the fact that the receipts and disbursements through the various accounts were from various places and for various purposes, and it was, therefore, desirable that the accounts be kept segregated in the manner set forth."

It is in one of the audits made under the court's direction by said firm of Giovanola and West and placed in evidence, stated that:

"The net total credit balance of these ten accounts amounting to \$133,770.50, was further reduced on September 28, 1931 by drawing a check payable to the 'Associated Almond Growers of Paso Robles' for the amount of \$8,770.50 and charging the account of 'Thomas B. Jones, Acct. No. 1260'. This entry reduced the credit balance of the 'Jones' account from \$28,145.30 to \$19,374.40, and it likewise reduced the net total credit balance of the aggregate ten accounts from \$133,770.50 to \$125,000.00. The disposal of this net credit balance of \$125,000.00 as evidenced by Journal Entry of September 28, 1931, is as follows: Contracts Receivable Seconds were charged with \$125,000.00 and crediting: Suspense \$3,500.00; Customers' Loans Jane V. Reinert a-c No. 1353, \$53,000.00; First Mortgage Certificates, Jane V. Reinert Certificates Nos. 443 to 451, inclusive (9 certificates), totaling \$68,500.00."

The record shows that, subsequent to the said transactions of September 28, 1931, but immediately thereafter, the Company paid off mortgage certificates 440 and 451, issued as just set out in Mrs. Reinert's name, and partially paid certificate 450 and

that the net aggregate of the remaining principals of the certificates 444 to 450, both inclusive, issued in her name and involved in the present litigation, is, as already stated, \$52,150.

With respect to Mrs. Reinert's connection with these occurrences Fred D. Jackson testified at length. His account of the matter in brief is as follows: He had been acquainted with Mrs. Reinert and her husband, Nels A. Reinert, having known them in Chicago as far back as 1916 when he practiced law there and they were his clients. In 1926 or 1927 he suggested their making deposits for Mrs. Reinert's account with the Company and they agreed to do so. He had many subsequent conversations with them on the subject, though Mrs. Reinert left the details largely to her husband. The first talk when they were both present was in Paso Robles. Later they have come to reside in Atascadero. Jackson was then and still is president of the Associated Almond Growers, a concern operating in that region, and Mr. Reinert then was and continues to be its vice-president. Reinert had gone into this concern about 1920 at Jackson's suggestion. Jackson testified that with Reinert's assistance he controlled this corporation in its activities from about 1924 on. Jackson's proposition to Mrs. Reinert was that she deposit money with the Company, which would in its turn loan parts of it to the Almond Growers, and any balance not so loaned and not needed by the Almond Growers would be invested for her in either first mortgages or first mortgage certificates. Pursuant to this arrangement which was verbal, Jackson says that:

"Mrs. Reinert advanced to the Associated Almond Growers through the medium of these accounts and allowed the Mortgage Company to take any excess and invest it for her in first mortgages and first mortgage certificates. *The mortgages* were not actually allocated to her or certificates actually issued to her, because if we did that we would have to change the certificates every day. It was left in this condition until it was thought advisable to close it."

In this connection he testified further with respect to the Jones account as follows:

"Those accounts are put in the contracts receivable. It was shown as a purchase of contract, not as money due or a liability of the Mortgage Company at all.

"Q. What contracts were shown as being held by that account? A. No specific contracts were allocated to it.

"Q. What contracts were allocated to it? A. Anything that might be turned over in the final analysis.

"Q. No contracts were allocated to them or set aside for them at that time? A. No, sir."

The claim is that the other nine of these accounts were all handled in the same way. Asked whether he merely had in mind that at some time he might turn over certain contracts, he said:

"We did turn over certain contracts if the money was not paid back. It was the same way as we had done in the other cases that we had. Of course not to this extent, but if people wanted to come in and buy securities they could deposit money and when they had deposited sufficient money they got their securities."

No securities, according to him, had been definitely allocated for any of the accounts "except as it reduced the securities held by the Mortgage Company by the ten accounts", by which he means that the aggregate of the sums receivable by the Company on contracts held by it was treated as so reduced.

As respects the loans claimed to have been made by the Company from Mrs. Reinert's deposits to the Associated Almond Growers, Jackson testified that interest was charged the Almond Growers at the rate of 12 per cent per annum, whereas Mrs. Reinert was credited with 7 per cent interest on the money in the Company's hands, the difference of 5 per cent being retained by the Company as its profit. Collections from the Almond Growers on Mrs. Reinert's account were, according to Jackson's testimony, not paid to her but simply credited to her on the books.

Referring to the transactions of September, 1931, Jackson testified that the Reinert situation was discussed at two meetings of the directors, held respectively on September 25th and September 28th, the first of which was informal in character and not reported in the minutes; that Mrs. Reinert's connection with the deposits carried in the ten accounts under discussion was well known to the members of the board; that the Company was under pressure from two of the Santa Barbara banks to pay up loans which they had made to it amounting to about \$80,000 which it was not at the time

able to repay, having then on hand only something like \$28,000 in cash; that he, Jackson, expressed a desire to see Mrs. Reinert's investment protected, in which the other directors concurred; that at the meeting of September 28th there were present, besides himself, directors Porter, Soule and Montgomery. The minutes show that this meeting convened in the morning and continued until noon when it was adjourned until 3 p. m. and makes no mention of Mrs. Reinert, though they do say that "the president made a lengthy statement giving the affairs of the company in full detail and the situation with reference to the loans and the moneys borrowed from the bank." Jackson testified that the Reinert situation was, on this occasion, discussed, and that:

"At the meeting on the twenty-eighth we talked about the previous things discussed on the twenty-fifth and carried out the matters which were discussed on the twenty-fifth."

Asked what these were he said:

"That the Company would segregate to Mrs. Reinert a number of first mortgages and in the event there were not enough first mortgages which we had deposited for that purpose we would then segregate and turn over to her second mortgages for the difference; that a contract would be entered into with Ewing, who was a clerk in my office, not the Mortgage Company office, but who was working for me, that the contract would be deposited with the Security Title Insurance and Guarantee Company and certificates would be issued against that and would be turned over to Mrs. Reinert. On the morning of the twenty-eighth these certificates were prepared, signed and authenticated by the Trust Company. The contract with Ewing had been prepared by me after the meeting of the twenty-fifth and before the meeting of the twenty-eighth and I think had already been signed and was deposited with the Title Company."

The certificates were to be turned over to Mr. Ewing "for the balance due on these ten contracts". There seems to be no dispute that all this was done prior to the reconvening of the directors' meeting at 3 p. m. at which time Montgomery, one of the directors, resigned and two representatives of the creditor banks were at the demand of the banks elected to the board. The minutes of the meeting as so reconvened at 3 p. m. of September 28th contain no men-

tion of the Ewing contract nor of any settlement with Mrs. Reinert, nor is it claimed that anything was then said to the two new directors about any of these matters.

Mrs. Reinert was not present at the trial but her deposition taken at Santa Barbara was read in evidence. She testified that she did not personally talk with Jackson about any investment in the Company about the year 1927 but that, together with her husband, she did subsequently have conversations at various places with him on the subject. No one else was present. Asked for details she said:

"I am afraid I couldn't go into it very much because my husband handled those things and I just listened and I couldn't tell just exactly what was said because it has just been at different times."

According to her testimony she does remember that shortly after she and her husband came to California (which she says was in 1927) there was some talk about an investment in "mortgages and certificates". She says it was her money, not her husband's, that was involved. Her husband explained it but she doesn't know much about it. "I trusted him and let him look after things." She thinks that she probably saw some mortgage certificates but "don't know if I just remember them exactly." She does not know when she saw them. She has access to her safety box at Paso Robles but doesn't go through it. She is not very inquisitive. She has seen these mortgages or certificates in her box but never examined them. She doesn't know whether she ever had any conversation with Jackson in the year 1931 about the state of her account with the company. She cannot say whether anything gave her any concern that year about her account. The certificates are not in her box now because she gave her husband permission to put them up for some money at the County Bank at Santa Barbara. He explained the transaction but she has forgotten the amount. She never saw a copy of her account with the Company but left that up to her husband. She doesn't know how much she had invested in the mortgage securities but it was \$55,000 or \$60,000. No explanation was ever made to her that she was loaning money to the Associated Almond Growers through the Company. Her money went into certificates. She has been married eighteen years. When she was married her husband was in the hotel business in Chicago and had been for several

years. Before that she says that she had been employed as secretary in an insurance office in Denver on a commission and salary and really had charge of the office and earned from \$125 to \$150 a month. Her husband had previous to their marriage been engaged in the brokerage business, selling stocks and bonds in Chicago. She had accumulated \$2,000 or \$3,000 of her own. Just before they came to California she had been made for \$200,000 of a hotel in which her husband had a half interest and "that was mine so I had close on to \$100,000. * * * I put my money into it and that was mine. He gave it to me." He had an interest in three hotels. She doesn't know whether her husband ever invested any of her money in the Associated Almond Growers, but does know that what came out of the hotel sale was not so invested. Her husband "has always taken care of those things for me". She thinks he may have her power of attorney. Her money was deposited in the Drexel State Bank at Chicago. She may or may not have drawn a check transferring it to California. She doesn't remember. She may have drawn checks for investment in bonds and other securities while her account was still in Chicago but she doesn't remember. She has burned up such records as she had of those things. She must have made some transfer of securities to invest funds in the Company but her husband attended to all that for her. She just remembers in a vague way that it was done. She does not remember that \$50,000 or \$60,000 was put in at any one transaction. As far as she knows \$10,000 may have been put in at one time and \$10,000 at another. She does know that Duncan P. Jackson holds her power of attorney. Her husband presented this power of attorney for her to sign. She does not know when it was signed or what has been done under it. She only knows that her husband told her it was to enable him to look after the certificates at Santa Barbara. She guesses that this power of attorney is still outstanding. She doesn't think she has any cancelled checks showing the investment of her funds in the Company. After a few years she got rid of her cancelled checks.

There is a good deal more testimony of like character in Mrs. Reinert's deposition but what we have thus summarized is typical of it all. She does not claim to have known anything specifically about what occurred in September, 1931.

Her husband, Nels A. Reinert, who ought, according to the evidence, to know intimately the details regarding her investments was not produced in her behalf or at all as a witness, nor does his absence appear to be accounted for.

William S. Porter, who as we saw, was an officer of the Depositary and a former president of the Mortgage Company and continued to be one of its directors, attended the meeting held on September 28, 1931. He testified at length at the trial. He knows nothing about the alleged informal directors' meeting of September 25, 1931, for when asked whether there had been any conversation between him and Mr. Jackson or any of the other directors mentioned in the record of the meeting of September 28th his answer was:

"No, not that I remember of except that I think I was asked to come because there were important matters that they wanted to discuss."

Asked about what actually transpired at the meeting of September 28, 1931, his recollection is that the discussion centered about the moneys due to the bank and the impossibility of raising the funds necessary to satisfy them. His testimony includes the following:

"Q. Was any reference made to a lady by the name of Jane V. Reinert? A. No, not that I know of.

"Q. No reference was made at that meeting to Jane V. Reinert? A. Not that I remember of.

"Q. Was any reference made at that meeting to the husband of Mrs. Jane V. Reinert? A. No, not that I remember of.

"Q. Did you have any discussion with Mr. Jackson at any time before the meeting either on the day of the meeting or any day preceding the meeting about an indebtedness of the Mortgage Securities to Jane V. Reinert? A. I wouldn't try to fix the date, but on occasions preceding this Mr. Jackson had told me that, from time to time—I thought he said the Associated Almond Growers, he may have said Reinert—had deposited funds with the Mortgage Securities which I understood were funds deposited at certain seasons when they were not necessary to the conduct of the Almond Growers' business, and that he was able to get them to make these deposits with the Mortgage Company for the use of the Mortgage Company during those periods.

"Q. What use did he tell you the Mortgage Company was making of these deposits? A. I wouldn't try to quote him, but I got the impression from what he told me that the funds would be used as an advance to the Mortgage Company in any way he chose to use them. He was at that time in charge of the Company's affairs."

He further testified as follows:

"Q. I will ask you if you have any recollection whether Mr. Jackson explained whether this money was being loaned to the Mortgage Securities by the Almond Growers Association or merely placed on deposit to be loaned for the account of the Almond Growers Association? A. My recollection is that the money was paid in to the Company and treated as an advance by the people, whether it was the Associated Almond Growers or the Reinerts, and Mr. Jackson was to determine how it was to be used.

"Q. Had you ever heard of Jane V. Reinert before you left here in 1928? A. Yes. * * * I learned it shortly after Mr. Jackson had taken charge of the company. I won't try to fix it by years."

Asked again whether at the directors' meeting of September 28, 1931, any reference was made to Jane V. Reinert or with reference to the issue of certificates to her, he proceeded:

"A. I don't recall any reference being made.

"Q. When did you first learn that certificates had been issued to Jane V. Reinert, and the certificates I am referring to are the certificates issued on or about September 28, 1931. A. Some weeks after they had been authenticated."

* * * * *

"Q. How many weeks after the meeting at Santa Barbara did you learn that fact? A. I learned it, I would say, between one or three weeks after the certificates were authenticated at the office.

"Q. At this directors' meeting on September 28th, 1931, in Santa Barbara was there any discussion of any indebtedness owing at that time and unpaid to the Associated Almond Growers of Paso Robles by the Mortgage Securities? A. I can't say. Undoubtedly we went over the entire ledger cards, and if those were there, then of course we seen them.

"Q. Did Mr. Jackson make any explanation as to why or how those ten accounts appeared in that group? A. No sir."

Referring to a visit made by him as an officer of the Depositary to Santa Barbara at some time subsequent to September 28, 1931, he testified:

"A. * * * I had previously some weeks prior to September 28, had given definite instructions to Mr. Barnard, then in charge of the Security office, under no circumstances should any more certificates be authenticated by the title company without referring them to the head office, and upon my return to Santa Barbara, I asked if that order had been followed out and Mr. Barnard told me it had, and upon further pressing him, he said, 'I will get the book and show you'. And upon getting the books I found that they had been authenticated, and Mr. Barnard explained that they had been authenticated without his knowledge, and by the assistant secretary.

"By the Court: Without whose knowledge? A. Mr. Barnard's knowledge.

"By Mr. Rogers: What was that last? A. Mr. Barnard explained that they had been issued without his knowledge and by the assistant secretary, Miss McGaw, during the noon hour.

"Q. While Mr. Barnard was absent? A. During the noon hour, or at least, I understood during his absence."

He learned of the deposit of the Ewing contract at the same time that he learned of the authentication of the Reinert certificates.

Porter testified that he never personally participated in any transactions either with the Almond Growers or with Mrs. Reinert.

The only other testimony as to whether or not the proposition to issue mortgage certificates or turn over any assets to Mrs. Reinert was discussed at either the alleged informal meeting of the company's directors on September 25, 1931, or at their formal meeting on the morning of September 28, 1931, is that of Mr. Soule, who had at a former time been secretary and was still a director of the company. He thinks that there were two or three meetings in September, 1931, at which Jackson, Porter, himself, and he thinks director Montgomery were present, at which he says that the issuance of certificates to Jane V. Reinert was discussed in Mr. Porter's presence and her deposit of moneys with the company mentioned. He thinks that the matter came up again at the meeting of September 28, 1931, and that the Ewing contract "was presented at that meeting and was entered

into by the Board of Directors". The effect of his testimony is that at this meeting the issuance of the mortgage certificates to Mrs. Reinert was authorized. With reference to this meeting of September 28th he testified further as follows:

"Q. Will you relate the statements made relative to that contract, the Ewing contract? A. As near as I can remember, Mr. Jackson reported that the different parcels of land which had been previously discussed in reference to the Ewing contract had been gone over and that the actual form of the contract itself had been assembled and was ready to be executed. He either said it had been executed or was about to be executed or was to be executed, I don't know.

"Q. Was Mr. Porter present at that time? A. He was."

Jackson testified that D. W. Montgomery, who, until his resignation on the afternoon of September 28th, was a director and who at that time was secretary of the corporation, carried the Reinert certificates over to the Depositary and had them authenticated, and the record shows that Montgomery in his capacity as secretary joined on that day in the execution of the assignment to the Depositary of the Ewing contract. Montgomery, however, is dead, so that the trial court did not have the benefit of his testimony about what action was or was not taken by the board in connection with these matters.

Whether or not, in actual truth, anything was ever said about this Reinert settlement or about the Ewing transaction at either the board meeting of September 28th or at any previous meeting, formal or informal, it is at least certain that all mention of these matters was omitted from the minutes and that no resolution or vote upon them by the board of directors is of record. There was a fifth director of the corporation prior to the reorganization of the board on the afternoon of September 28th, one Guy Sawyer, who was not present on the morning of September 28th and apparently not present at any other meeting or conference of the directors in that month.

[1-4] In proceeding, then, to deal with Mrs. Reinert's claim that the evidence does not support the findings, it will be convenient to first discuss those findings that we have quoted in extenso. Referring to the above quoted finding 17, it is beyond dispute that the Company was, in and for

some time prior to September, 1931, *insolvent* in the sense of being unable to pay its debts as they became payable. *Washburn v. Huntington*, 78 Cal. 573, 21 P. 305; *Sacry v. Lobree*, 84 Cal. 41, 48, 23 P. 1088; *In re Ramazzina*, 110 Cal. 488, 42 P. 970. It could not, with only some \$28,000 on hand in money, meet the \$80,000 presently due the two Santa Barbara banks, not to speak of its other unsecured creditors, as is fully acknowledged in its minutes of September 28, 1931. Even if it had nonliquid assets that at a fair valuation ought to have largely exceeded its liabilities it had no assurance that it would not be required to sacrifice them for a small part of their nominal value. The court did not find that it was bankrupt but that it was in "imminent danger of bankruptcy." We think this finding justified. The finding, indeed, goes too far in saying that the Company was then unable to pay "any part" of its debts, but this statement is unimportant for nobody claims that it could then have paid even the greater part of those with which it was at the time confronted. The trial court evidently believed that some sort of a directors' conference occurred on September 25th at which this situation was discussed. While Porter seems to remember no conference as having occurred on that day there was evidence which might reasonably have led the court to believe that such a conference did occur at which there was a general discussion of the Company's indebtedness. We note that this finding 17 at a later point asserts that Jackson obtained Ewing's execution of his contract to buy the nineteen parcels of the Company's land "without notice to any of the other officers or directors of the Company". The contract bears date September 26. The only documentary evidence connecting any officer of the Company other than Jackson with the transaction is Montgomery's signature as secretary on the assignment of this Ewing contract to the Depositary, together with the fact that Montgomery also attested for the Company the mortgage certificates in controversy, and, as to that assignment we notice that it is not written or typed on the contract itself but carried as a rider, now attached to the contract by wire staples, which in itself would do as well for an assignment of any other security. It bears date September 28. Just what were the circumstances under which he attested the certificates, and under which he signed this rider or how it came to be attached to the contract, we cannot know from Mont-

gomery's lips. The trial court was not obliged to believe Jackson's statement that Montgomery was the one who carried the Ewing contract with the assignment over to the Depositary and obtained its authentication of the Reinert certificates. As to whether the Reinert and Ewing transactions were ever mentioned in the conference of September 25 or the meeting of directors on the morning of September 28 there is a conflict of evidence. Jackson and Soule say that they were and Porter says that he heard nothing of them until later. The trial court was at liberty to believe Porter's account and disbelieve those of Soule and Jackson. Although the finding that Jackson's maneuvers in connection with these matters were without notice to the Company's other officers and directors is pretty sweeping, then, we cannot say that it is without support in the evidence. Even though it were conceded, however, that Soule and Montgomery were fully cognizant at the time of what was going on and participated therein, that would not amount to any actual authorization of this transaction by the board of directors in its capacity as such, nor have the same effect, and in view of the silence of the minutes on the subject and of Porter's testimony that no such action was taken, we think the trial court entirely justified in believing that to be the truth. While the corporate seal on the assignment, attached as a rider to the Ewing contract, affords some evidence that such assignment was executed by competent authority, it is not conclusive proof thereof and the trial court was, in the circumstances, entirely justified in regarding its presence as of small importance. Outside of the features of finding 17, above discussed, we find nothing in it that the evidence does not fully support.

[5] Assuming, once more, that the trial court believed Porter's account to the effect that the transactions just discussed were never mentioned at directors' conferences or meetings, as against the testimony of Jackson and Soule that they were, we can find nothing in the finding 18 hereinbefore set out which is not sustained by at least some evidence in the record.

We find nothing even disputable about the determinations made in the above quoted finding 19, other than what is therein said to the effect that there was no reference to Mrs. Reinert or the transactions pending with her, or yet to the Ewing arrangement, at either the conference

of the Company's directors on September 25, 1931, or at their meeting on the morning of September 28. There again it is simply a case of the trial court's having believed Porter rather than Jackson and Soule and we cannot say that it was wrong in so doing.

[6] The above quoted finding 20 appears to us to be in every respect sustained by the evidence, nor do we find any fault with the characterization of the ten accounts therein referred to as "uncertain". Except as hereinbefore stated the source of the moneys deposited under them with the Company does not appear in them, and could not be ascertained from any examination of them.

[7] Finding 21 is not entirely correct, in that the evidence does show that there had been a former transaction on the Company's part with Mrs. Reinert involving an item of \$5,000 not mentioned therein whereby she bought a trust deed from the Company, but that has no connection at all with the present controversy and the omission of any mention of it is unimportant. Otherwise the finding, so far as it relates to the Company's books and records, is right. Except for the said \$5,000 transaction and the \$2,000 transaction referred to in the finding there appears to have been no mention therein of Mrs. Reinert prior to September 28, 1931. If those two transactions are left out of account the correctness of the finding, which negatives generally the purchase by Mrs. Reinert from the Company of any mortgages, deeds of trust, or mortgage certificates, except as specified, or her payment therefor, is, of course, dependent, at least in part, upon the correctness of the trial court's view that the money in the ten accounts that figure so largely in the discussion was not her money, and that Jackson's testimony as well as such account as she undertook to herself give of the matters are unworthy of credence. This, so far as her appeal is concerned, goes to the gist of the case. We think the trial court entirely justified in its view of the matter. Though it is claimed that Mrs. Reinert's funds were deposited with the Company in sums both large and small, pretty continuously from 1927 on until September of 1931, not a returned check, draft, voucher or scrap of paper of any sort has been produced to substantiate Jackson's account of what was done or her own vague statements about it or to show that she ever

advanced or deposited a cent. Neither did any bookkeeper or clerk in the Company's employ at any of those times testify to ever handling any particular one of her remittances or shed any sort of light upon the form in which they came; and this is true notwithstanding that Duncan P. Jackson, who, as we saw, is Fred D. Jackson's son, is shown during some months prior to September, 1931, to have handled the Company's bookkeeping and notwithstanding that during the same period he had Mrs. Reinert's power of attorney. During this whole period Mrs. Reinert's name is omitted from each and all of the ten accounts in question on the Company's books, and if it be assumed that the money was hers there is no reasonable explanation given for the omission. Two of the accounts are, without any apparent necessity for it, kept in fictitious names. Mrs. Reinert's husband, though said to be the person who made these extensive deposits for her and the one who, if her account were true, ought to have been able to supply all the details, appears from the record to be a resident of the county adjacent to that in which the trial occurred and despite the size of his wife's claims involved and the long time that the case was pending and repeated continuances of the trial itself, he was not produced to testify in her behalf. Neither was his deposition taken, and the trial court was left to draw its own deductions from his unexplained absence. Nobody in the Company except Jackson claims to know any of the particulars about Mrs. Reinert's deposits and his testimony, voluminous though it be, is, as to the exact form in which they were received, very far from circumstantial. No explanation is offered for the circumstance that, though the Reinerts were themselves interested in the Associated Almond Growers and Mr. Reinert was vice-president of that concern, either he or Mrs. Reinert should, instead of loaning money to it directly at such interest as they might think proper, have preferred to deposit the money with the Company, to be loaned by it to the Almond Growers at 12 per cent per annum, while it credited Mrs. Reinert's deposits with only 7 per cent. It does not appear that between 1927 and September 1931 any accounting was made by the Company to Mrs. Reinert or any interest on her alleged deposits actually paid to her or to anyone else, and though it appears that \$19,515.40 in the aggregate was credited during this period as interest

to the ten accounts referred to, it does not appear that she ever really drew a cent of that. The evidence shows without conflict that, after the transactions of September 28, 1931, Jackson procured from Mrs. Reinert a paper purporting to authorize him to pledge and that he actually pledged the certificates issued in her name to a bank for an old debt of his own. Respondents suggest that, during the latter part, at least, of the period involved, the Company sustained a heavy operating loss, as shown by the audit known in the record as exhibit 23. The evidence, of course, does not trace any connection, if any there be, between such loss and the sums deposited in the ten accounts under discussion. Certainly, however, the combination of circumstances that we have recited did impress, and could hardly have done otherwise than to impress the trial court as needing explanation when coupled with Fred D. Jackson's feverish anxiety in September of 1931 to carry through the transactions that were consummated on September 28th of that year.

Jackson testified vaguely that his own interest (by which we take it that he meant the interest held by himself and his wife) in the fictitiously named Jones account had been segregated, that is, set apart from any interest therein that may have been attributed to Mrs. Reinert. He could not give the details, nor is it made to appear how, or to what extent such segregation affected the amounts of the allotments made on September 28th to Mrs. Reinert based on the net balance shown on that date in the ten accounts. Jackson says that he "drew some cash" and that "my interest was pretty well wiped out if not entirely". The credit balance in the Jones account having been \$19,374.80, the trial court may well have inferred that the cash he drew accounted, to practically that extent, for the disbursements made on that day out of the \$28,000 shown to have been on hand when the day started. Jackson testified also that according to his belief Mrs. Reinert had not been interested in the Alice P. Jackson account, in which the credit balance as of September 28th was \$35,004.68, but that the account belonged to his wife and that her interests therein were conserved by her retention of an interest in the mortgages (not mortgage certificates) in form assigned by the Company on September 28th to Mrs. Reinert. It is at least apparent from this testimony that

neither the cancellation of any interest not belonging to Mrs. Reinert herself in the Jones account, nor yet any cancellation of the Alice P. Jackson account could have provided any part of the consideration for the issuance of the mortgage certificates here in litigation.

There can, of course, be no question that a great number of deposits aggregating very large sums were from time to time actually made in cash or its equivalent in various banks at Santa Barbara to the credit of the Company and carried by it in the ten accounts under discussion, nor is there any doubt that the net balances payable to whoever may have been beneficially interested in these accounts, according to the company's books, amounted immediately prior to the transactions of September 28, 1931, to the above stated sum of \$133,770.50, though the Company was, of course, in no position to pay any such balance in money. It is not incumbent on this court to resolve the mystery as to who made those deposits or to whom the credit balance of \$133,770.50 belonged. We do now hold that the circumstances recited, with such inferences as might fairly be drawn from them, were enough to justify the trial court in believing that Mrs. Reinert did not furnish the money so deposited and was not entitled to any part of the said credit balances, and that, therefore, there was no consideration *emanating from her*, for the mortgage certificates issued in her name involved in the present litigation. Insofar, therefore, as the said finding 21 determines that she did not pay for those certificates it must be sustained. We also think that it must be sustained in its determination that she did not *purchase* them (otherwise than by subsequently ratifying what Fred D. Jackson undertook to do). True, Fred D. Jackson testified that he communicated with her on the subject on September 28th by telephone but she in her deposition disclaims any recollection of such a telephone conversation. The court had the right to believe that the whole transaction was initiated and carried out without any previous authority from her by Fred D. Jackson with the assistance of any others connected with the Company or the Depository who may have been induced by him to participate in it. True, Duncan P. Jackson held Mrs. Reinert's power of attorney but there is no evidence that he acted in this connection for her under it.

[8-11] We think that the evidence sufficiently supports the finding numbered 22 which we have quoted except for its omission of any reference to Mrs. Reinert's \$5,000 trust deed purchase, which is immaterial in the present litigation. It also supports the above quoted finding 23. We hold also, upon grounds already stated that it supports the above quoted finding 24 in its entirety. This indeed goes further than the finding 22 hereinbefore discussed, in that it determines not only that Mrs. Reinert paid no consideration for the mortgage certificates referred to but that they were issued without any consideration at all. True the mere existence of such writings in the hands of others than the corporation issuing them is some evidence of a consideration but such evidence is not conclusive nor was the trial court bound to accept it. So far as any pretense is concerned that there was other consideration for their issuance than the cancellation of such interest in those ten accounts as Mrs. Reinert claims to have owned, it is without substance, since, as has just been seen, no interest which, according to Jackson, either he or his wife had in the Jones and Alice P. Jackson accounts entered into such consideration. Both Fred D. Jackson and Alice P. Jackson have, indeed, made a record disclaimer in the instant case of any interest in the certificates issued to Mrs. Reinert, but that does not mean or tend to show that any interest which they admit having had in any of the accounts discussed made up any part of such consideration. On being asked whether there was any writing transferring the ten accounts to Mrs. Reinert, Fred D. Jackson testified, "There was not at the time. In January of 1932 such a writing was presented to the Mortgage Company." That, of course, was long after the discussion under review occurred, and the paper referred to was not produced, nor is it apparent what consideration it could have furnished for the mortgage certificates in litigation even if it be believed to have existed.

It is true, of course, that if anybody proved to have owned these ten accounts or any part of them shown to have been treated as any part of the consideration for the mortgage certificates issued to Mrs. Reinert, has assigned them to her, then the cancellation of such accounts or parts thereof might be regarded as actually amounting to such consideration. But the trial court did not believe that the accounts originally belonged to Mrs. Reinert, and it was justi-

fied for the reasons above stated in believing that such interest as the Jacksons legitimately held in them, whether in name transferred to Mrs. Reinert or not, formed no part of the consideration for the certificates. If, however, it be said, as indeed it must be, that the accounts belonged to somebody, then if Mrs. Reinert was not that somebody, no connection appears between the actual owner or owners and Mrs. Reinert. We need not follow respondents' counsel in their intimations that the bulk of the credits in these accounts really belonged to the Company itself or that Fred D. Jackson was seeking personally to profit in some way from them. All we need say is that apart from the limited interest that the Jacksons admit having had in two of them we do not know, neither can we determine from the present record, nor need we determine in disposing of Mrs. Reinert's appeal, who other than she did own them.

[12-14] So far as the Ewing contract was concerned it is manifest that it was a mere sham and entirely apart from the circumstance that the Indenture and Permit did not authorize the use of executory contracts of sale as collateral, that it could have afforded no actual consideration whatever justifying the authentication of the Reinert certificates here involved. We therefore hold that the evidence supports the above quoted finding 25, and for reasons hereinbefore sufficiently stated that it supports the above quoted finding 26. Counsel for appellant complain very bitterly of the characterization of Fred D. Jackson in this finding 26 as Mrs. Reinert's agent, upon which we suppose respondents' counsel have insisted in order to charge her with knowing what Jackson knew about the Company's financial condition. We think it is true that there is nothing in the evidence to show that Mrs. Reinert ever in truth authorized him in advance to act for her. Nevertheless he did, in September of 1931, to all intents and purposes assume to do so, and, since she now adopts and relies upon what he did, her whole conduct in connection with the certificates issued to her and with the current litigation, is in substance and effect a ratification of his agency for her. Civ.Code, sec. 2307; *Brown v. Rouse*, 104 Cal. 672, 38 P. 507; *B & W Engineering Co. v. Beam*, 23 Cal. App. 164, 137 P. 624, and as such relates back to the time when he undertook to act in her behalf. *Taylor v. Robinson*, 14 Cal. 396; *Wittenbrock v. Bellmer*, 57 Cal.

12; Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 P. 225.

[15,16] The Indenture, of course, did not contemplate that the proceeds of any particular part of the securities assigned to the Depositary should be allocated to the payment of any particular mortgage certificate or mortgage certificates. Until such time, therefore, as the mortgage certificates issued on September 28, 1931, to Jane V. Reinert should be cancelled or eliminated from the list of certificates treated as valid, it is clear that the deposit as part of the collateral necessary to make up the aggregate required to permit such Reinert certificates to be added to the other certificates previously issued and authenticated, of any such mere sham as the Ewing contract tended to prejudice the rights of all prior certificate holders. For that reason we hold the above quoted finding 27 justified and for reasons already sufficiently stated we hold the above quoted finding 28 to have been also justified.

An attack is made upon various findings, including those numbered by the trial court 8, 10, 16, 39 and 40, which we do not take the space to quote, insofar as their net effect is to determine that the company's outstanding certificates, other than those issued to Mrs. Reinert, were sold and issued for cash paid to the company, in the amount of their respective par values, at the dates when they were respectively issued. It must be conceded that in respect to the consideration for certain of these certificates the court's findings are not literally correct. For reasons that we shall hereinafter discuss we do not regard this inaccuracy as of serious importance.

Complaint is also made of a finding (numbered 7) insofar as it determines that from the time of the organization of the Company until February 11, 1930, W. S. Porter and Fred D. Jackson dominated and controlled the said Company, its business and affairs, and that from February 11, 1930, until January 8, 1934, the said Fred D. Jackson dominated and controlled the company. Reference has already been made to the circumstance that Porter and Jackson successively occupied the office of president of the Company. There is no dispute that each acted successively also as its manager. There is no dispute that they owned all of its common stock. We think it tolerably clear, therefore, that regardless of the fact that there were other directors, they substantially controlled its policies until Porter

left Santa Barbara for Los Angeles, and that Jackson was mainly active in their control thereafter and up to the time of the reorganization of the Board of Directors on the afternoon of September 28, 1931. We do not mean by this that the other directors were excluded from participating in its affairs but merely that Porter and Jackson appear successively to have been mainly active in its management. That Jackson, during the latter part of this time, took upon himself much of the responsibility for what was done, is, among other things, shown by his management of the very ten accounts with which we have been here concerned. Nobody else connected with the Company seems to have been able to give much information about these notwithstanding the unusually large amounts of money involved. It is true that after the reorganization of September 28, 1931, there were representatives of the two banks on the board and it may be assumed that they participated in shaping the Company's action so far as they deemed such participation beneficial to the special interests represented by them. We do not know, however, that the evidence shows that their interest in the Company extended beyond that. Altogether then we think that to the extent this finding is material it is not unsupported by evidence in the record.

We have not undertaken to deal in detail with all of the trial court's findings nor to discuss all of the strictures upon them made by Mrs. Reinert's counsel. Undoubtedly there are various overstatements and inaccuracies in them. None of these, however, appear to us to be of such importance as to affect the result of the case. We therefore proceed to discuss certain propositions of law advanced in Mrs. Reinert's behalf.

It is claimed that no consideration was required or necessary for the issuance of the Reinert certificates by the Company, otherwise, at least, than as such requirement was made by the commissioner's permit, and that such lack of consideration cannot, of itself, establish the invalidity of such certificates without a further showing of fraud, duress or mistake. The argument in support of this somewhat startling suggestion is that the mortgage certificates "do not constitute promissory notes or bonds of any kind", but amount to "nothing more than a sale of individual interests in the securities on deposit with the Depositary with the promise or option of repurchase by the Company"; that the arrangement for

their issuance is an executed one and that, therefore, there is applicable to it section 1040 of the Civil Code providing that:

"A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general; *except that a consideration is not necessary to its validity.*" (Italics those of appellant's counsel.)

[17] We agree with respondents that this statutory provision is inapplicable. It cannot, of course, be doubted that the certificates were intended to represent sales to the holders named therein of the right to participate pro rata in the security afforded by the arrangement for the aggregate total of their investments. It is equally certain that none of them acquired any interest in specific notes, mortgages or deeds of trust in the hands of the Depositary. Their interest was rather in an abstraction, that is a *fund*, represented by whatever notes, mortgages or deeds of trust might be on deposit at any particular time, there being no limit to the number of changes permitted or in the number of units making up this deposit. Their sole security consisted at all times in the *obligation* of the Company to keep an adequate total of proper notes, mortgages and deeds of trust on deposit and the reciprocal *obligation* of the Depositary to require it to do so. So long as the Company was not in default, the notes, mortgages and deeds of trust making up the corpus of the deposit were entirely beyond their reach, the payment of the interest on their investment was purely an obligation of the Company and they could recoup their principal only by calling on the Company to repay it, though such recoupment is in form described as a repurchase, by the Company, of their interest in the securities. In the event of the Company's default their only recourse was to insist on a liquidation of the securities through the Depositary amounting in practical effect to a foreclosure. Looking through matters of mere verbiage, we think, then, that what the certificate holders purchased was primarily the Company's obligation to pay them the interest on their investments and to ultimately repay the principal thereof, and secondarily the obligation of the Depositary, in the event the Company should default, to proceed to liquidate the securities and to pay them their pro rata shares of the proceeds up to the amounts necessary to satisfy what should be due them. Substantially then, the mortgage certificate represented those two obligations rather than

any true assignment of property and the transaction evidenced by it is not within the purview of the code section. We have, thus far, not considered, in this connection, the requirements of the commissioner's permit which were, of course, in the issuance of the Reinert certificates, flagrantly disregarded.

[18, 19] The next proposition insisted on is that the Company cannot lawfully question the validity of Mrs. Reinert's certificates on the ground of lack of consideration or on any other ground, and that evidence was inadmissible on behalf of the Company in attempting to attack the validity of the certificates. The argument under this head is, briefly, that in spite of numerous fraud charges made by the complaint against the Company and against Jackson, it makes none specifically against Mrs. Reinert, that it is the law that recitals between the parties to an investment, of a consideration, may not for the purpose of avoiding their legal effect be contradicted except on grounds of fraud or duress, and that therefore evidence was wholly inadmissible in any effort to show that there was no consideration for the certificates. Citing such cases as Winchester v. Winchester, 175 Cal. 391, 165 P. 965, and Arnold v. Arnold, 137 Cal. 291, 70 P. 23. The obvious answer is that, even though Mrs. Reinert may not be charged with being initially a party to the fraud, as in fact she very probably was not, since it is likely that she knew nothing about the transactions of September, 1931, until after they had occurred, yet she has, since their consummation sought, and still, by her pleadings and position seeks actively to take advantage of them and by doing so to profit from whatever frauds were committed, which is tantamount to a ratification of them. Goldsmith v. Koopman, 2 Cir., 152 F. 173; 27 C.J., pp. 11, 12, and cases cited under note 86. The further claim that though those transactions were fraudulent the Company is, in consequence of its complicity, *particeps criminis* and, therefore, in no position to complain of them, would carry with it more plausibility if any authority from the board of directors, in its capacity as such, for what was done were established, but since on evidence that was conflicting the court has found in effect that there was no such authority given but that what was done was the mere fraudulent act of an executive officer, we see no reason why the Company should be precluded from seeking relief, especially as

Mrs. Reinert is in no position to claim any estoppel in pais in her favor.

[20] Equally without merit is the claim that the plaintiffs-respondents are without standing to attack the Reinert certificates. The Reinert brief concedes that they might do so, were they able to found such an attack "*on the ground that the Company had no interest in the security on deposit with the Depositary to convey under the Reinert certificates at the time of their issuance and has subsequently acquired no interest in such securities which would come under the operation of the conveyance in the Reinert certificates*". Apparently the point sought to be made is that such respondents, at the time they commenced their action, were not parties to the certificates, were not judgment creditors of the Company (12 Cal.Jur. 74, note 10) whose right to be satisfied out of any specific property of the Company of their debtor was being delayed or obstructed by the existence of the Reinert certificates, and, therefore, had not, under authority of section 3441 of the Civil Code, any right of action to set aside such certificates as fraudulent conveyances; that they were in no proper sense general creditors of the Company, or persons upon whom the estate of the Company devolves in trust, so as to give them right of action to set aside the Reinert certificates under either section 3439, section 3440 or section 3442 of the same code, and, therefore, not entitled under these enactments to set aside the said certificates as transfers made with intent to delay or defraud creditors; and that they could not, of course, attack the certificates under section 1227 of that code since the certificates were not real estate. Plaintiffs-respondents were not, of course, at the time they commenced their action, judgment creditors of the Company, and it may, moreover, be true that they have not brought themselves within the provisions of sections 3439 and 3442 of the Civil Code on any theory that the Ewing transaction tended to impair the Company's ability to pay the interest from time to time accruing on their certificates or to carry out its obligation to redeem the certificates themselves when required to do so, inasmuch as their recourse, in the event of such default was, under the terms of the Indenture, to be to the securities then in the hands of the Depositary. We think, however, that the Reinert brief misconceives the gist of the complaint that these other certificate own-

ers make. It is that the fund that they were entitled to look to for their security was, by the transactions complained of, adversely affected in two ways: first, by admitting Mrs. Reinert in the event of a default to participation in all of the securities, good and bad, in the hands of the Depositary and thereby reducing their own proportion of what would be realized from the good securities in the event of a liquidation; and, secondly, by diluting through the deposit of the fictitious Ewing contract the fund in the Depositary's hands so as greatly to increase its content of nonliquid assets to the detriment of the certificate holders generally in the event of such liquidation. We hold, therefore, that the property rights of plaintiffs-respondents as certificate holders were clearly infringed by the tortuous conduct of Fred D. Jackson and whoever else participated with him in bringing about the deposit of this Ewing contract and the issuance and authentication of the Reinert certificates; that Mrs. Reinert having ratified these transactions has become to all intent and purposes a party to them; that the Company having defaulted in its obligations to the certificate holders generally, the existence of the certificates improperly, and as the trial court has found fraudulently, issued to her, is an impediment to the resort by the other certificate holders to the securities lawfully in the hands of the Depositary when the default occurred, and that having no adequate remedy at law, such other certificate owners have rightfully sued in equity to have these Reinert certificates canceled.

Recurring, now, to the corporation commissioner's permit, it is to be noted that it permitted the mortgage certificates to be issued "at par for cash, lawful money of the United States, so as to net the applicant the full amount of the selling price thereof", also that the same might be authenticated, issued and sold only in accordance with the terms and provisions of the Indenture, and that these requirements have been disregarded and violated in the following particulars:

That the Reinert certificates were not sold for cash, in lawful money of the United States, but that the alleged consideration for them was the cancellation of accounts claimed to represent balances due Mrs. Reinert from the Company in consequence of its handling of her funds through a period of four years more or

less, and that the trial court has on sufficient evidence found that these accounts were not the property of Mrs. Reinert;

That whereas the Indenture required the assignment to the Depositary of notes secured by *mortgages* and *deeds of trust*, accompanied by guarantees, abstracts or policies of title insurance showing them to be *first liens* upon the properties therein described, aggregating not less than 110 per cent of the total amount of mortgage certificates at any time outstanding, and that mortgage certificates should only issue when accompanied by the Depositary's authentication certifying, among other things, that these conditions had been complied with, even prior to the time the Reinert certificates issued the Company had persistently failed to live up to that requirement in that, although it commonly kept in the hands of the Depositary assets of an aggregate par value of more than 110 per cent of the certificates outstanding, yet at all times after its issue back in 1925 of the first certificate its deposits of collateral were made up in large part of executory contracts of sale, which were not securities permitted by the Indenture, but without which the aggregate of securities deposited would at practically all times have been less than the 110 per cent requirement;

That the situation last described would have been aggravated by the deposit of the Ewing contract and the concurrent issuance of the Reinert certificates, even had the Ewing contract been genuine, since after that transaction had been consummated the aggregate of certificates outstanding amounted to \$169,207.45, which, with the 10 per cent addition, required a deposit of collateral aggregating \$189,706.25, of which only \$88,180.15 was then actually represented by first trust deeds, no less than \$101,271.10 being represented, in violation of the Indenture and permit, by executory contracts of sale, and \$255 by second trust deeds or second contracts;

That not only was this result on its face irregular, but the fact was that the Ewing contract of sale was only a simulacrum, made in bad faith, never intended to be carried out, and unenforceable otherwise than by recouping the land described in it;

That even the subsequent attempt of the Depositary to protect its holding of collateral by obtaining the Company's notes secured by its own deed of trust on the same property affected by the Ewing contract, failed to result in any regularization

of the situation, since the first mortgages and deeds of trust which the Indenture contemplated should be assigned by the Company to the Depositary were patently not to be the Company's own obligations but obligations *held* by it and so capable of *assignment* as collateral, for the performance of its obligations to the certificate holders.

The record shows, also, that the Indenture was further violated in connection with the deposit of the Ewing contract in that no pretense was made of furnishing the Depositary with any evidence of the state of the title to the lands affected; and it further appears that the appraisal of this property furnished, instead of being made by an entirely disinterested party was made by an appraiser who was himself indebted to the Company and therefore under obligation to it.

[21] The date of the corporation commissioner's permit was January 24, 1925. At that time there was in effect the Corporate Securities Act of 1917, St.1917, p. 673, which provided in section 12 that corporate securities issued without a permit or in violation of a permit are void; in section 13 that any company issuing securities contrary to or in nonconformity with the act or applying the proceeds of sales thereof otherwise than in accordance with the permit authorizing the issue is guilty of a public offense; and, in section 14 making criminal the act of any officer, agent or employee of a company or any other person authorizing, directing or aiding in such issue. Certain amendments to this act were made by the legislature of 1931 effective on August 14 of that year. Under sections 17 and 18 of the act, as so amended, St. 1931, p. 950, in lieu of the said *former* provisions of sections 12 and 13 the issue or sale of securities contrary to the provisions of the act or in nonconformity with permits issued thereunder, by a company or any officer, agent or employee thereof continued to be a criminal offense. Among changes made by this amending statute was the deletion of *former* language of section 12 making wholly void securities issued in violation of the act or in nonconformity with the permit issued. A new provision in section 16 makes such irregularly issued securities voidable at the option of the holder or purchaser thereof unless the commissioner within 60 days after notice of the irregularity shall issue a subsequent permit legitimatizing them, but providing

that, in case he does so, the circumstance that they were issued without a permit or in nonconformity with the permit shall not make them voidable. St.1931, p. 949. The briefs contain considerable discussion of the effect of these amendments which, of course, became effective before the Reinert certificates issued, and the claim is made on behalf of Mrs. Reinert that the elimination of the former provisions of section 12 and the insertion of the provisions above referred to in section 16 result in making the certificates issued to her immune from any attack based merely on violations of the permit unless she chooses to make such attack herself. In this connection, however, it is to be observed that by far the greater part of the certificates held by others than Mrs. Reinert issued before the change in the law, that the Indenture was a contract to which they, in effect, became parties, and that the law, as it stood when their contractual rights were acquired entered into and became part of their contracts. When they invested in certificates then it was their statutory, and therefore their contractual, right to treat any issue of the Company's certificates not made in substantial conformity with the permit as void. No subsequent statute could impair that right or deprive them of any means of enforcing it. *Robinson v. Magee*, 9 Cal. 81, 70 Am.Dec. 638; *Spencer v. Houghton*, 68 Cal. 82, 8 P. 679; *Welsh v. Cross*, 146 Cal. 621, 81 P. 229, 106 Am.St.Rep. 63, 2 Ann.Cas. 796. We think, then, that while it may be conceded, as claimed by Mrs. Reinert's counsel, that the violation of the commissioner's permit is, under the amended statute, not one of the grounds available to the Company for attacking the Reinert certificates, it nevertheless is a ground for such attack available to holders of valid certificates issued prior to the amendment of 1931.

[22,23] As has been observed, however, in our foregoing discussion of Mrs. Reinert's attack on the findings, the claim is made in her behalf that if the certificates issued to her are subject to question on the part of the other certificate holders for violation of the corporation commissioner's permit, many of the certificates held by the plaintiffs-respondents are subject to attack for the same infirmity. The situation seems to be that among them are twenty-two that were issued in consideration of the surrender of earlier certificates; that three were issued in consideration of the delivery to the Company of a trust deed in

an amount equal to the aggregate of their sums; that one was issued for cash not fully paid until above a month after its delivery; and that another was issued to cover accrued interest on other certificates. So far as the substitution of certificates was concerned, that involved no increase whatever, of the Company's obligations. As respects the certificates issued in consideration of the trust deed delivery, respondents' counsel assert that the Company subsequently collected the obligation secured by the trust deed in full. Though reference to the record is not furnished in support of it, that assertion is not disputed in the Reinert reply brief and we therefore assume it to be true. If so, the Company actually did receive the cash and the only real irregularity would seem to be that the certificate issued prematurely, an irregularity that may be treated as cured when the proceeds of the trust deed were actually realized. The same remark is applicable to the case of the certificate issued before it was fully paid for. While the issuance of the certificate in consideration of accrued interest on other certificates was apparently irregular, it was certainly not issued without consideration. In fine, there seems to be no dispute that the Company received full value for all of this group of certificates. In these circumstances it could not be heard to question their validity. *Braunstein v. Title Guarantee & Trust Co.*, 216 Cal. 780, 17 P.2d 104; *Security-First National Bank of Los Angeles v. J. G. Ruddle Co.*, 218 Cal. 435, 23 P.2d 1016. Patently the Depository, after authenticating the certificates, is in a practically similar position, and as is said in the brief for the plaintiffs-respondents "Neither the plaintiffs nor any of the other parties directed under the terms of the decree to recover, are questioning among themselves the regularity of their own various certificates." We do not think Mrs. Reinert in any situation to question them. With a single exception every one of them was issued prior to those which she claims and its issue constituted, therefore, no impairment of any preexisting right of hers. The one—that numbered 456 for \$1,200—later in date than those which she received is included in the number substituted for earlier certificates and therefore could have resulted in no increase of the outstanding total to her detriment. It is entirely true that all of these certificates subsequent to the very first one, were issued in violation of the

terms of the Indenture in that, as already observed, part of the securities delivered to the Depositary and included in the aggregate against which certificates issued, consisted of executory contracts for the sale of lands, so that the aggregate of first mortgages and first trust deeds on deposit constantly fell short of the required total, but the evidence does not show that the certificate holders bought with any notice of that situation and the Depositary's certificate of authentication attached to each certificate was well calculated to disarm any suspicion that such a situation existed. For the purposes of this decision, therefore, the holders of the certificates other than those in litigation issued to Mrs. Reinert must be assumed to have bought them in good faith and without notice of this defect in collateral.

After considering this Reinert appeal, in its various aspects, we are constrained to say that we find no merit in it.

The Appeal of the Depositary.

[24] The Depositary, Security Title Insurance and Guarantee Company, disputes the correctness of so much of the decision and judgment as imposes upon it, together with the Mortgage Company, liability to those adjudged to be holders of valid certificates for any deficiency in the amounts due them that may remain unpaid upon the completion of the liquidation of the deposited certificates now in its hands. We observe that the Depositary's notice of appeal is, in terms, from the judgment "and from the whole of the said judgment", so that we are invested with jurisdiction to review any and all features of the judgment that affect it. The opening brief for this appellant, however, disclaims any attack upon the validity of the judgment "in so far as it declares invalid the so-called Reinert certificates", or any claim "that the persons found by the court to be the holders of valid certificates are not in fact such holders of such certificates". Its main quarrel with the judgment is over the contingent liability imposed upon itself.

[25-29] The Depositary calls specific attention to the form of mortgage certificate used, on the face of which, reference is made to the Indenture with the words: "This certificate is issued under and is subject to and the holder hereof does by the acceptance of this certificate consent to all of the terms, conditions and provisions of said agreement." The Depositary insists

that the effect of this clause was to incorporate the Indenture in each mortgage certificate issued, to make each purchaser of a mortgage certificate in effect a party to the Indenture itself, to charge him with notice of its contents, and to bind him by its various terms. Citing *Bell v. Title Trust & Guarantee Co.*, 292 Pa. 228, 140 A. 900, 57 A.L.R. 463; *Davidge v. Guardian Trust Co. of New York*, 203 N.Y. 331, 96 N.E. 751, and *Preston v. Howell*, 219 Iowa 230, 257 N.W. 415, 97 A.L.R. 1140. These propositions are not seriously disputed by the plaintiffs-respondents nor do we dispute them. The Depositary then directs attention to the provisions hereinbefore quoted by us from article VII of the Indenture relative to the affidavits by officers of the Company required to accompany deposits of securities, and to the provisions of article XIV of the Indenture hereinbefore set out at large relieving it—that is the Depositary—from any responsibility for passing upon the validity of the securities deposited, permitting such Depositary to rely conclusively upon the affidavits referred to, and further exculpating the Depositary from any responsibility for any recitals or statements of fact made in the Indenture and declaring all such statements to be solely those of the Company. The brief then recites the language prescribed for the authentications and advances the further contention that the purchasers of certificates are charged with making their investigations of the character of the securities on deposit and are "bound by the facts which such an investigation would have disclosed". That is, in our opinion a nonsequitur. In the effort to substantiate this claim, however, various cases are cited in which a depositary as trustee has merely certified upon a bond or obligation substantially that it is one of a series of some given number of bonds or obligations issued by some named concern or issued by it under the terms of some given instrument. In such cases, which are numerous, it is pretty uniformly held that the certifying depositary or trustee makes no other, further or different representations from that which the language of the certificate imparts. Such cases are *Ainsa v. Mercantile Trust Co.*, 174 Cal. 504, 508, 163 P. 898; *Bell v. Title Trust & Guarantee Company*, supra; *Byers v. Union Trust Co.*, 175 Pa. 318, 34 A. 629; *Bauernschmidt v. Maryland Trust Co.*, 89 Md. 507, 43 A. 790; *Davidge v. Guardian Trust Co. of New York*, supra; *McCauley*,

v. Ridgewood Trust Co., 81 N.J.L. 86, 79 A. 327, all of which, with others, are on behalf of the present Depositary cited and relied. Many like cases might have been cited. For the most part, however, they seem to have little application here because of the much more restricted language of the certificates which they involve as compared with that involved in the instant case. Of them it may well be said, as it was said in *Ainsa v. Mercantile Trust Co.*, supra, 174 Cal. page 512, 163 P. page 901, that: "The purpose of the certification was not to insure the sufficiency of the security. It was to prevent an overissue." In the instant case, on the other hand, the authentication goes beyond the mere representation that the mortgage certificate has been duly executed by the Company, or that it is one of those executed under the Indenture. It contains the further representations that: "as depositary under said escrow agreement the undersigned holds the securities referred to in the within certificate in the proportion of One Hundred Ten Dollars of said securities for each One Hundred Dollars interest as represented by this certificate; said securities being held with and subject to the terms and conditions of said agreement". Of the numerous authorities cited by the appellant to illustrate the limited scope given to authentications by depositaries or trustees, we find only one in which the words used are given any narrower import than the obvious one. That is the Massachusetts case of *Continental Corporation v. First National Bank*, 285 Mass. 419, 189 N.E. 184, 186, where the trustee certified that the "bond is one of the bonds described in a mortgage or deed of trust to the subscriber as trustee", giving the purported date of the instrument. Each of the bonds so certified to on its face contained the language: "to which mortgage or deed of trust reference is hereby made for a description of the property so deeded or mortgaged, the nature and extent of the security, the rights of the holders of the bonds under the same, and the terms and conditions upon which said bonds are issued and secured". There was in fact no mortgage or deed of trust of the date recited in the certificate, nor any deed of trust affecting real estate at all, though there was an unrecorded indenture, dated subsequently to the date of the certificate but before any of the bonds in fact issued, conveying to the trustee certain machinery and equipment as security for bonds without specifically

designating the bonds secured. While this case goes further than any of the rest relied on, it is distinguishable from the one at bar by the circumstance that inquiry for the mortgage or deed of trust specifically referred to in the bond certified to, would have undoubtedly disclosed its nonexistence, whereas in the instant case there was nothing which is made by reference any part of the authentication or mortgage certificate which did not actually exist. The question before us, therefore, is whether, in the instant case, the purchasers of mortgage certificates are or are not entitled to rely on statements distinctly made on the face of the authentication which could be only given greater definiteness but not in any way contradicted, if the intending purchasers were with all diligence to read in full both the mortgage certificate and the Indenture referred to in it. We are in accord with the view that a representation in the certificate of a depositary or trustee ought not to be held to mean more than it says, but think that to be no reason for holding it to mean less than it says. Specifically, in the present case, we agree that, as provided in the Indenture, the Depositary had no responsibility for passing on the legal validity of the security or the validity of any insurance policy, certificate, guaranty or abstract of title accompanying the same, as to their binding force upon the companies or persons issuing the same. Further, we agree that the Depositary, as further stipulated in the Indenture, was entitled to conclusively rely on the contemplated affidavits, to be submitted with the securities deposited, as to all of the matters which the Indenture specifies as to be covered by such affidavits, provided such affidavits were not contradicted by matters appearing on the face of the securities deposited, themselves. This does not, however, in our opinion, mean that the Depositary might lawfully close its eyes to the most obvious departures apparent from the merest glance, in the securities deposited with it, from the plain terms of the Indenture and the plain requirements of the corporation commissioner's permit; and, on the strength of such affidavits, proceed to certify to something manifestly contrary to the fact. More than that, the contemplated specifications of the affidavits included no statement that the securities to be submitted were of the classes contemplated by the Indenture, but were intended rather to assure the reader that they were in fact what they purported to be. We

see no reasonable ground on which the Depositary could be justified in assuming or stating that they were of a description and class authorized by the Indenture, when they did not even purport to be securities of the authorized description and class. The Depositary here had certified and represented that it holds "the securities referred to in the within certificate". That meant notes and the debts represented thereby secured by first mortgages and first deeds of trust which, in our opinion, do not include executory contracts of sale. The cases cited in the effort to show that they do, do not seem to us in point. We hold, therefore, that when the securities held included executory contracts of sale, which had to be counted to make up the required totals, the representation of the Depositary that it held securities referred to in the mortgage certificate was a representation of that which was untrue and which the Depositary was charged with knowing to be untrue. Such certification, manifestly intended to facilitate the sale of the mortgage certificates, amounted in our opinion both to culpable negligence and to actual fraud within the meaning of subdivision 2 of section 1572 of the Civil Code, and was a breach of the warranty involved in the authentication. Neither the negligent aspect of the Depositary's conduct, however, nor the circumstance that, whatever its motives, its conduct amounted in law to a fraud, is the dominating feature of the cause of action against it. The net effect of its conduct was a breach by it of the contract, whether that be called an escrow or a trust, to which, in making these authentications, it became a party and held itself out as a party.

[30,31] It is, indeed, claimed that even though the representation may have been false the certificate holders could complain of its falsity only if they proved their reliance in it. Citing *Hallidie v. First Federal Trust Co.*, 177 Cal. 600, 603, 171 P. 431, and *Brewis v. Toffelmier*, 97 Cal. App. 329, 337, 275 P. 819. That, as a proposition of law, is indisputable, but in our opinion the trial court was clearly justified from the situation presented in inferring that the certificate holders must have relied and did rely on the statements of the authentication. In the very nature of the case they did so. As counsel for the plaintiffs-respondents well say:

"If each separate investor was obligated to audit the collateral securities as to totals

and character and supporting instruments, there would have been no need for an authentication and certification covering these elements by the title company. There was no clause in the indenture even contemplating or permitting such an audit. Such a precaution required of investors is utterly at variance with business practice and has never even been suggested before."

[32] As is well illustrated by such cases as *Pollak v. Staunton*, 210 Cal. 656, 664, 293 P. 26, no such duty rests upon investors or is to be expected of them.

[33] It is further claimed that "any defects which may have occurred were cured by action of the Depositary prior to the trial" of the present case. By this is meant the Depositary's action already referred to in obtaining from the Company on or about May 4, 1932, the latter's own notes for \$51,015.32 and \$33,412.17, together with the trust deeds executed by the Company to secure the same, affecting as respects the security for the \$51,015.32, the same nineteen parcels of land embraced in the Ewing contract. The Indenture, however, by its terms contemplates the deposit only of "notes (and debts evidenced thereby) secured by mortgages or deeds of trust heretofore owned by the Company", and "other notes (and debts evidenced thereby) secured by mortgages or deeds of trust which will be owned by the Company". It does not include among the deposits authorized by it, any direct obligations of the Company. Therefore this attempt to supply the deficiency in the earlier deposit of authorized securities, was insufficient to bring about conformity with the requirements of the Indenture and permit. *Conover v. Guarantee Trust Co.*, 88 N.J.Eq. 450, 102 A. 844. So far as the Depositary may in the past have realized or may hereafter realize anything by foreclosure upon these new obligations of the Company and may lawfully apply the proceeds upon the sums due the holders of certificates adjudged to be valid, it may, indeed, reduce to that extent, or, by possibility entirely wipe out, any damage which they might otherwise be found to have sustained through its failure in the first instance to insist that the securities deposited be of the classes specified, but such arrangement for minimizing or obviating damages is, strictly speaking, outside of anything contemplated by the Indenture itself.

[34-36] We are in agreement, then, with the respondent certificate holders that not

only is the Company liable to them for such damages, if any, as they have sustained, but that the misconduct of the Depositary has made it also liable to them for the amount of any such damage. At this point, however, we are called upon to notice another contention on the Depositary's part. That is that it was incumbent on the trial court to ascertain at the trial whether or not any such damage had been sustained rather than to leave it to be determined at the end of the process of realizing on the securities. Complaint is made that the certificate holders have not offered any evidence to show that they have sustained any damage and that evidence to that effect is wholly lacking. Contrariwise, in the effort to demonstrate that the certificate holders had sustained no damage, the Depositary offered to show that the assets in the several ways above outlined placed in its hands by the Company, largely exceed in value the amounts of the mortgage certificates outstanding and adjudged valid. On objection the trial court refused to hear testimony to that effect and its refusal to do so is assigned as error.

We think these criticisms without merit. In *Conover v. Guarantee Trust Co.*, supra, it was said [88 N.J.Eq. 450, 102 A. 846]:

"The rule of liability of a trustee who has transcended his powers is defined in 28 Am. & Eng. Enc. of Law, 1063, as follows:

"'Trustees are bound to observe the limits placed upon their powers, either by law or by the trust instrument, and if they transcend such powers and cause damage to the estate they will be held responsible therefor, although they may have acted in perfect good faith.'

"Prof. Pomeroy defines every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or arising through negligence, or arising through mere oversight or forgetfulness, as a breach of trust, and declares the trustee's personal liability to make compensation for the loss occasioned by such breach of trust to be 'a simple contract equitable debt,' and also that the amount of liability is always sufficient for the complete indemnification and compensation of the beneficiary. 3 Pom.Eq.Jur. §§ 1062, 1079, 1080. The distinction between a case in which a trustee has transcended the powers conferred by the trust and one relating to matters of judgment or conduct on the part of a trustee in transactions within the trustee's pow-

ers necessarily enters into all considerations touching a trustee's liability."

In the same case, which was strikingly similar in many of its facts to the one at bar, and involved a certification by a trustee that it held such securities for a bond issue as it was authorized to hold, when it had actually accepted others that it had no authority to accept, the court further said:

"The ordinary measure of accountability is recompense to the cestuis que trustent for the loss sustained by reason of the breach of trust. *Polhemus v. Holland Trust Co.*, 61 N.J.Eq. 654, 47 A. 417; *Pomeroy's Eq. Jur.*, supra.

"It is obvious that it is here impossible of even approximate ascertainment what losses have fallen to or will eventually be sustained by the collateral bondholders by reason of the breach of trust here in question, for the course of the trust, in the absence of the exercise of unauthorized power by the trustee, can never be known. In such circumstances, the trustee must be deemed to have assumed personal responsibility for such losses as should fall to the holders of the collateral bonds by reason of the securities which were improperly accepted by the trustee and made the basis of issued collateral bonds by reason of the trustee's certificate ultimately producing less in value than the amounts for which they were unlawfully accepted and certified. Although the trust agreement by its terms imposed no responsibility on the trustee for the value of the mortgages to be assigned to the trust fund, when the trustee assumed to accept for the trust fund mortgages not authorized for that purpose by the trust agreement and certified against such securities collateral bonds as issued pursuant to the trust agreement a just regard for the rights of collateral bondholders, who were privileged to rely upon the trustee's certificate, necessarily imposes upon the trustee the measure of liability already stated, in the absence of any possible means of ascertainment whether a loss would have arisen had the trustee performed its plain duties as defined by the trust agreement. That measure of liability alone satisfied the principle that the trustee 'acts at his peril' in transcending his powers. A suggestion that, had the Ventnor Syndicate made conveyances of lots to dummy vendees and taken purchase-money mortgages and assigned them to the trustee, the letter of the trust agreement would have been satisfied, is without force; had the trustee been made ac-

quainted with such procedure, the situation would have been unchanged. In this view the trustee must answer to the bondholders for such loss as they ultimately sustain by reason of the mortgages which were made to the trustee realizing less than the amount they were pledged to secure, unless the immunity clauses of the trust agreement shall be found to exempt the trustee from such liability."

The court, in the case referred to, then proceeded to discuss the immunity clauses of the trust instrument there involved, which also had many aspects of similarity to those in the case at bar, and held that they were insufficient to exculpate the trustee from responsibility for the misstatements in its certificate. The court, having held that in consequence of its breach of trust through the exercise of powers not conferred upon it, the trustee had rendered itself liable to the cestuis que trustent for such losses as might be found to have arisen by reason of the securities accepted realizing less than the amounts which they were made to secure, went on to say:

"This standard of responsibility renders it impossible to determine at this time the amount for which the trustee must account to the holders of collateral bonds; that can only be accurately ascertained at the final liquidation of the trust."

[37-41] It is undoubtedly true as pointed out in such cases as *Doyle v. Chatham & Phenix Nat. Bank*, 253 N.Y. 369, 377, 171 N.E. 574, 577, 71 A.L.R. 1405, that no trust relation in favor of a purchaser of securities can arise where the certification precedes the purchase, until the purchase is made, but we do not see how that proposition is of any assistance to the Depositary here. It is true also that some decisions have undertaken to hold that depositaries or trustees were not under contractual liability for representations made in their certificates attached to securities offered to the public on the theory that at no time did any privity arise between them and the purchasers of the securities. This latter ground is taken in *Allen v. Kreidler*, 106 N.J.Eq. 402, 150 A. 844, which undertakes to distinguish *Conover v. Guarantee Trust Co.*, supra, on the ground that, there, the defendant issued the securities involved. In reliance on this supposed want of privity the liability of the certifying company for its representations was, in *Allen v. Kreidler*, held not to be contractual but to be based on simple tort. So far as *Allen v. Kreidler* is concerned we are

not impressed with the reasoning employed. One who makes representations knowing that the purpose for which they are sought must be to induce others to buy securities, is in the position of having made the continuing offer of a warranty that the representations are true. It is indeed no guaranty of the sufficiency or legality of the securities (*Doyle v. Chatham & Phenix Nat. Bank*, supra, and cases therein cited), unless the certificate contains such a warranty in terms. It is merely an offer to warrant the truth of the certificate itself. Such offer, originally unilateral on the part of the maker of the certificate, when accepted by those who in reliance on it buy the securities becomes, in our view, a binding contract. Nor is the one who has made the certificate any the less a party to such contract than those who directly issue the securities. Neither is it material that the benefits of the contract inure mainly or even wholly to some one other than such maker of the certificate. It is elementary, in the law of contracts that the consideration need not involve a benefit to the promisor but that it is enough that it be a detriment to the promisee. The maker of the certificate can reasonably ask only that his or its liability be confined to such warranties only as the language of the certificate itself fairly imports. Liability in tort is not, of course, excluded by this contractual relation, but seems to us to be dominated by it.

[42] Turning to our own Civil Code and treating the breach here involved as essentially one arising from contract, in a case where the measure of damages is not otherwise expressly provided for, it follows that such measure of damages is "the amount which will compensate the party aggrieved for all the detriment proximately caused" by the breach "or which, in the ordinary course of things, would be likely to result therefrom". (Civ.Code, sec. 3300.) It is likewise provided by section 3301 of the Civil Code that: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." It would be manifestly impracticable, by any proof of the present value of the securities in the hands of the Depositary to know whether or not the certificate holders will suffer any ultimate loss from the circumstance that the Depositary has transcended its powers. To now determine from that circumstance that they have sustained no damage and countenance an adjudication exonerating

the Depositary from all responsibility for its conduct would set a precedent which, if generally followed, must lead to disastrous results. It seems to us to follow that the course pursued by the trial court was the right one. Should it appear after a fair liquidation that the certificate holders have, by reason of being paid in full, suffered no injury, the Depositary will owe them nothing more and have no ground for complaint. If, on the contrary, a deficiency shall remain due them, the court must, from the necessity of the case, indulge the inference that it would not have occurred had the Depositary confined itself to conduct authorized by its specific powers.

[43] The Depositary complains of various findings. One of those objected to is that no accounting was made by it prior to the trial. It is not claimed that it made any but what seems to be objected to is the supposed implication that it failed to respond to requests from certificate holders for information. We do not think that the finding carries any such implication. It objects to the finding that it failed to keep any record of securities deposited and withdrawn. It is not claimed that it kept any such record or that the finding is untrue but its claim is that it was under no duty to keep records of securities not retained by it. We do not think the finding one of which it may reasonably complain. It may be a finding not strictly necessary to the decision but its tendency is to show that the difficulty of establishing the extent, if any, to which the certificate holders have been prejudiced by its conduct, has been rendered the greater by its failure to keep any record of the substitution by the Company of some securities for others and, therefore, of the extent, if at all, to which securities deposited with it, conforming to the requirements of the Indenture, were supplanted with its acquiescence by others that did not conform thereto. The finding does not seem to us of special importance one way or the other since the audit made of the Company's books, at length covered the situation. Objection is made to the finding that it allowed collateral nominally deposited with it to remain in the actual custody of the Company. There is a conflict in the testimony on the subject but Jackson testified that while the Company's headquarters were maintained in the same building with that of the Depositary various of these papers were so kept as to be accessible to persons such as Mr. Porter who were at the same time connected with

both concerns. According to this account, when the Company's offices were later removed to another location a safe belonging to the Company in which securities deposited as collateral were kept, as well as various files pertaining to such collateral were moved, by inadvertence, to the Company's new office, though when their presence there was noticed they were returned to the Depositary. The finding, which we must assume to be correct, is illustrative of the loose methods employed, but is not otherwise of importance. Various criticisms are made of the portions of the findings detailing the assets remaining in the Depositary's hands and their relation to those required in connection with the mortgage certificates valid and invalid authenticated by it. It is conceded by respondents that there is a transposition of figures in the court's finding 35 relative to the respective amounts of notes secured by trust deeds and Home Owners Loan Corporation bonds now in the Depositary's hands which should read, as respects trust deeds \$10,-121.40, and as respects such bonds \$3,425, which figures are by clerical error in fact reversed. Portions of these findings when read by themselves might be misleading but when all are read together we do not think, other than said transposition of figures, any substantial error can be said to exist in them, or that, except for such transpositions, the judgment entered shows the Depositary to have been prejudiced by any misstatement of fact contained in them.

[44] In the disposition of this appeal a few other matters require attention. The Depositary complains because, as between the certificate holders and itself, it has been charged in the accounting with \$2,375 retained, in instalments of \$50 a month for its own compensation, and \$450 paid to its attorneys. The \$2,375 was charged, at the monthly rate stated, for its own services subsequent to the Company's default. There is no question that under the terms of the Indenture the Company agreed to pay to the Depositary the reasonable value of its services and, subject to what are therein adjudged to be the rights of the certificate holders to be paid in full, the judgment recognizes a liability from the Company to the Depositary on that account, fixed by it at \$10,000. Since the default various foreclosures of collateral have been carried out by the Depositary and its attorneys have made charges against it for legal advice in connection with its proceedings. The \$450 charged

back to it by the court does not represent all of the attorneys' fees disbursed by it since the default but, apparently, only such part of the amounts paid them as were not included in the ordinary routine charges for conducting foreclosures. Inasmuch as these disallowed items appear to have been reasonable in their amounts and their disbursement to have been made since the default in the necessary administration of what was, at least after the default itself, indisputably a trust, we do not think them distinguishable from other expenditures contemplated by the judgment in the liquidation of the deposited assets. Assuming, however, that we are right in sustaining the action of the trial court in holding the Depositary liable to those held to be valid certificate holders, for any deficiency remaining in the amounts due them after the liquidation shall be completed, we cannot see that the Depositary is in anywise prejudiced by the disallowance of these items of \$2,375 and \$450, together aggregating \$2,825. To permit the Depositary to charge them against the funds derived from liquidated assets would merely result in charging them back to the Depositary in the event that a deficiency shall appear at the conclusion of the liquidation. If no deficiency appears then the certificate holders will have been satisfied, and the sums in question can, of course, be retained by the Depositary from any remaining proceeds of the liquidation in its hands, so far as those suffice to meet them, since otherwise such remaining proceeds would belong to the Company, against which the Depositary now has its \$10,000 judgment for services rendered, which so far as can be ascertained from the record, includes *inter alia* these charges which the Depositary now contends ought to be allowed out of the trust fund. We see no reason, therefore, for interfering with the trial court's disposition of those items.

Some other aspects of the judgment rendered do present difficulties. It undertakes to sanction and provide for the liquidation by the Depositary under the court's direction of all the deposited assets. As respects the Ewing contract not only has the trial court in effect found that its deposit was not validly authorized by the Company but it is patent that such deposit was made for no other reason than to secure the authorization of the Reinert certificates. The legal consequence of holding these invalid would, in ordinary circumstances be that the trans-

action should be set aside as a whole and the Ewing contract returned to the Company, which is, in effect found to have been victimized by Jackson and perhaps others of its officials, in the whole Reinert transaction, rather than to have been in a legal sense a party to it. The Ewing contract, however, is found in fact to be no asset at all but a mere sham and it would, therefore, be useless to the Company or anyone interested either as a creditor or stockholder of the Company, to direct its return, even if the Company sought such return, which in fact it does not.

As respects, generally, the executory contracts of sale belonging to the Company and assigned by it to the Depositary, while as we have seen, they were not such securities as were authorized by the Indenture, yet both the Company and the Depositary treated them as such and neither is in any position to complain, and neither in fact complains, of so much of the judgment as contemplates resort to them with the rest of the securities deposited to satisfy the just claims of the certificate holders.

The Company has not appealed from the judgment, nor have any of its general creditors, some of whom at least, are parties to the record. Had it or they done so, a serious question might arise as to whether the Company's notes in the respective sums of \$51,015.32 and \$33,412.17, with the trust deeds made to secure them ought to be regarded as any part of the assets constituting specific security for the mortgage certificates that were held valid. Their execution as we have seen was a transaction entirely outside of anything contemplated by the Indenture. It was not done in the regular course of business contemplated by the instrument but was the result of an afterthought and a mere voluntary arrangement between the Company and the Depositary. However, it was done after the Company's board of directors had been so reorganized as to include representatives of the Company's two principal general creditors and neither those nor any other general creditors of the Company are here complaining of it. So far as the Depositary is concerned, though, as we saw, its notice of appeal is from the whole judgment, its counsel expressly say that they raise no question (other than their claim of a lien in favor of the Depositary for its services) "as to the validity of the judgment * * * in so far as it declares that the holders of the valid certificates have a right to the funds and securities now in the pos-

session of the Depositary, * * * it being admitted by the Depositary that *they* have no right, title or interest in or to the securities mentioned except under and by virtue of the agreement of October 6, 1924." We take it that, in the language quoted, in the use of the word *they* counsel really mean *it* and that the antecedent intended is the Depositary. At all events it is clear that the Depositary thus agrees that all of the assets in its hands resulting from deposits made with it shall be treated as though the deposits had been made in strict accord with the terms of the Indenture. This is a reasonable attitude insofar as the Depositary is concerned, since, to the extent that the liquidation of these assets, including specifically the foreclosure of the trust deeds made to secure the \$51,015.32 and \$33,412.17 notes, results in available funds to apply to the demands of the holders of valid certificates it will diminish the probability of any deficiency payable under the terms of the judgment to them.

[45] Complaint is made, because in determining the amounts to be paid to those found to hold valid mortgage certificates, the trial court allowed interest on all unpaid balances thereon at 7 per cent per annum from December 1, 1931. It is claimed that the selection of this date was arbitrary and attention is called to the circumstance that most of the mortgage certificates provide for interest at the rate of 6½ per cent per annum only. The interest date as provided in the certificates was March 1, 1932, but the Company paid only half of the interest for the six months ending on that day, or, in other words, only interest for the period ending on December 1, 1931. We are in agreement with the respondents that the Depositary's liability, to use again the language of Prof. Pomeroy referred to in one of the above quoted passages from *Conover v. Guarantee Trust Co.* is a "simple contract equitable debt". Its measure, however, is the loss occasioned to the certificate holders by the breach of trust, which manifestly cannot exceed the principals of their respective certificates with the stipulated interest thereon up to the time when, had the breach of trust not occurred, they would

have been paid, whether as a result of realizing on the security or otherwise. We cannot know what this date would have been had the securities deposited been confined to the classes contemplated by the Indenture. For practical purposes we think that this date should be considered as coming at the end of a time equal to that which the trial court has allowed for the actual liquidation ordered by it. We think, therefore, that the interest allowed to each holder of a certificate adjudged to be valid should, as of December 1, 1931, be reduced to the rate fixed in the mortgage certificate itself for the time during which the liquidation is allowed to continue (whether that be the four years initially contemplated by the decree or any shorter time within which the court may, by reservation of jurisdiction in the decree, hereafter require such liquidation to be confined), and that 7 per cent interest should be allowed only on the deficiency as then ascertained and from that date. Since all of the certificates do not bear interest at the same rate, these details, though the record exhibits them, can best be worked out in the trial court. This, of course will not require the taking of further evidence.

The judgment in so far as it is affected by the Reinert appeal, is affirmed. In so far as the judgment is affected by the appeal of the Depositary, Security Title Insurance and Guarantee Company, it is reversed with instructions to the trial court to render a new judgment in substance the same as that originally entered by it, except that it shall contain said corrections in the amounts of the trust deeds and Home Owners Loan Corporation certificates respectively charged to the Depositary, and that in case of mortgage certificates bearing, according to their terms, interest at less than 7 per cent per annum, the interest allowed to each of the holders of such mortgage certificates adjudged to be valid shall be reduced in accordance with the views hereinbefore expressed.

Respondents to recover costs.

We concur: BARNARD, P. J.; GRIF-FIN, J.

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CUMMINGS v. KENDALL et al.

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District Court of Appeal, Third District,
California.

Aug. 29, 1939.

both are "proximate cause," and recovery may be had against either or both of the responsible persons.

[Ed. Note.—For other definitions of "Proximate Cause," see Words & Phrases.]

6. Negligence ⚡61(1)

"Concurrent negligence," which may impose liability on two persons acting separately, need not necessarily occur simultaneously if they are so related as to directly contribute to accident which results in injuries complained of, but it is necessary that concurrent acts of negligence shall contribute to a substantial degree as a proximate cause of injuries.

[Ed. Note.—For other definitions of "Concurrent Negligence," see Words & Phrases.]

7. Negligence ⚡61(2)

If negligence of defendant is one of proximate causes of injury of which plaintiff complains, he cannot escape liability by showing that negligence of a third person also contributed to injury, and that accident would not have happened but for such negligence of third person.

8. Automobiles ⚡244(36)

In action for injuries sustained when plaintiff's automobile, overturned by an oncoming automobile, was struck by defendants' automobile which was following closely behind plaintiff's automobile, mere proof that negligence of defendants concurred with negligence of oncoming automobilist may not be sufficient to fasten liability upon defendants, unless there is substantial evidence that defendants' negligence contributed in some degree to plaintiff's injuries.

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Action for damages for injuries suffered in an automobile accident by Norman M. Cummings against William Kendall, Cecil Kendall, and Calvin Kendall, individually and as copartners doing business under the name and style of Kendall Brothers (a copartnership). From a judgment for the plaintiff, the defendants appeal. On motion to dismiss appeal.

Motion denied.

Bronson, Bronson & McKinnon, of San Francisco, for appellants.

1. Automobiles ⚡244(36)

In action for injuries resulting from automobile accident, defendants' liability may not be determined alone from their ascertained negligence, but there must be substantial evidence that the negligence contributed to some extent to plaintiff's injuries.

2. Appeal and error ⚡786

In action for injuries sustained when plaintiff's automobile, overturned by an oncoming automobile, was struck by defendants' automobile approaching from rear at an excessive rate of speed, question whether defendants' negligence was a proximate cause of plaintiff's injuries presented a serious question of both law and facts which would prevent dismissal of defendants' appeal without hearing on merits.

3. Appeal and error ⚡768

Statement in appellants' brief that there was no evidence to support finding that breach of any duty on part of driver of defendants' automobile proximately contributed to plaintiff's injuries raised issue whether defendants' negligence was a contributing cause of plaintiff's injuries.

4. Automobiles ⚡201(8)

Where plaintiff's automobile, overturned by an oncoming automobile, was struck by defendants' automobile which was following closely behind plaintiff's automobile, technically speaking, the two collisions did not occur "instantaneously" or "simultaneously," but both collisions might have been so closely connected as to constitute concurrent negligence which would render operators of both automobiles liable as joint tortfeasors.

[Ed. Note.—For other definitions of "Simultaneously," see Words & Phrases.]

5. Negligence ⚡61(1)

In order to hold one liable for negligence, it is not necessary that his act or omission be sole cause of injury suffered, but where injury results from two separate and distinct acts by different persons, operating simultaneously and concurrently,

Charles Reagh, of San Francisco, and T. F. Peterson, of Eureka, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The respondent has moved, under the provisions of rule V, subdivision 3, of California Court Rules, to dismiss the appeal in this case on the ground that the issues are unsubstantial and that the appeal was taken merely for delay. The appellants' opening brief has been filed.

We are of the opinion that the appeal presents a legal problem too serious to justify the dismissal of the case without a hearing on its merits. The appellants contend that there is no evidence supporting the findings or judgment that their alleged negligence contributed in any wise to the injuries sustained by the plaintiff. The accident which is the foundation of this litigation involves the collision of three automobiles. The appellants' car was following the machine in which the plaintiff rode as a passenger, in the night-time, down grade on a straight unobstructed highway at a distance of about 150 yards. They were traveling fifty or sixty miles an hour. The car in which the plaintiff and four other men were riding met an approaching machine driven by Norman Gobet, whom one witness testified was drunk. Gobet swerved his car over onto the wrong side of the highway in the pathway of the other machines, and a head-on collision occurred. The driver of the appellants' car did not see the approaching Gobet machine. He heard the compact of the two cars ahead of him, but did not see either machine. He failed to apply his brakes until he arrived at a point thirty to fifty feet from the plaintiff's car as it lay on its side or stood on its wheels in the middle of the highway. He swerved his machine to his left and hit the plaintiff's car, landing in the ditch sixty feet beyond that point. When he returned to the place of the disaster the plaintiff's machine lay upon its side badly demolished. All of the occupants of that machine were unconscious. One of them died subsequently from the results of his injuries. The plaintiff was seriously and permanently injured. Each of the occupants of that car testified they remembered absolutely nothing after the collision with the Gobet machine. Gobet was sued jointly with the appellants. Apparently he was not served with process. He did not answer or appear at the trial. No judgment was rendered against him.

The judgment was rendered against the appellants only.

We have read the transcript of testimony, and find no evidence, unless it may be inferred, that the subsequent striking of plaintiff's car by the appellants' machine, contributed in any degree or manner to the injuries previously received by the plaintiff in the collision with the Gobet machine. The evidence seems to be lacking in that regard. In support of the findings and judgment, we may assume the driver of the appellants' automobile was guilty of negligence in failing to observe the approaching Gobet machine; in running so rapidly and so closely behind the plaintiff's car that he was unable to stop and avoid striking that car, or in his omission to apply his brakes in a space of approximately one hundred yards after the first collision occurred, until he reached a point so close to the wreck as to be unable to stop his machine and avoid striking the overturned automobile.

[1,2] The issue regarding the appellants' liability for the injuries sustained by plaintiff may not be determined alone from their ascertained negligence. There must be substantial evidence also, that their negligence contributed to some extent to the plaintiff's injuries. The vital questions are whether plaintiff's injuries were sustained as a proximate result of the concurrent negligence of Gobet and the driver of appellants' car; whether they were joint tortfeasors; and whether the concurrent negligence of the appellants contributed in any manner as a proximate cause of plaintiff's injuries. This presents a serious question of both law and facts which will not warrant a dismissal of the appeal without a hearing on the merits. We may not say, under such circumstances, the issues presented on appeal are unsubstantial, or that the appeal was perfected for mere delay.

[3] The appellants clearly raise the issues suggested by this court. The opening brief states in that regard:

"There is no evidence to support the finding that the breach of any duty on the part of Calvin Kendall proximately contributed to the plaintiff's injuries."

[4] In his brief on motion to dismiss the appeal, the respondent prints statements of evidence in parallel columns which he calls "The Deadly Parallel". But that comparison does not appear to be so deadly. The range is too short. It fails to reach the mark. It does show the existence of

substantial evidence indicating that appellants were guilty of negligence. By the aid of certain inferences, we may assume it shows concurrent negligence with that of Gobet, who was the cause of the first collision. Technically speaking, the two collisions did not occur "instantaneously" or "simultaneously" as the court found that they did. But it may be true that they were so closely connected as to constitute concurrent negligence which would render the operators of both cars liable as joint tortfeasors. *Merrill v. Los Angeles Gas & Elect. Co.*, 158 Cal. 499, 111 P. 534, 139 Am.St.Rep. 134. The serious question is whether there is any substantial evidence that the appellants' subsequent striking of plaintiff's machine contributed in any degree to the injuries sustained by the plaintiff. The finding that the two collisions occurred simultaneously and concurrently was evidently adopted to meet the language found in many cases cited in support of the texts in 19 California Jurisprudence 572, sec. 20; 2 California Jurisprudence 10-Year Supp. 539, sec. 349; 4 Blashfield's Cyc. of Auto Law, Permanent Edition, § 2552, page 361, secs. 2551-2553; 3-4 Huddy's Cyc. of Auto Law, 49, sec. 22; 62 A.L.R. 1181, note, with respect to concurrent negligence in successive collisions. In the text found in 19 California Jurisprudence, page 572, which is supported by numerous California cases, it is said:

[5] "In order to hold one liable for negligence, it is not necessary that his act or omission be the sole cause or injury suffered. * * * Where injury results from two separate and distinct acts by different persons, *operating simultaneously and concurrently*, both are the proximate cause, and recovery may be had against either or both of the responsible persons. * * * Although, in order to be concurrent, the negligence of two persons must be simultaneous, *a primary act of negligence may be so continuous in its character that it conjoins with an act of negligence of another committed at a much later date*, and an act not negligent at the time committed may become so because of the acts of another."

[6] Good reason and logic impels the conclusion that concurrent negligence which may impose liability on two individuals acting separately, need not necessarily occur simultaneously if they are so related as to directly contribute to the accident which results in the injuries com-

plained of. But, as the authorities seem to agree, it is necessary that the concurrent acts of negligence shall contribute to a substantial degree as a proximate cause to the injuries complained of. The text in 4 Blashfield's Cyc. of Auto Law, supra, it is said in that regard:

[7] "Under the principle stated in the foregoing section, if the negligence of defendant is *one of the proximate causes of the injury of which the plaintiff complains*, he cannot escape liability by showing that the negligence of a third person also contributed to the injury, and that the accident would not have happened but for such negligence of the third person."

[8] It seems to follow that the mere proof of concurrent negligence of the appellants in the present case may not be sufficient to fasten liability upon them, unless there is substantial evidence that their negligence contributed in some degree to the injuries sustained by the plaintiff.

For the foregoing reasons the motion to dismiss the appeal is denied, and the petitioner is granted twenty days from notice thereof in which to file his brief on the merits of the cause. The appellants may have ten days thereafter in which to reply.

We concur: PULLEN, P. J.; TUTTLE, J.



AMES et ux. v. EMPIRE STAR MINES
CO., Limited, et al.*
Civ. 6215.

District Court of Appeal, Third District,
California.
Aug. 22, 1939.

Rehearing Denied Sept. 20, 1939.

Hearing Granted Oct. 20, 1939.

1. Mines and minerals ☞9

Persons making proper mineral discoveries and complying with mining laws before issuance of patent to railroad company for land involved could establish valid mining rights therein, notwithstanding grant of land to railroad company or any acts performed thereby before issuance of patent. Act Cong. July 25, 1866, 14 Stat. 239; Act Cong. July 26, 1866, 14 Stat. 251.

* For subsequent opinion, see 110 P.2d 13.

2. Mines and minerals ⚡44

Mineral claimants lose no rights as against one claiming land under another act than mining laws merely because of their failure to adverse his claim, so that mineral claimants' failure to adverse railroad company's application for patent to land involved did not affect evidentiary value of patent to mining claim. Act Cong. July 25, 1866, 14 Stat. 239; Act. Cong. July 26, 1866, 14 Stat. 251.

3. Public lands ⚡117

Generally, patent issued by federal land department pursuant to act excluding lands known to be mineral from grant of public lands imports final determination by department of nonmineral character of land covered by patent and is accepted by courts on collateral attack as affording conclusive evidence of such nonmineral character.

4. Public lands ⚡106(4), 114(2)

The federal land registrar's issuance of final certificate of entry on land to mineral claimants and receipt for fees paid before issuance of patent to railroad company for land was binding determination by land department as to mineral character of land, and patent issued to such claimants after issuance of railroad patent related back to establishment of their mining titles before date of certificate, so that department lacked jurisdiction to grant land to railroad company until such determination was cancelled or set aside. Act Cong. July 25, 1866, 14 Stat. 239; Act Cong. July 26, 1866, 14 Stat. 251.

5. Public lands ⚡114(1)

A land patent, issued to railroad company after issuance of federal land registrar's final certificate of entry on land to mineral claimants, did not set aside or constitute cancellation of such certificate or land department's finding as to mineral character of land, where patent records contained no such order and patent issued to claimants after issuance of railroad patent recited that certificate was issued on date thereof and that patent was based partly on such certificate. Act Cong. July 25, 1866, 14 Stat. 239; Act Cong. July 26, 1866, 14 Stat. 251.

6. Mines and minerals ⚡29(1)

Mineral claimants had vested rights in minerals under land from date of issuance of federal land registrar's final certificate of entry to them until cancellation of such certificate. Act Cong. July 25, 1866, 14 Stat. 239; Act Cong. July 26, 1866, 14 Stat. 251.

7. Mines and minerals ⚡21(4)

A certificate of purchase of mineral land on entry thereof by claimant at local land office passes government's right to him and is equivalent to patent as against acquisition of title by any other party, where no adverse claim is filed with land register and receiver and entry is not cancelled or disaffirmed by land department officers at national capital.

8. Public lands ⚡106(4)

A local land office register's certification, after approval of school land survey, that there was no mineral claim or filing on portion thereof in his office, did not constitute binding determination of nonmineral character of land or pass title to state, but finding of mineral character of land in proceedings taken on mineral claimants' patent before issuance of certificate is conclusive in landowners' action to prevent mining beneath surface of land. Act Cong. March 3, 1853, 10 Stat. 244.

9. Mines and minerals ⚡52

In suit to enjoin and recover damages for mining under surface of plaintiffs' land, proof of defendant corporation's right to mine ores in vein within such land under either its predecessor's locations or reservation of such right in deed to plaintiffs from successor to railroad company's title was sufficient to defeat plaintiffs' demands, regardless of whether deed reserved exclusive right or privilege. Act Cong. July 25, 1866, 14 Stat. 239; Act Cong. July 26, 1866, 14 Stat. 251.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by Worthington Ames and wife against the Empire Star Mines Company, Limited, and others, to prevent mining beneath the surface of certain land and recover damages therefor. From a judgment for named defendant on the question of title to the land, plaintiffs appeal.

Affirmed.

Simeon E. Sheffey, of San Francisco, and Richard Belcher, of Marysville, for appellants.

Robert M. Searls, of San Francisco, Jones & Finnegan, of Nevada City, and William E. Colby, of San Francisco, for respondents.

PAULSEN, Justice pro tem., delivered the opinion of the court.

This action was brought to prevent defendant from mining beneath the surface of plaintiffs' land and to recover damages for operations carried on there before the action was commenced. The issues as to damages were not tried, counsel having stipulated that the trial of such matters be held in abeyance until after the question of title had been disposed of and settled upon an appeal. On this question of title judgment was rendered in favor of defendant, and plaintiffs appeal therefrom.

The land of appellants, referred to herein as the "Ames" land, may be described for the present purpose as the southwest quarter of section 15, township 16 north, range 5 east, M. D. B. & M. Two quartz mining claims, the Pennsylvania and the Jefferson, which are held by respondent under leases from the alleged owners thereof, are situated in the southeast quarter of section 16 of the same township and, of course, lie to the west of the Ames tract. The mining claims are located on a north and south vein, are the same width (400 feet) and their easterly side lines are approximately parallel to and 200 feet distant from the westerly boundary line of the Ames land. The Jefferson claim extends 750 feet north from the south line of said section 16, and its north end line coincides with the south end line of the Pennsylvania. The latter claim then extends north for a distance of 1540 feet. Section 16 is a so-called school section and therefore the 200-foot strip of land lying between the mining claims and the westerly boundary of appellants' land is so-called school land. It is conceded that the vein dips easterly at an angle of about forty-five degrees and passes under and through the strip of school land and thence under the Ames tract.

As far as the Pennsylvania claim is concerned the controversy is essentially a question of priority of title. Appellants claim title to the Ames tract under a railroad grant by congress which became effective July 25, 1866, 14 Stat. 239, granting certain sections of the public domain to the California and Oregon Railroad Company in aid of railroad construction between Roseville, California, and Portland, Oregon, followed by a patent issued June 14, 1880. Respondent bases its claims on locations allegedly made long prior to 1860, under local mining district rules, followed by recognition by the Mining Act of July 26, 1866, 14 Stat. 251. A patent was is-

sued for the Pennsylvania claim on August 18, 1880. The Jefferson is unpatented. Respondent maintains that its predecessors have worked the two claims since the early days of the California gold rush and have taken therefrom great quantities of valuable minerals.

Assuming for the present that respondent's claims are otherwise valid, we shall proceed first to dispose of the question of priority. On this point appellants urge that when congress passed the act of July 25, 1866, 14 Stat. 239, granting the railroad company certain alternate sections to be earned and selected later, it was a grant in praesenti; that at that time, although many thousands of men were engaged in mining upon the public domain, such men were simply trespassers; that even though their district rules were in many respects recognized as law in disputes between mining claimants, such men had no legal rights as against the government or anyone claiming under it. It is further argued that no legal rights could be acquired in such claims prior to the Mining Act of July 26, 1866, which, it will be noted, became effective one day after the effective date of the railroad grant. It is further contended that although the Mining Act sought to recognize the rights theretofore initiated by miners under their district rules and thus cause the inception of title to such claims to relate back to the time of location, that congress, by the railroad grant, entered into a contractual relation with the railroad company and for this reason and because the grant was a present one had no power to give effect to a mining location that had no legal standing before said contractual relation arose. It is also maintained that even though the railroad grant did not purport to pass mineral lands, when the land department passed upon the character of the land for the purpose of issuing a patent this was necessarily a binding adjudication of the fact that said land and everything beneath the surface thereof was nonmineral and that this finding is conclusive against a collateral attack and thus effectively cut off any rights which might have otherwise intervened. In reply to this, respondent contends that its locations were made long prior to the railroad grant and insists that there was congressional legislation, even before the Mining Act of July 26, 1866, which established the validity of such locations; that

when a patent was finally given to the Pennsylvania it related back to the date of location.

For the reasons that follow, we are of the opinion that the solution of the problems now before the court does not depend upon the validity or effect of early mining district regulations and that it was not necessary for respondent to show that its rights originated prior to July 26, 1866.

The railroad grant of July 25, 1866, is similar to many other such grants made about that time. Section 2 provided, in part, "That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof." Section 10 provided, "And be it further enacted, That all mineral lands shall be excepted from the operation of this act; * * * Provided, That the term 'mineral lands' shall not include lands containing coal and iron."

The effect of such grants has been discussed many times by the federal courts. In *Barden v. Northern Pacific Railroad Company*, 154 U.S. 288, 14 S.Ct. 1030, 1033, 38 L.Ed. 992, the court was confronted with much the same question as is presented here, except that it differed from this in the very important particular that in that case no patents had been issued. The railroad company was claiming under an act passed July 2, 1864, 13 Stat. 356. It had proceeded with the construction of the road, commissioners had been appointed by the President to pass upon the work and their report had been filed and approved. Thereafter the sections, including that in dispute, had been listed and the lists had been accepted by the local land office and fees paid. In the year 1888, before any patent had issued to the railroad company, veins of rock in place bearing gold and silver were found in one of the sections so listed and were located as mining claims. Thereupon the railroad company commenced the action to establish its right

to such veins. Its case was based in part upon the contention that the grant of July 2, 1864, was a grant in praesenti; that as the land was not *known* mineral land at the time of the passage of the act, or at least at the time the section was listed, no rights could be acquired by subsequent mining locations. Speaking on behalf of the court, Mr. Justice Field said: "It is also true that the grant was one in praesenti, of lands to be afterwards located. From the immense territory from which the sections were to be taken, it could not be known where they would fall until the line of the road was established. Then the grant attached to them, subject to certain specified exceptions; that is, the sections, or parts of sections, which had been previously granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, were excepted, and the title of its other sections or parts of sections attached as of the date of the grant, so as to cut off intervening claimants. In that sense the grant was a present one. But it was still, as such grant, subject to the exception of mineral lands made at its date, or then excluded therefrom by conditions annexed. Whatever the location of the sections, and whatever the exceptions then arising, there remained that original exception declared in the creation of the grant. The location of the sections, and the exceptions from other causes, in no respect affected that one, or limited its operation. * * * The policy of congress as expressed in its numerous grants of public lands to aid in the construction of railroads, has always been to exclude the mineral lands from them, and reserve them for special disposition, as seen in the following acts, among others:" (Then are listed a number of such acts including the California and Oregon Railroad Act of July 25, 1866.) "In all of these cases, and in all grants of public lands in aid of railroads, minerals (except iron and coal) have uniformly been reserved, and in no instance has such a grant been held to pass them. Patents issued after an examination and determination of the fact by the government whether portions of the land embraced in such grants did or did not contain other minerals, have been held as conclusive in subsequent controversies, and of this we shall speak hereafter; but grants in aid of railroads: (and we speak of no other grants): before such determination and issue of a patent have never been held to

pass other than iron or coal, and it is only with other minerals, and with lands containing them, that we are concerned in this case." The court then held that the mining locations made twenty-four years after the effective date of the act of congress, but before the issue of patent, created valid claims and that the railroad company had acquired no rights therein. The facts that the road had been located, the sections listed, and the land paid for at the local land office were held not to bar the rights of the mineral claimants. To the same effect are *Northern Pacific Railroad Co. v. Sanders*, 166 U.S. 620, 17 S.Ct. 671, 41 L.Ed. 1139, and *Wyoming v. United States*, 255 U.S. 489, 490, 41 S.Ct. 393, 65 L.Ed. 742.

[1] Appellants have cited a number of cases holding that where patents are issued to agricultural lands title relates back to the date of entry. But these decisions are not controlling in this case so far as the Ames tract is concerned because the patents so issued were authorized by public land acts other than railroad grants. In the *Barden* and *Sanders* cases the court was careful to point out that its ruling was confined to cases arising out of grants in aid of railroad construction. The reason given was that such acts differed materially from most other acts granting public lands; that the railroad acts reversed mineral lands and should be strictly construed in favor of the government, and therefore, every opportunity should be given to establish the character of the land as mineral, if that were a fact, in which event the railroad could then make another selection in lieu thereof. In other words, under the railroad grants, the grant was in praesenti as to lands *not mineral* when patent was issued and then related back to the date of the act, but if before a patent was issued minerals were found and rights thereto fully established by compliance with the mining laws, then such grant never took effect as to such excepted mineral lands. We are therefore of the opinion that if respondent's predecessors made proper discoveries and complied with the mining laws at any time before the patent was issued to the railroad company on June 14, 1880, it was legally possible for them to establish valid mining rights therein notwithstanding the railroad grant or any acts performed by the railroad prior to the issuance of the patent.

[2] But appellants contend that even if this is a correct statement of the law, the patent was based necessarily upon a finding by the land department that the land embraced therein was not mineral in character; that the claimants of the *Pennsylvania* and *Jefferson* claims did not adverse the application for the railroad patent and, as stated in the *Barden* case this finding is "conclusive in subsequent controversies".

Before taking up the other points it should be said that there was no provision made for adverse such claims. Adverse proceedings relate only to surface conflicts between mineral claimants and there was no opportunity for such a proceeding in any other case. No rights are lost merely because of a failure to adverse a claim when the conflict is between a mineral claimant and one claiming the land under some act other than the mining laws. *Creede & C. C. Min. & Mill. Co., v. Uinta Tunnel etc. Co.*, 196 U.S. 337, 25 S.Ct. 266, 49 L.Ed. 501; *Lawson v. United States Mining Co.*, 207 U.S. 1, 28 S.Ct. 15, 52 L.Ed. 65; *Lindley on Mines*, [3d ed.] sec. 717. The failure to adverse the railroad application had no effect upon the evidentiary value of the patent to the *Pennsylvania*.

[3] We have no quarrel with appellants' contention as to the effect, generally of such a determination by the land department. Speaking of this question in *Burke v. Southern Pacific R. R. Co.*, 234 U.S. 669, 34 S.Ct. 907, 913, 58 L.Ed. 1527, the court said: "As has been seen, the exclusion was of 'all mineral lands.' It was not a mere reservation of minerals, but an exclusion of mineral lands * *. This shows that a determination of the character of the lands, as mineral or non-mineral, was plainly contemplated. * *. Congress confided the identification of the lands, both included and excluded to the Land Department * *. The grant * * * was in praesenti in the sense that the title to the granted lands, when they should be identified, passed as of the date of the granting act; * * * and so it was that provision was made for issuing patents 'confirming to said company the right and title to said lands' after construction. * * *. This was obviously the purpose of the patents. They were to be in confirmation of the company's 'right and title,' and so were to be the legally appointed evidence that the lands described

in them had passed to the company under the grant." Continuing this discussion, 234 U.S. at page 685, 34 S.Ct. at page 914, 58 L.Ed. 1527, it is said: "As it plainly was not intended that patents should issue for excluded lands, to which the company was not to have any right or title, the direction respecting the issue of patents necessarily carried with it the power and duty of determining in every instance whether the land came within the terms of the grant, or, for any reason, was excluded from it * * *." 234 U.S. at page 686, 34 S.Ct. at page 914, 58 L.Ed. 1527, the court quotes with approval from an opinion by Secretary Noble: "It is not questioned that the Land Department has jurisdiction until patent or certification, * * * to determine whether any of the lands within the lateral limits of the grant had been, at the time the line of the road was definitely fixed, 'sold, reserved, or otherwise disposed of,' or was subject to 'a pre-emption or homestead claim,' and therefore excepted from the grant. * * * It has been the practice of that Department for many years past, to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of the patent.'"

In *West v. Standard Oil Co.*, 278 U.S. 200, 49 S.Ct. 138, 141, 73 L.Ed. 265, it is said: "Ordinarily, where an act granting public lands excludes those known to be mineral, the determination of the fact whether a particular tract is of that character rests with the Secretary of the Interior. * * * If such act provides for the issue of a patent, whether it be to pass the title or to furnish evidence that it has passed, the patent imports that final determination of the nonmineral character of the land has been made. The issue of the patent terminates the jurisdiction of the Department over the land. * * * And in the courts the patent is accepted, upon a collateral attack, as affording conclusive evidence of the nonmineral character."

There is no doubt but that the foregoing statement is the generally accepted and generally applicable rule, nor can there be any doubt but that it would apply to this case unless the facts show an exception to it.

Speaking of the conclusiveness of patents, Judge Lindley says, at page 1889 of the third edition of his work on mines:

"The land department is a quasi judicial tribunal, and a patent is the judgment of that tribunal upon the questions presented and a conveyance in the execution of that judgment.

"When it is attacked, two questions are presented. They are, Did the department have jurisdiction to issue the patent and to determine the questions which conditioned its issue? and, Was its judgment induced by fraud, mistake of fact, or error in law?

"With the issuance of the patent the functions of the land department terminate. It is the culmination of the proceeding in rem—the final judgment of the tribunal specially charged with passing the government title. With the title passes away all authority or control of the executive department over the land and over the title which it conveys.

"To the extent that we have already covered the field, it is unnecessary to do more than recapitulate the results heretofore reached as to the force and effect of this judgment.

"(1) A patent for land is the highest evidence of title, and is conclusive against the government and all claiming under junior patents or titles until set aside or annulled. It is not open to collateral attack;

"(2) The land department is a tribunal appointed by Congress to decide certain questions relating to the public lands, and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else;

"(3) The government having issued a patent cannot, by the authority of its own officers, invalidate it by the issuing of a second one for the same property;

"(4) A patent may be collaterally impeached in any action, and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others;

"(5) A patent is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken;

"(6) It is conclusive evidence of the citizenship and qualification of the patentee; and,

"(7) In cases of mining patents, that all matters which might have been the subject of an adverse claim have been conclusively adjudicated in favor of the patentee."

In support of the rules laid down he cites *Hardin v. Jordan*, 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428; *Davis' Administrator v. Weibbold*, 139 U.S. 507, 11 S.Ct. 628, 35 L.Ed. 238 and *Wright v. Roseberry*, 121 U.S. 488, 7 S.Ct. 985, 30 L.Ed. 1039.

[4-7] Does the patent issued to the railroad company in this case come within any of the exceptions to the rule as to conclusiveness against collateral attack? We think it does.

We have already held that it was possible for the mineral claimants to acquire mineral rights in land listed to the railroad at any time prior to patent. The patent to the Ames land was issued June 14, 1880. The patent records leading up to the patent of the Pennsylvania claim show that the patent to that claim was issued August 18, 1880, but that the registrar's final certificate of entry and the receipt for the fees paid were issued May 31, 1880, which was fourteen days before the railroad patent was issued. This was the first binding determination by the land department as to the character of the land and when the patent was issued later it related back to the establishment of the mining titles which was at the very latest some time prior to May 31, 1880. This adjudication removed the land from the non-mineral area open to the railroad under its grant and conferred upon the applicants an equitable title therein as of May 31, 1880. Until this determination was cancelled or set aside the land department lacked jurisdiction to grant such land to the railroad company, and for this reason the case comes within exception (4) as shown in *Lindley on Mines* and in the cases there cited. But it will be argued that the railroad patent, issued fourteen days after the certificate, set aside this determination and did constitute a cancellation of the certificate or the finding as to the mineral character of the vein. But the record shows conclusively that this cannot be the case. The patent records contained no such order and the patent, subsequently issued, recites the fact of the issuance of the certificate on that date and that it is based in part upon it. After this determination by the department the min-

eral character of the vein was established by competent authority and no rights therein could be acquired unless by compliance with the mining laws. From the date of the issuance of the certificate the claimants had vested rights until the certificate was cancelled. 50 C.J. 920, 924. In *Deffebach v. Hawke*, 115 U.S. 392, 6 S.Ct. 95, 29 L.Ed. 423, it is said (quoting from syllabus): "No title from the United States to land known at the time of sale to be valuable for its minerals * * * can be obtained under preemption * * * laws, or the town-site laws, or in any other way" than by compliance with laws specially providing for disposal of mineral lands. "A certificate of purchase of mineral land upon an entry of the same by a claimant at the local land-office, if no adverse claim is filed with the register and receiver, and the entry is not canceled or disaffirmed by the officers of the land department at Washington, passes the right of the government to him, and, as against the acquisition of title by any other party, is equivalent to a patent. The land thereby ceases to be the subject of sale by the government, which thereafter holds the legal title in trust for the holder of the certificate." It therefore appears that the vein covered by the Pennsylvania patent was acquired by the mineral patentee in time to cut off any possible rights of the railroad company and the patent, when introduced in evidence by respondent, conclusively established its rights in that segment of the vein.

[8] By an Act of Congress dated March 3, 1853, 10 Stat. 244, the 16th and 36th sections of each township were granted to the state of California for school purposes. The land was then unsurveyed, the survey being approved August 6, 1867. Appellants contend now that this also was a grant in praesenti which took effect prior to the time when the locators of the mines could have acquired a legal title and, therefore, the strip of school land between the Ames tract and the mining claims had passed to the state of California and had cut off any possibility of the locations or patent carrying collateral rights in appellants' land. The question then is, When, if at all, did title to the school land actually vest in the state?

The survey of said lands was approved, as we have already noted, on August 6, 1867. If on that date the lands were known to be mineral, the title did not pass

to the state under the terms of the grant; for congress had thereby excluded such mineral lands. If the land was not then known to be mineral the title passed to the state on that date. The act of 1853 made no provision for determining what parts of the land mentioned therein were to be excluded because of their known mineral character. No provision was made for the issuance of patents or for any equivalent action by the land department to evidence the transfer of title and it was therefore necessary to determine, in some other way, whether the land was or was not mineral at the date of the survey. *West v. Standard Oil Co.*, supra, and cases there cited.

Appellants argue that the non-mineral character of the land had been established by the fact that the register of the local land office on March 7, 1871, had certified that there was no claim or filing on the southeast quarter of said section 16 in his office and that this "had the effect of a patent", citing *McCormick v. Hayes*, 159 U.S. 332, 16 S.Ct. 37, 40 L.Ed. 171, in which the commissioner had certified, and the secretary of the interior had approved the granting of lands to the state for railroad purposes. *Saunders v. La Purisima Co.*, 125 Cal. 159, 57 P. 656, and *Worcester v. Kitts*, 8 Cal.App. 181, 96 P. 335, are also relied on to support this contention. But since these cases were decided the Supreme Court of the United States in *West v. Standard Oil Co.*, supra, has pointed out the difference between the acts of minor officials of the land office and the acts of the secretary of the interior and has held directly that such acts as the register performed here do not constitute a binding determination in school land cases and no title passes because of them.

So far then as the school land is concerned there is nothing in the record here showing in any way that there had ever been a determination of the character of the land embraced in said section 16 prior to the issuance of the Pennsylvania patent. The proceedings on this patent taken before the certificate was issued then constituted the first and only determination that the vein was mineral and did not pass to the state. This finding is conclusive. It should be remembered, in this connection, that the certificate issued prior to the Pennsylvania patent was issued by authority of the secretary and is not to be confused with the character of certificate

given by the local register mentioned above.

What we have already said disposes of all the principal questions concerning the Pennsylvania claim and there now remains for consideration the conflict arising from the unpatented Jefferson claim.

[9] Appellants deraign title to the Ames tract through a deed from J. E. Ebert who had succeeded to the railroad title. This deed contained the following reservation: "There is hereby expressly reserved to the said party of the first part, his heirs, executors, administrators, and assigns, the right to follow the Jefferson Gold Quartz Ledge with its dip, and to mine and extract the ores from the same in and upon said land, without disturbing the surface of the said land."

The rights thus reserved were later conveyed to respondent's lessors and are included in its lease.

If this was a valid reservation it is immaterial so far as this case goes whether respondent, independently of it, has any right to mine beneath the Ames land. If the railroad company owned that portion of the vein which lay beneath its surface but had its apex within the limits of the Jefferson claim and it was reserved from the deed to appellants, and subsequently respondents acquired the rights under it, appellants are in no position to complain. They do not deny the existence of the reservation or that they deraigned title from Ebert, but they seek to avoid its effect (we quote from their Reply Brief) by the following argument: "If the holding of the trial court is correct, that the Jefferson claim has extralateral rights in the Ames tract, then there is nothing for the reservation to operate upon" (citing and quoting from 18 C.J. 344). "On the other hand, if the Jefferson claim has no extralateral rights in the Ames tract, then the reservation is no broader than its terms. Appellants contend that the reservation creates merely a right or privilege." It is then argued that this is a right or privilege that is not exclusive.

It seems quite obvious that if Ebert had no rights in the vein, then appellants, who acquired whatever rights they now have through the deed from him, could have none. If the Jefferson claim did not have collateral rights—and this is what appellants have maintained throughout this case—then Ebert must have had them. If the deed did nothing more than reserve a

"right or privilege" it would still be a complete defense in this action, even though not exclusive.

Appellants appear to have forgotten the nature of this action. This is not a suit to quiet title. By their complaint they alleged that respondent wrongfully entered their land and now wrongfully withholds the possession; that the wrongful acts consist of "entering, mining and extracting minerals, ores, and mineral-bearing rock from certain veins and lodes underlying plaintiffs' land." They seek to enjoin these acts and recover damages. The answer sets up two special defenses—and we are referring now to the Jefferson segment of the vein only. After denying the charges in the complaint, it sets up the claim under the Jefferson locations and as another special defense it sets up the reservation in the Ebert deed. No cross-complaint was filed. It therefore appears that the only question involved was the right to mine and extract the ores and minerals in this vein. If respondent could establish a right to do this either under the locations or the Ebert reservation, it was sufficient to defeat appellants' demands. It was not necessary to do both. The exercise of the rights mentioned in the reservation is exactly what appellants are seeking to prevent, and they have made no claim that it has resulted in a "disturbance of the surface of the land."

In view of the nature of this action it is immaterial whether the rights reserved were or were not exclusive, but we do not wish to be understood as holding, by the foregoing discussion, that they were not. The right reserved is not merely to mine and extract ores, but is to mine and extract the ores.

Although we do not find it necessary to decide the point, it might be argued with great force that as we are concerned here with two mining claims on the same vein, and the whole of said vein is in one section of land, that the determination of the land department made before the issue of the certificate and patent fixed the mineral status of the whole vein and of the whole section. Because of the peculiar nature of collateral rights we think that this question might properly be deferred for consideration in some other case where it is necessary.

Many other points have been raised and elaborately argued but what we have said

disposes of them. No matter what conclusion we might reach with reference to them, it would not change the result or the effect on the parties to this action.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



34 Cal.App.2d 376

PEOPLE v. McCANN.

Cr. 3229.

District Court of Appeal, Division 2,
Second District, California.

Aug. 28, 1939.

1. Burglary ☞42(3)

The possession of stolen property, coupled with false statements as to the manner in which the property came into possession of accused, will sustain conviction of burglary.

2. Burglary ☞42(3)

The possession of stolen watch by accused at time of his arrest, coupled with inconsistent and conflicting accounts of the manner in which it came into his possession, sustained conviction of burglary.

3. Criminal law ☞1166(8)

Where accused at time case was called for trial moved for continuance of four or five days, which was denied, but after case was tried court continued it for seven days so that accused might procure testimony of allegedly absent witness, denial of motion for continuance was not prejudicial.

4. Criminal law ☞590(2)

Any right that accused might have had to a continuance on the ground that his counsel who had just been substituted for previous counsel was not prepared to try the case was waived by counsel's statement that motion for continuance was not based on ground that he had just been substituted.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Arthur A. McCann was convicted of burglary and he appeals.

Affirmed.

Vernon R. Hamilton, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial before the court without a jury of burglary. This appeal is from the judgment of conviction and order denying his motion for a new trial.

Viewing the evidence most favorable to the respondent, the facts are:

December 31, 1938, the home of Anthony Guadnola in the city of Los Angeles was entered and a watch stolen therefrom. At the time of the burglary defendant was in the city of Los Angeles. On January 6, 1939, defendant was arrested in Phoenix, Arizona, together with a man by the name of Hash. The stolen watch was in an overcoat belonging to Mr. Hash. Defendant at the time of his arrest stated that the watch belonged to him and that it had been given to him by a party in Amarillo, Texas. Defendant after questioning was released and later arrested in El Centro, California with the stolen watch in his possession. He was brought to Los Angeles, where he stated that he had purchased the watch from a man named Olson in Phoenix, Arizona, for the sum of \$3.00 and denied being in Los Angeles at the time of the burglary. Later he stated that he had purchased the watch from a man named Fred in Los Angeles for the sum of \$4. When the case was called for trial, defendant substituted his present attorney for previous counsel and his present attorney requested a continuance for five days, so that he might produce a witness who would corroborate defendant's story that he purchased the watch in Los Angeles from a man named Fred. This continuance was denied.

Defendant relies for reversal of the judgment on these propositions:

First: There is no substantial evidence to sustain the trial court's judgment finding defendant guilty of burglary.

Second: The trial court committed prejudicial error in denying defendant's motion for a continuance.

[1] The first proposition is untenable. The law is established in California that possession of stolen property coupled with false statements as to the manner in which the property came into defendant's possession is sufficient evidence to sustain a conviction of burglary. *People v. Neber*, 125 Cal. 560, 561, 58 P. 133; *People v. Russell*, 120 Cal.App. 622, 625, 8 P.2d 209.

[2] Applying the foregoing rule of law to the facts in the instant case, there is substantial evidence to sustain defendant's conviction of burglary, since he possessed the watch at the time of his arrest and he gave inconsistent and conflicting accounts of the manner in which it came into his possession.

[3] The second proposition is likewise untenable. Defendant at the time his case was called for trial moved for a continuance of four or five days, which was denied. However, after the case was tried, the trial court continued it for seven days, so that defendant might procure the testimony of his allegedly absent witness. Thus it is evident that in fact the trial court afforded to defendant a longer time in which to produce his witness than defendant had requested. Hence defendant was not prejudiced by the trial court's ruling in denying his motion for a continuance.

[4] There is no merit in defendant's contention that the rule stated in *People v. Simpson*, Cal.App., 88 P.2d 175, to the effect that it is prejudicially erroneous for the trial court to refuse defendant a reasonable time in which to prepare for trial, is applicable to the facts of the instant case, since at the time the case was called for trial defendant's counsel stated to the court that he was not basing his motion for a continuance on the ground that he had just been substituted into the case. It is thus apparent that any right that defendant might have had to a continuance upon the ground that his counsel was not prepared to try the case was expressly waived by him in open court. Moreover, it was not held in *People v. Simpson*, supra, that the substitution of an attorney on the day of trial makes it mandatory for the trial court to grant a continuance.

For the foregoing reasons the judgment and order appealed from are and each is affirmed.

I concur: WOOD, Acting P. J.

34 Cal.App.2d 367

TAKAHASHI v. KUNISHIMA et al.

Civ. 2323.

District Court of Appeal, Fourth District,
California.

Aug. 28, 1939.

Rehearing Denied Sept. 19, 1939.

1. Garnishment ⇨167

The statutory provisions respecting proceedings to be taken after levy of attachment on property in hands of others than immediate parties to action do not authorize court or referee to adjudicate matter of garnishee's indebtedness to party whose property is attached. Code Civ.Proc. §§ 544, 545.

2. Garnishment ⇨148

Where return to notice of garnishment under attachment of proceeds of crop was unverified and asserted no beneficial interest of garnishee in such funds, no authority existed to try title to crop thereunder. Code Civ.Proc. § 689.

3. Execution ⇨420½

The statutory provisions respecting proceedings supplementary to execution give court no jurisdiction to try summarily question whether third party, served with notice of execution levy, is indebted to defendant, when such indebtedness is denied, especially where such party also asserts that funds in his hands are claimed by another than defendant. Code Civ.Proc. §§ 717-720.

4. Garnishment ⇨180

A garnishee, writing words "no funds" and explanation under heading "Note" that third party demanded payment of funds held by garnishee after statements in return, made on form furnished by sheriff, to attachment levy that garnishee was indebted to defendant in "sum of Dollars," did not admit indebtedness to defendant, so that court acquired no jurisdiction to enter summary order for payment of funds to plaintiff. Code Civ.Proc. §§ 717-720.

5. Execution ⇨420½

A claimant of funds in garnishee's hands did not waive right to object to court's jurisdiction to adjudicate right thereto by appearing at hearing on plaintiff's petition to determine title to attached property and application to show cause why money should not be paid to sheriff in proceedings supplementary to execution, where he objected

to jurisdiction to try title under attachment proceedings and court denied him right to raise issues triable in proper forum by refusing him leave to file intervention petition in supplementary proceeding, as he was not estopped by default judgment for plaintiff to raise such questions. Code Civ.Proc. § 720.

6. Garnishment ⇨167

In garnishment proceeding, trial court had no jurisdiction to determine who was entitled to proceeds of sale of crop in hands of garnishee withholding payment thereof pending determination of question whether plaintiff or crop mortgagee was entitled thereto. Code Civ.Proc. §§ 544, 545, 689, 717-720.

7. Appeal and error ⇨714(5)

The appellate court cannot determine whether trial court erred in adjudicating plaintiff's title to funds held by garnishee, in absence of reporter's transcript, bill of exceptions, copies of files in other cases referred to in trial court's findings, and depositions quoted from in amicus curiae brief.

8. Garnishment ⇨167

An interpleader suit filed by garnishee, not garnishment proceeding, is proper cause in which to settle question whether plaintiff in garnishment proceeding or adverse claimant of fund held by garnishee is entitled thereto.

9. Appeal and error ⇨684(3)

Proceedings in garnishee's interpleader suit cannot be considered on appeal from judgment for plaintiff in garnishment proceeding, where not disclosed by record.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by K. Takahashi against Harry K. Kunishima to recover on certain labor claims, in which plaintiff took out a writ of attachment and caused service of notice of garnishment thereunder on the Consolidated Produce Company, Limited, and George Manos, as claimant of the attached funds, appeared at a hearing on plaintiff's petition for determination of right thereto and order to show cause why they should not be paid to the sheriff in proceedings supplementary to execution on a judgment for plaintiff. From a judgment for plaintiff, claimant appeals.

Reversed.

Stickney & Stickney and William H. Wylie, all of San Diego, for appellant.

Frank Birkhauser, of El Centro, for respondent.

Elmer W. Heald, Dist. Atty., of El Centro, *amicus curiæ* for respondent.

HAINES, Justice pro tem.

Defendant Kunishima was, during the year 1937, engaged in raising farm produce in Imperial county and appellant Manos claims to have been the assignee of Manos Brothers, to whom Kunishima in December of that year is said to have executed a promissory note for \$4,000 and interest, secured by a crop mortgage on a tomato crop then growing on Kunishima's premises in that county, which mortgage is stated to have been in that month duly recorded. On July 12, 1938, respondent Takahashi commenced the instant action in the superior court of Imperial county against Kunishima to obtain judgment on certain labor claims aggregating \$1,053, one of which Takahashi asserted to have been originally his own, and the other two of which he alleged that he had acquired by assignment. Pending this action he took out a writ of attachment and caused notice of garnishment thereunder to be served on the Consolidated Produce Co., Ltd., hereinafter referred to as the "Produce Company", a Los Angeles concern to which Kunishima had delivered the tomatoes. The Produce Company on July 15 made return in the words and figures following:

"To notice of garnishment and demand for a statement served on me this 15th day of July, A. D. 1938, by the sheriff of Los Angeles County, under and by virtue of a writ of attachment issued in the above entitled cause my answer is: That ——— I am indebted to ———, said defendant, in the sum of ——— Dollars, and that ——— I have ——— in ——— my possession ——— and under ——— my control ——— personal property belonging to said defendant, to-wit: No funds.

"Note: Handled shipments for this account, but notified to effect by Manos Bros. of San Diego, California, they hold Crop Mortgage covering crops produced; and they rightfully entitled to proceeds and demanding payment thereon. Have therefore withheld payments until such a time as proper party proven rightfully entitled to these payments.

"Amount withheld \$1140.91."

Thereupon Takahashi filed in the case a petition, apparently conceived to be under the provisions of section 689 of the Code of Civil Procedure, claiming that the labor on which his claims were based had been bestowed on the crop delivered to the Produce Company and asking determination of the right to the money derived from the sale of the crop. The court directed a hearing on the matter and fixed August 24, 1938, as the time therefor, of which notice was given to the Produce Company but so far as appears to nobody else. In the meantime it enjoined the Produce Company from disbursing the \$1,140.91. Kunishima having defaulted in the main case, Takahashi proceeded to take judgment as he had prayed on July 26, and on July 27, he took out an execution thereon for \$1,064 then due on the judgment, and had a notice of levy thereon served on the Produce Company which refused to pay the sheriff the funds in its hands but instead made return that it was not indebted to Kunishima and had in its possession or under its control no personal property belonging to him but did have in its possession \$1,140.91 as the sales price of produce consigned to it by Kunishima for sale but that Manos Brothers claimed such proceeds by virtue of a crop mortgage. On August 12, Takahashi made an affidavit under section 717 of the Code of Civil Procedure asking that the Produce Company, Manos Brothers, and appellant George Manos appear and show cause why the money should not be paid to the sheriff. The court on that day issued an order to show cause accordingly, fixing August 24 as the time for the hearing on the matter, restraining the Produce Company in the meantime from doing anything to prejudice the proceeding and shortening to 5 days the time for service of the order. This order was served on all parties concerned but the service was not made on appellant until August 23, and he apparently made no appearance on August 24. The court minutes as of that date recite that "Leave is granted to the plaintiff for a reference before Arthur W. Kennedy, attorney at law, on September 10, 1938, at 10 o'clock a. m."

According to the recitals in the court's findings hereinafter referred to, the original petition filed for determination of the title to the property sought to be levied on under the writ of attachment, as well as the hearing asked for in the affidavit made under section 717 by way of a pro-

ceeding supplementary to execution, came on together before the court on August 24, and were continued to August 31, at which latter time Takahashi, Kunishima, Manos Brothers and appellant George Manos all did appear by counsel, and counsel for appellant George Manos, according to the recitals referred to in the findings, objected to the court's jurisdiction "to determine the title to the property" attached, and presented and sought leave to file a petition in intervention. This leave, however, the court denied.

In this proposed petition in intervention appellant Manos set out the making of the note and crop mortgage by Kunishima in favor of Manos Brothers and the assignment of the same by Manos Brothers to him; that the tomatoes were subject to the mortgage lien; that the mortgage provided that the crop should be delivered into the mortgagee's possession for sale and the proceeds applied to the debt; that Kunishima, in violation of the terms of the mortgage and without notice to the mortgagee, had removed \$1,140.91 worth of tomatoes from the land and delivered the same to the Produce Company with instructions to sell them for his account; that the Produce Company had done so and realized therefrom \$1,140.91, which sum it held; that the case as between the respondent Takahashi and defendant Kunishima was collusive and instituted to defraud Manos and his assignors; that Kunishima was not in fact indebted to Takahashi; and that he, Manos, was entitled to the \$1,140.91.

The hearing of August 31 was adjourned (according again to the recitals mentioned) for the taking of evidence in Los Angeles, pursuant to the reference made by the court, after which the court on October 25, 1938, rendered judgment for respondent Takahashi which, however, was vacated by consent and the matter reargued. Appellant claims that he was not represented at the taking of the evidence in Los Angeles and his counsel claim to have had no notice of the hearing there. The findings assert that they did have such notice thereof.

The findings bear date December 17, 1938. They are of considerable length and, as we have stated, recite various proceedings above mentioned; undertake to determine that the claim of Manos Brothers and George Manos to a lien upon the funds in controversy by virtue of their crop mortgage is unsupported by the evi-

dence, for the reason that on January 19, 1938, they filed an action in San Diego county, which was subsequently transferred to Imperial county, against Kunishima on the \$4,000 promissory note and filed therein an attachment affidavit and secured the issuance of a writ of attachment and levy thereof on the said moneys in the possession of the Produce Company, whereby they waived their mortgage lien; further, that they waived it by reason of their apparent consent to Kunishima's sale of the crop and their lack of reasonable diligence in protecting their rights after the crop had been harvested. The court also found that by Takahashi's action in levying under his own writ of attachment on July 15, 1938, he obtained a prior lien on the money in the hands of the Produce Company and that he is entitled to satisfaction of his judgment therefrom. It was further found that the Produce Company had, prior to the making of said findings, filed an interpleader action in Imperial county wherein it named as defendants both Takahashi, Manos Brothers and George Manos, and had offered to deposit therein the sum of \$1,064 with interest thereon from July 26, 1938, and costs, for disposition to whichever party should be adjudged entitled thereto, to which sums the court found, as above stated, that Takahashi was entitled.

Pursuant to these findings and in accordance with certain conclusions of law drawn by it from them, the court thereupon proceeded in the instant case to adjudge Takahashi entitled to the money claimed by him, but to provide that upon the deposit by the Produce Company of the money in its hands with the county clerk of Imperial county, either in the instant case or in the interpleader action, such clerk should pay Takahashi therefrom enough to satisfy his judgment and hold the balance, if any, subject to the court's further order. It is from this judgment that the present appeal is prosecuted.

The fundamental question in the present appeal appears to us to be whether, either under the provisions of sections 544, 545 and 689 of the Code of Civil Procedure, relating to proceedings to be taken in certain circumstances after an attachment levied on property in the hands of persons other than the immediate parties to the action, or under sections 717 to 720, both inclusive, of the Code of Civil Procedure, having to do with proceedings supplemen-

tary to execution, the court had any jurisdiction in the instant proceeding to make the determination complained of.

[1-3] Section 544 deals with the circumstances under which third parties become liable to an attaching creditor, not with the matter of adjudicating their liability. It has been squarely held that "neither that section nor section 545 authorizes the court or referee to make an adjudication as to the matter of the indebtedness of the garnishee to a party whose property is attached". *Bunnell v. Wynns*, 13 Cal.App.2d 114, 116, 56 P.2d 267, 268, hearing denied by Supreme Court. So far as section 689 is concerned, the proceeding there contemplated has to do only with the determination, after an attachment levy, of rights in the property levied upon asserted by a verified third party claim. The Produce Company's return to the notice of garnishment under the attachment was not verified, nor did it assert any beneficial interest on the part of the Produce Company in the funds sought to be attached. No authority whatever existed to try title under it. Manifestly, therefore, if the judgment appealed from is to be sustained at all, it must be sustained as one authorized by sections 717 to 720, both inclusive. But it cannot be so sustained. It has long been settled that no jurisdiction exists under these sections to summarily try the question of whether the third party served with notice of an execution levy is indebted to the defendant when such an indebtedness is denied. *Parker v. Page*, 38 Cal. 522; *Hartman v. Olivera*, 51 Cal. 501; *Hibernia Savings & Loan Society v. Superior Court*, 56 Cal. 265; *Ex parte Hollis*, 59 Cal. 405, 413, 414; *G. Cavaglieri Mortgage Co. v. Superior Court*, 79 Cal.App. 655, 250 P. 700. So far as the right to enter any summary order for the payment of the funds is concerned, such denial is conclusive against the court's power to make it. *G. Cavaglieri Mortgage Co. v. Superior Court*, supra. The court can, in such a case, do no more, after holding the examination, than to authorize, under section 720, the institution of an independent action and forbid the disposition of the fund while that is going on. A fortiori do these principles apply where the one served with the notice of the levy not only denies the indebtedness to the defendant but, as here, asserts that the funds in his hands are in fact claimed by someone other than the defendant. *Deering & Co. v. Richardson-*

Kimball Co., 109 Cal. 73, 82, 83, 41 P. 801; *Miller v. Superior Court*, 82 Cal.App. 634, 639, 256 P. 431.

[4,5] Respondent claims that these authorities are not applicable because on the return to the original attachment levy the Produce Company did not deny but admitted an indebtedness to Kunishima. There is nothing whatever in this claim. It is sufficiently evident from the return, as set out in the record, that it was made on a form furnished by the sheriff containing inter alia the words: "I am indebted to ———, said defendant, in the sum of ——— Dollars, and that ——— I have ——— in ——— my possession ——— and under ——— my control ——— personal property belonging to said defendant, to-wit:" and that the assistant secretary of the Produce Company deemed that he had sufficiently negated these solicited statements by writing after them the words "No funds" followed by the explanation under the heading "NOTE" hereinbefore in this opinion set out. When the return is looked at as a whole, no other construction of it appears reasonable. As respects the later return made to the execution levy, it is explicit in the denial that the Produce Company owed Kunishima anything. It has been suggested that appellant, by appearing in connection with the proceedings actually taken in the instant case, waived his right to object to the court's jurisdiction to make adjudications therein. But the record shows that he objected to the jurisdiction so far at least as the attempt to try title under the attachment proceedings was concerned and, as respects the proceedings supplementary to execution in refusing him leave to file his petition in intervention, the court in effect denied him the right to raise issues which he would in the independent action contemplated by section 720 of the Code of Civil Procedure have been entitled to try, such inter alia as the bona fides of the indebtedness on which the respondent had obtained judgment. These were questions which he had the right to raise in a proper forum, for, unlike Kunishima, he was not estopped by the default judgment to raise them. *Coghill v. Marks*, 29 Cal. 673; *McEldowney v. Madden*, 124 Cal. 108, 56 P. 783; *Carlin v. Masten*, 118 Cal.App. 373, 5 P.2d 65. We agree, however, that a proceeding supplementary to execution was not a proper one in which to try these questions. By that token his rights ought not to have

been concluded in a proceeding in which he could not properly raise them.

[6,7] In view of the situation as we have set it out and the authorities cited, we think it clear that the trial court erred in attempting in the case before us, to make any adjudication determining the right to the money in the hands of the Produce Company. We are not especially interested, therefore, in the details of the evidence presented to it other than those which we have recited. What has been said is enough to show that it was without jurisdiction to act at all in deciding who was entitled to the funds levied upon. Whether it was right or wrong in the views entertained by it as to who was entitled to them is, therefore, a matter which does not greatly concern us now. It may be pointed out, however, that even were we entitled here to investigate that question, the record before us would not afford us the means of doing so. The briefs are full of assertions about what the evidence presented to the trial court showed and what it did not show, but counsel have furnished us with neither a reporter's transcript nor bill of exceptions to enable us to know anything more about the matter than is exhibited in what is tantamount to a judgment roll. We learn from the record that we do have, that the trial court had before it files in the other two cases referred to in its findings, that is, in the attachment action said to have been brought on the \$4,000 note, and in the interpleader case. No copies of any of these files have been furnished us except as counsel undertake to quote from them in the briefs. In the amicus curiae brief filed by the district attorney, he quotes from the depositions said to have been taken in Los Angeles. This testimony is not before us.

[8,9] It is wholly outside the record brought up to us, but was stated at the oral argument before this court, that the Produce Company, whether before or after the actual rendition of the court's judgment here appealed from, in fact paid the funds to the county clerk of Imperial county, as a proceeding in the interpleader suit and not in the instant case, and that the court proceeded in that suit to enter a judgment exonerating it from all further responsibility in the matter; that though the interpleader case has not yet been tried as between respondent Takahashi and appellant Manos, the court made an *ex parte*

order therein directing the money claimed by him to be paid over to Takahashi; that the clerk paid it over accordingly, but that the court subsequently vacated such *ex parte* order, it having been made without jurisdiction. If such deposit of money in the interpleader case and the entry of an interlocutory judgment therein exonerating the Produce Company in fact occurred before the judgment appealed from in the instant case, it would afford an additional reason why the court had no jurisdiction to enter such judgment here complained of. *Israel v. Bryan*, 52 Cal.App. 66, 73, 197 P. 121. However this may be, it is manifest that the interpleader cause and not the cause before us is the proper one in which to settle, as between respondent and appellant, the right to the money in dispute. But what has or has not been done in that case cannot under the record before us be considered on the present appeal.

The judgment appealed from is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.



34 Cal.App.2d 335

STRONG et al. v. CHRONICLE PUB.
CO. et al.
Clv. 6181.

District Court of Appeal, Third District,
California.

Aug. 25, 1939.

Hearing Denied Oct. 23, 1939.

1. Negligence ⚡32(2)

An "invitee" is one who enters upon the property of another person by express or implied authority, as when customer enters grocery store to purchase provisions.

[Ed. Note.—For other definitions of "Invitee," see Words & Phrases.]

2. Negligence ⚡32(2)

A "licensee" is a person whose presence is not invited but merely tolerated.

[Ed. Note.—For other definitions of "Licensee," see Words & Phrases.]

3. Negligence ⇨32(2)

An "invitation" will be implied when one visits another's premises for purpose which is of mutual benefit to both parties and not as the mere caprice or for visitor's sole pleasure.

[Ed. Note.—For other definitions of "Invitation," see Words & Phrases.]

4. Negligence ⇨32(2)

A person may be an invitee upon certain portions of another's premises for a proper purpose and may be a mere licensee on other portions of the property, depending on particular circumstances of case.

5. Negligence ⇨32(4)

A 12-year-old boy who was on runway of airport as employee of newspaper distributor for express purpose of receiving newspapers delivered by plane was an "invitee" of operator of airport which was maintained to receive and discharge both passengers and merchandise, as respects operator's liability for injuries sustained when boy was struck by revolving propeller of plane.

6. Negligence ⇨139(1)

In invitee's action against operator of airport for injuries sustained when invitee was struck by revolving propeller of plane, instructions that operator was bound to exercise reasonable care in providing a safe place and operating facilities of airport for protection of invitee were proper.

7. Negligence ⇨61(2)

The alleged negligence of employer of 12-year-old boy in failing to warn boy of danger of revolving propeller of airplane carrying package of newspapers which boy was to receive at airport, in the company of employer, would not relieve operator of airport from liability for injuries sustained by boy who was struck by revolving propeller as result of operator's concurrent negligence.

8. Negligence ⇨61(1)

Joint and several liability may attach to different individuals who are guilty of concurrent negligence.

9. Negligence ⇨5

In invitee's action against operator of airport for injuries sustained when invitee was struck by revolving propeller of airplane, expert testimony that all other airports of a similar class were operated in the same manner was not conclusive of operator's freedom from negligence.

10. Negligence ⇨124(3)

Under proper circumstances, evidence of custom of use of other similar standard equipment and instrumentalities in same locality can be shown to aid jury in determining whether acts or omissions complained of actually constitute negligence.

11. Negligence ⇨5

The custom of others engaged in the same pursuit, though generally admissible in evidence by either party as tending to show negligence or the contrary, is not conclusive.

12. Negligence ⇨5

The test for determining the presence or absence of negligence is not what others have done in that regard, but rather what reasonably prudent person would do under similar circumstances.

13. Negligence ⇨136(24)

Evidence whether operator of airport sued for injuries sustained by invitee who was struck by revolving propeller of airplane was negligent in failing to provide reasonably prudent means of warning plaintiff against danger of coming into contact with propeller was for jury.

14. Negligence ⇨136(29)

Evidence whether 12-year-old invitee suing operator of airport for injuries sustained when he was struck by revolving propeller of airplane was contributorily negligent in coming in contact with propeller before it had ceased to revolve, was for jury.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by Harrison Strong, a minor, by Ben Strong, his guardian ad litem, and Ben Strong, against the Chronicle Publishing Company and William C. McDuffie, as receiver of the Richfield Oil Company of California, and others, for personal injuries received by Harrison Strong when he was struck by the revolving propeller of an airplane while he was attempting to accept delivery of package of newspapers at an airport operated by the second named defendant. From a judgment for the plaintiffs, the second named defendant appeals.

Affirmed.

J. Hampton Hoge and Hoge, Pelton & Gunther, all of San Francisco, and George W. Murphy, of Santa Rosa, for appellant.

Keyes & Erskine, of San Francisco, and C. W. Anderson, of Santa Rosa, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant, William C. McDuffie, as receiver of Richfield Oil Company, a corporation, has appealed from a judgment which was rendered against him pursuant to a verdict returned by a jury, for personal injuries received by the plaintiff who was struck by a revolving propeller of an airplane while he was attempting to accept delivery of packages of newspapers at the Santa Rosa Municipal Airport.

The appellant, as receiver of the Richfield Oil Company, through its agent Cedric Musselman, was operating the Santa Rosa Municipal Airport near that city as a commercial enterprise for the accommodation of airplanes. The property consists of eighty-five acres of land upon which a gas station and tower with a beacon light are maintained adjacent to the highway, from which a forty-foot lane extends eight hundred feet to a hangar and the landing field. No fence or barriers separated the lane from the landing field. No signs were maintained to warn individuals against the danger of airplanes on the field. The hangar contained a staff from which a wind cone was constantly kept flying. The hangar was also equipped with two floodlights to illuminate the runway but the service wires had been cut or broken several days before the accident occurred and those lights were not operating at that time. Mr. Musselman was in charge of the gas station and airport, but he temporarily left the premises prior to the time of the accident and no agent of the company was then present at the field. For several years prior to the accident and thereafter airplanes were accustomed to land at that port both in the daytime and in the night-time for servicing and for commercial purposes. The general public was invited by the appellant to use the airport for those purposes. When airplanes landed at the field in the night-time, it was ordinarily the appellant's custom to light red lanterns along the margins of the landing field to indicate the boundaries of the runway, but on the night of the accident no such lights were displayed. The beacon light on the tower, however, was then burning.

On the night of June 14, 1934, the San Francisco Chronicle issued a special edition

reporting the Baer-Carnera pugilistic fight. Mr. Johnson, the Santa Rosa distributor of that newspaper, employed the plaintiff, a twelve-year old boy, to go with him to the Santa Rosa Airport to get the newspapers which were delivered by airplane from San Francisco at that place at 9:30 o'clock p. m. The boy had not previously visited the airport. He was not familiar with the dangers connected therewith. He had not been warned of the danger of entering the landing field or of coming in contact with the revolving propeller. The appellant's agent, Musselman, had left the premises without lighting the red lanterns along the margins of the runway. The floodlights were not burning. No warning signs were displayed on the premises. In the vicinity of the hangar where the airplanes stopped, the field was in darkness. No fence separated the lane from the runway. The airplane arrived and landed on the runway some distance from the hangar and taxied to a point near that building where it stopped. The ignition was then turned off, but the propeller continued to revolve for sometime thereafter so rapidly that it was invisible. After the ignition had been turned off the noise of the revolving propeller was scarcely audible. The boy had not been warned of that danger. He did not see the revolving propeller. He testified that he thought it had stopped before he reached the vicinity of the airplane. Another bystander by the name of Squires also testified that the noise of the propeller had ceased and that he thought it had stopped revolving before the accident occurred.

When the airplane stopped, Mr. Johnson, in company with the plaintiff, ran toward it to take delivery of their packages of newspapers. Without a word of warning the plaintiff approached from the front of the airplane and the outer end of a revolving blade of the propeller, which he had not seen, struck him on the head, knocking him to the ground where he lay unconscious. He sustained a serious fracture of the skull. Slivers of bone penetrated the brain. Two operations were subsequently performed. A permanent condition of epilepsy followed as a result of the injury. The plaintiff is afflicted with periodical convulsions. A physician testified that his condition is incurable. The jury rendered a verdict against the appellant for damages resulting from his negligence in the sum of \$8,812.93, which includes an item of \$1,312.93 as necessary medical and

hospital expenses incurred as a result of the injury sustained. A judgment for that aggregate sum was accordingly entered. From that judgment this appeal was perfected.

The appellant contends the judgment is not supported by the evidence; that the Santa Rosa Municipal Airport was operated in all respects as similar standard airports of the same class are maintained and that the warning omissions complained of against the danger of approaching an airplane on the runway therefore do not constitute negligence; that the accident was due to the fault of plaintiff's employer in failing to warn him against the danger of coming in contact with the revolving propeller; that the plaintiff was a mere licensee on the runway and that the injury sustained by the plaintiff was the result of his contributory negligence exempting the defendant from liability.

We are of the opinion the judgment is adequately supported by the evidence.

[1-5] The plaintiff was at the airport when his injury was received as the invitee of the appellant and not as a mere licensee. An invitee is one who enters upon the property of another person by either expressed or implied authority as when a customer enters a grocery store to purchase provisions. A licensee is a person whose presence is not invited but merely tolerated. *Latham v. R. Johnson & Nephew*, 1 K. B., Eng., 398; 36 A.L.R. 37, note. An invitation will be implied when one visits the premises of another for a purpose which is of mutual benefit to both parties and not as the mere caprice or for the sole pleasure of the visitor. It is true that one may be an invitee upon certain portions of the premises of another person for a proper purpose, and yet he may become a mere licensee on other portions of the property, dependent upon the particular circumstances of the case. *Medcraft v. Merchants' Exchange*, 211 Cal. 404, 407, 295 P. 822; *State Compensation Insurance Fund v. Allen*, 104 Cal.App. 400, 413, 285 P. 1053. In the present action the plaintiff was on the runway of the airport as the employee of Mr. Johnson for the express purpose of receiving delivery of packages of the San Francisco Chronicle which were brought and landed on the public airport by an airplane according to custom by the implied invitation of the appellant. The airport was maintained for the purpose of receiving and discharging both passengers and

merchandise. The delivery of the newspapers at that time and place were for the mutual advantage of both the plaintiff and the appellant, and therefore the presence of the plaintiff should be construed to be that of an invitee. The numerous authorities on that subject which are cited by the respective parties to this action are not in conflict with what we have previously said and it is therefore unnecessary to analyze them.

[6] Since we are convinced the plaintiff was an invitee on the premises of the appellant at the time he received his injury, it follows that the instructions to the effect that the appellant was bound to exercise reasonable care in providing a safe place and operating facilities of the airport for the protection of such invitees were properly given to the jury. They were not erroneous or prejudicial.

[7,8] The appellant insists that the employer of the plaintiff, who took him out to the landing field and failed to warn the boy of the danger of the revolving propeller, is guilty of negligence and wholly responsible for his injuries. Conceding, without so deciding, that Mr. Johnson was guilty of negligence in that regard, that fact would not relieve the appellant from liability for injuries sustained as a result of his negligence even though it concurred with that of another person. It is a recognized principle of law that joint and several liability may attach to different individuals who are guilty of concurrent negligence. 19 Cal.Jur. 572, sec. 20, 45 C. J. 895, sec. 476; *Canvin v. General Brewing Corp.*, 20 Cal.App.2d 49, 54, 66 P.2d 691.

The appellant contends that since the expert evidence of his witness, Edison Mouton, is uncontradicted to the effect that all airports similar to the Santa Rosa Municipal Airport, which is classified by the United States Department of Commerce as "B-4-X", are maintained and operated without attendants, warning signs, floodlights or barriers to prevent free access to the flying field, *his testimony is conclusive*. Many cases are cited in support of that theory.

We are directed to no evidence of the witness, Mouton, which warrants the sweeping declaration contended for by the appellant. He did so testify with respect to floodlights and possibly regarding some other customs affecting the operation of similar standard airports belonging to the classification referred to. But he did not

specifically include all of the alleged acts and omissions of negligence relied upon by the respondent. The witness did testify that Santa Rosa Municipal Airport was classified by the federal government as "B-4-X". We are directed to no evidence of the required regulations of such a class of airports. It was a mere conclusion of the witness to assert that other similarly classed airports were maintained and conducted in all respects in the same manner that this one was managed. Moreover, there is affirmative evidence in this record that the Santa Rosa Municipal Airport was equipped with floodlights which were frequently used; that it was the custom to light red lanterns along the margins of the runway for the landing of airplanes at night; that Cedric Musselman, the employee of the appellant, was usually in attendance at the field when airplanes landed; that the defendant advertised and the official classification of the Santa Rosa Municipal Airport specified that it was equipped with "landing-area floodlights, servicing facilities day and night"; that airplanes were accustomed to land on that field in both the day and night-time, but that on the night when the accident occurred the floodlights were not burning; that he left the station without lighting the red lanterns along the runway, and he was not present at the time of the accident. There is therefore a substantial conflict as to just what regulations of this airport were required or followed under the circumstances of this case.

[9-11] Assuming that the expert witness, Mouton, who is the president of a California aviation corporation, did testify that all other airports of a similar class were operated in the same manner in which the Santa Rosa Municipal Airport was conducted, that evidence is not conclusive of the appellant's freedom from negligence. It is true, as some of the cases cited by appellant declare, that under proper circumstances, evidence of custom of the use of other similar standard equipment and instrumentalities in the same locality may be shown to aid the jury in determining whether the acts or omissions complained of actually constitute negligence. 2 Jones Commentaries on Evidence, 2d ed., p. 1275, sec. 685. Many reputable authorities, however, hold that such evidence is not conclusive, even though it may be undisputed. No California case, and none from other jurisdictions which have been called to our attention, hold that such evidence is con-

clusive on the subject of negligence. We think the correct statement of the law in that regard is concisely declared in 1 Shearman & Redfield on Negligence, sixth edition, page 22, section 12a, as follows: "The custom of others engaged in the same pursuit, though generally admissible in evidence by either party as tending to show negligence or the contrary, is *not* conclusive."

The foregoing text is supported by numerous authorities, among which is Martin v. California Central Ry. Co., 94 Cal. 326, 332, 29 P. 645.

[12] It has frequently been said the test determining the presence or the absence of negligence is not what others have done in that regard, but, rather, what would a reasonably prudent person do under similar circumstances. Wolfson v. Wheeler, 130 Cal.App. 475, 483, 19 P.2d 1004; 19 Cal.Jur. 581, sec. 25.

[13] We conclude that the record contains substantial proof of the negligence of the defendant in failing to provide for reasonably prudent means of warning the plaintiff against the danger of coming in contact with the propeller of the airplane, and that the evidence regarding the method of operating similar standard airports is not conclusive of the appellant's freedom from negligence under the circumstances of this case. The question of the appellant's negligence was a matter for the determination of the jury under all the facts and circumstances of this case. Pignet v. City of Santa Monica, 29 Cal.App.2d 286, 84 P.2d 166.

[14] Likewise the question of the alleged contributory negligence of the plaintiff was a problem for the determination of the jury under the circumstances of this case. The plaintiff knew nothing of the manner of landing an airplane or the danger of coming in contact with the propeller until it ceases to revolve. He had been given no warning and the danger of the revolving blades of the propeller was not obvious. He could neither hear nor see them revolving. He testified in that regard:

"Q. After the plane landed, what did the plane do? A. Well, it taxied to the runway and stopped * * * and the motor was cut.

"Q. While it was taxiing up the runway what did you do? A. I was going in a dog trot toward it. * * *

"Q. Were you approaching it from the front or from the side? A. From the left hand side. * * *

"Q. When the plane came to a stop, did you hear any noise? A. I heard the ignition turned off.

"Q. Previous to the time the ignition (was) turned off, was the plane making any noise? A. Yes.

"Q. After the ignition was turned off, did it make any noise? A. Not that I remember.

"Q. At the time the plane ceased making noise about how far from it were you? A. About fifteen or twenty feet. * * * I was to the side of it. * * * To the left hand side of the airplane.

"Q. What did you do after the noise stopped? A. I came on walking right on up to the airplane.

"Q. Could you see the airplane itself? A. Well just a vague outline of it, dim outline.

"Q. Could you see any details of it? A. No. * * * There were no lights on the airplane at all, from the automobiles.

"Q. As you approached it after this noise was turned off, did you see the propeller? A. *You couldn't see the propeller, it was dark.*"

Mr. Squires corroborated the plaintiff in his statement that the revolving propeller could neither be seen nor heard after the ignition was turned off. He said:

"Q. Did you hear the motor stop, the noise stop? A. I did hear the noise of the motor stop.

"Q. After that noise stopped, will you tell us what then occurred? A. Well, when I knew the motor stopped, that he had cut off his ignition and cut off his motor, I went over towards the plane, but I was just a little ways from the plane when I heard a terrible ping, * * * just a real thud or a ping and I saw the form of what I thought was a boy fall to the ground. * * *

"Q. Did you see the propellers? A. No, I didn't see the propellers."

Mr. Welch also testified regarding the same matter:

"Q. There was a motor running at the time it (the airplane) came to a stop? A. Right. * * *

"Q. And then that noise stopped? A. Right. * * *

"Q. Could you see the propeller? A. No, I couldn't see the propeller.

"Q. Was the front of the plane dark? A. Extremely dark, yes it was obscured, as a matter of fact. * * * I couldn't see the propellers."

The last witness testified that the airplane was in comparative darkness when it stopped on the runway; that it had no lights except the small red and green clearance lamps on either side; that the floodlights of the airport were not burning; that there were no red lanterns along the margins of the field; that no warning signs were displayed on the premises, and that no attendant of the airport was present when the accident occurred. There is ample evidence to support the implied finding of the jury that the plaintiff was not guilty of contributory negligence.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



36 Cal.App.2d Supp. 767

ROBERTS et al. v. CASEY et al.

No. 96531.

Appellate Department, Superior Court, San Diego County, California.

Aug. 25, 1939.

1. Innkeepers ⌘8

Landlord and tenant ⌘1

A mere "guest" or "lodger" in an apartment building is not a "tenant."

[Ed. Note.—For other definitions of "Guest," "Lodger" and "Tenant," see Words & Phrases.]

2. Innkeepers ⌘8

Landlord and tenant ⌘1

One of the distinctions between a "tenant" and a "lodger" is that a "tenant" may maintain ejectment, quare clausum fregit, and trespass, while a "lodger" may not.

3. Innkeepers ⌘13

Landlord and tenant ⌘246(1)

While a landlord has a lien upon the goods of a lodger for unpaid rent, he has no lien upon the goods of his tenant.

4. Innkeepers ⇐8

Landlord and tenant ⇐1

The relation established by hiring of rooms in house of another depends upon contract of hiring, gathered from its terms and interpreted in light of surrounding circumstances, having in end finding of intention of parties to contract.

5. Innkeepers ⇐8

Generally, landlord furnishes "lodger" with a furnished room or rooms, whose care landlord has, and whose habitation and enjoyment he gives to lodger, while he himself retains occupation.

6. Innkeepers ⇐8

Landlord and tenant ⇐1

A "lodger" has merely use without actual or exclusive possession which remains in lessor, while a "tenant" has exclusive possession of his rooms.

7. Innkeepers ⇐8

Landlord and tenant ⇐1

The determination of whether a person is a lodger or a tenant presents a mixed question of law and fact.

8. Innkeepers ⇐8

Landlord and tenant ⇐1

Evidence that owners of apartment building retained keys to all apartments, furnished linens and maid service, kept hallways and windows in apartments clean, attended to removal of garbage, and furnished water, heat, and telephone service, tended to show that relations between occupants of apartments and owners was that of "proprietors" and "lodgers" rather than "landlords" and "tenants."

[Ed. Note.—For other definitions of "Landlord" and "Proprietor," see Words & Phrases.]

9. Landlord and tenant ⇐1

Evidence that suites in apartment building contained kitchens, dining rooms, toilets and bathrooms, that each suite was a distinct unit, and that rent for a suite was the same without regard to number of occupants, tended to show that the relation between occupants of suites and owners of building was that of "landlords" and "tenants."

10. Innkeepers ⇐8

Landlord and tenant ⇐1

The determination of whether the relationship between owner of apartment building and occupant of apartment was that

of landlord and tenant or proprietor and lodger does not depend on any one factor, as being decisive, but rather on general effect of various tests that have been applied, after weighing opposing ones against each other.

11. Innkeepers ⇐8

Landlord and tenant ⇐1

Evidence that owners of apartment building retained keys to all apartments, furnished linens, maid service, light, water, heat and telephone service, kept the halls and carpets and windows in the apartments clean, and attended to removal of garbage, justified finding of trial court that occupants of apartment were "lodgers" and not "tenants," and could be summarily removed for nonpayment of rent.

12. Innkeepers ⇐9

Where occupants of apartment were in arrears in rent and hired a police officer to prevent removal of their property from apartment, an action for forcible detainer by owner of apartment building would not lie to secure possession of the apartment, since an action for forcible detainer may not be maintained when defendants originally entered pursuant to a contract with plaintiff. Code Civ.Proc. § 1160, subds. 1, 2; § 1161.

13. Innkeepers ⇐9

Although complaint in action by owner of apartment building to secure possession of apartment occupied by parties in arrears in rent purported to state an action under forcible detainer statute, which action did not lie against the defendant, a judgment for the plaintiff would be sustained if complaint stated a good cause of action in unlawful detainer. Code Civ.Proc. § 1160, subds. 1, 2; § 1161.

14. Innkeepers ⇐9

A complaint in an action, purporting to be based upon the forcible detainer statute, in which an apartment owner sought to summarily remove occupant of apartment for nonpayment of rent, stated a cause of action under the unlawful detainer statute, where occupant was a mere licensee and not a tenant. Code Civ.Proc. § 1160, subds. 1, 2; § 1161.

15. Innkeepers ⇐9

Guests in a hotel, boarders in a boarding house and roomers or lodgers, are generally mere "licensees" and not "tenants" as

respects right of landlord to summarily remove them for nonpayment of rent.

[Ed. Note.—For other definitions of "Licensee," see Words & Phrases.]

16. Innkeepers ⇐9

Guests in a hotel, boarders in a boarding house and roomers or lodgers have only a personal contract and no interest in realty.

17. Innkeepers ⇐9

Occupants of an apartment in an apartment building who were mere lodgers and not tenants on default in making rent payments could by appropriate proceedings in unlawful detainer be ousted from premises without requirement of any advance notice. Code Civ.Proc. § 1160, subd. 1; § 1161, subds. 1, 2.

18. Innkeepers ⇐9

Where owner of apartment building accepted from occupants of apartment a note payable in one year in payment of rent arrearage, owner in action to recover possession of premises could not, before note became payable, recover judgment for amount of rent represented by note.

19. Innkeepers ⇐9

Where owner of apartment building brought action to remove occupant of an apartment from premises for failure to make rent payment, owner could only recover amount of rent that had accrued at time of bringing action and could not recover rent for remainder of month after time of bringing action.

Appeal from Municipal Court, San Diego County; Eugene Daney, Jr., Judge.

Action in forcible detainer to regain possession of an apartment and to recover rent allegedly due by Webster M. Roberts and Luella Roberts against Walter Casey, Marguerite Casey and Robert Casey. From a judgment for the plaintiffs, Walter Casey and Marguerite Casey appeal.

Modified and as modified affirmed.

Whelan & Whelan, of San Diego, for appellants.

Hillyer & Boldman and Bertrand L. Comparet, all of San Diego, for respondents.

HAINES, Presiding Judge.

Plaintiffs and respondents Webster M. Roberts and Luella Roberts have been at all of the times here involved the owners

of the premises situate within the City of San Diego known as the Riviera Apartment Hotel. The trial court, upon sufficient evidence, found that they "had possession, control and supervision of the same, and of all rooms, suites and apartments therein," also that they "offered for rent and rented rooms and apartments by the day, week or month, or from month to month; that said building consisted of a large number of rooms and apartments or suites of rooms, including apartment number 311 and apartment number 217, all of which were completely furnished; that said plaintiffs retained keys to all of said rooms, suites and apartments and had access to all of them at all times for the purpose of cleaning and keeping them in order; that they furnished, laundered and changed the necessary linen, kept the carpets and windows in all said rooms, suites and apartments clean, swept the hallways, removed the garbage, and furnished all said rooms, suites and apartments with all necessary light, heat, water and telephone service."

The record shows that from October 5, 1937, to June 30, 1938, the defendants and appellants occupied the apartment numbered 311 at the agreed price of \$40 per month, and beginning with July 1, 1938, until they were ousted, as hereinafter stated, occupied the apartment number 217 at the agreed price of \$45 per month. There were in the building 74 distinct apartments. There was no common toilets, bathrooms, kitchens or dining rooms. The said apartment 217 consisted of kitchen, living room, dining room, bath and hall and had no connection with any other apartment, its sole exit being into a hallway which led to the street entrance.

Defendants came to be seriously in arrears in their payments for the accommodations furnished them, as well as for newspaper deliveries and other incidentals made to them but paid for by respondents. The aggregate so owed is found by the Court to have been \$399.14, which the record appears to show to be the correct amount after allowing credit for some \$24 worth of clerical work performed by Mr. Casey for respondents. At the beginning of the year 1939, or just prior thereto defendant and appellant, Walter Casey, executed to respondents a note for the amount then due. It bore date January 1, 1939, and was payable by its terms on January 1, 1940. It bore no interest. Respondent

Webster M. Roberts testified that he did not accept the note as a payment but merely as an acknowledgment of what was owed. Respondents had by the early part of January, 1939, become dissatisfied with appellants' failure to keep up their payments and respondent Webster M. Roberts had insisted that something be done about it. Though, in the absence of usage or contract, the rule is otherwise (Civil Code, § 1947), there seems in the instant case to be no dispute that the arrangement between these parties contemplated that defendants' payments should be made in advance. However, after the note referred to evidencing indebtedness for the period preceding January 1, 1939, had been given, the defendants again got into arrears for their January payment, on account of which, however, Mr. Casey testified that on January 18 he tendered \$25 to respondents' bookkeeper, which sum, being substantially less than was payable for that month alone, was refused. This is denied by the bookkeeper. Respondents had made up their minds that punctual payments could not be obtained from appellants and, on January 17, Mr. Roberts had verbally told Mr. Casey that unless he made a payment by six o'clock that evening his apartment would be locked. This not having been done, respondents that night caused the door to the apartment to be removed from the hinges and removed from the apartment all movable furniture and bedding. This, as we saw, was the day preceding the alleged tender of the \$25. Notwithstanding the removal of the door and furniture, however, appellants did not vacate the property. Their son visited them there from time to time and when they had occasion to be away themselves they hired a special police officer to remain in the apartment and "not to let anyone come in and take any of our goods from this apartment." This instruction, as witness Walter Casey testified, applied to the landlord as well as to anyone else.

This being the situation, respondents, without serving any notice in advance, commenced this action in forcible detainer to regain possession of the property, as well as for the sums owed them on account of its occupancy, and were given possession under mesne process on January 23, 1939. Upon trial of the case they obtained judgment both for the possession of the premises and also for the money owed them including the amount represented by the note.

[1] (1) The distinction between the position of a hotel keeper or lodging house keeper with relation to his guest or lodger on the one hand and that of a landlord with relation to his tenant on the other, is fully recognized by the authorities. A mere guest or lodger is no tenant. *McDowell v. Hyman*, 117 Cal. 67, 71, 48 P. 984; *Stone v. Los Angeles*, 114 Cal.App. 192, 199, 299 P. 838; *Mathews v. Livingston*, 86 Conn. 263, 85 A. 529, Ann.Cas. 1914A, 195; *Coggins v. Gregorio*, 10 Cir., 97 F.2d 948; *Marden v. Radford*, 229 Mo. App. 789, 84 S.W.2d 947, 955; *White v. Maynard*, 111 Mass. 250, 253, 235, 15 Am. Rep. 28; *Green v. T. A. Shoemaker & Co.*, 111 Md. 69, 73 A. 688, 690, 23 L.R.A., N.S., 667; *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 200, 58 N.E. 576, 581; *Wilson v. Martin*, 1 Denio 602.

[2-7] In *Mathews v. Livingston*, supra, the Court, inter alia, said [86 Conn. 263, 85 A. 531, Ann.Cas.1914A, 195]:

"The distinction in law between a tenant and a lodger is a substantial one. The tenant may maintain ejectment, quare clausum fregit, and trespass. The lodger may not.

"Upon the goods of the lodger his landlord has a lien for unpaid rent. Upon those of his tenant he has no lien.

"The relation established by the hiring of rooms in the house of another depends upon the contract of hiring, gathered from its terms and interpreted in the light of the surrounding circumstances, having in end the finding of the intention of the parties to the contract. * * *

"Ordinarily the landlord furnishes the lodger with a furnished room or rooms, whose care the landlord has, and whose habitation and enjoyment he gives to the lodger, while he himself retains the occupation. The tenant has the exclusive possession of his rooms, while the lodger has merely the use without the actual or exclusive possession which remain in the lessor. It is a mixed question of law and fact."

Some of the decisions, indeed, deprecate the use of the term landlord at all when the other party to the arrangement is a mere guest or lodger rather than a tenant, preferring the term proprietor or other expression of like import.

(2) While in their broad lines the distinctions between tenants on the one hand and mere guests or lodgers on the other

are entirely clear, yet in some classes of establishments their tendency is to shade into each other, and, therefore, attention has to be given to the detailed criteria that must be relied on to decide into which class given individuals fall.

[8] In the instant case the circumstances already alluded to, that the plaintiffs at all times retained keys to all of the apartments and had regular access to them for caretaking purposes, furnished the linen and caused it to be laundered, furnished regular maid service and caused the beds to be changed and in some of the apartments, though perhaps not in those of appellants, to be made every day as well, kept not only the hallways but also the carpets and windows in the apartments themselves clean, and attended to the removal of garbage, as well as furnishing light, water, heat and telephone service, are matters tending as far as they go to show the relation of the parties to have been that of proprietors and lodgers rather than landlords and tenants. *Fox v. Windemere Hotel Apt. Co.*, 30 Cal.App. 162, 164, 165, 157 P. 820.

[9] On the other hand, it is true, as we also saw that there were, on the premises, no common kitchens, dining rooms, toilets or bathrooms; that the suites had severally these various facilities; that each suite was, in some sort, a distinct unit, and that the rent for a suite was the same without regard to the number of occupants. These circumstances tended, so far as they went, to characterize the relations between respondents and appellants as those of landlords and tenants. *Fox v. Windemere Hotel Apt. Co.*, 30 Cal.App. 162, 164, 157 P. 820.

[10, 11] In determining, then, what was, in legal contemplation, the status of the parties in their relations with each other, it is manifest that the result cannot be said to depend on any one factor, as being decisive. It is rather a question of which direction the general effect of the various tests that have been applied, after weighing opposing ones against each other, can be said to take. It is not a question of what the relation would be if considered in some isolated aspect, but rather what is its dominant character. This, as was said in *Mathews v. Livingston*, *supra*, is a "mixed question of law and fact." In *McDowell v. Hyman*, *supra*, the trial Court in its instructions to the jury treated this question as one purely of fact and it was

held that no reversible error had been committed on the trial and the Court's judgment based on the jury's verdict was affirmed. Though we treat the question, however, not as one of fact merely but as one of mixed law and fact, it is still clear that an appellate tribunal is only justified in overruling the view taken by a trial court if the factors that enter into the relation, and mark it as of the character opposite to that found by the lower Court, so dominate the situation as to clearly nullify the effect of the factors opposed to them. Otherwise the question is to be determined as one of fact as to which the judgment of the trial Court must be treated as concluding the matter. We think that is the case here. In other words we do not think the factors pointing to the status of the appellants as that of tenants to so decidedly outweigh the other factors tending to characterize them as lodgers as to justify us in overruling the trial Court's conclusion as to what the fact was. It follows, then, that we must accept the determination of the Municipal Court that appellants were mere lodgers and invested with only such rights as belong to lodgers.

(3) It is claimed in appellants' behalf that, even though it be held that they were mere lodgers, they were entitled under Section 1161 of the Code of Civil Procedure to some sort of a notice before the instant action could properly have been instituted against them. It will be observed in this connection that the instant action purports, in its title, to be based on the forcible detainer statute which is Section 1160 of the Code of Civil Procedure. The second subdivision of that section is manifestly inapplicable and, therefore, the contention must be that the cause of action exists under the first subdivision of the section which declares every person to be guilty of a forcible detainer who: "By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise."

[12, 13] Assuming but not deciding that appellants' conduct in supplying a special policeman to guard the premises in their absence would bring their conduct within the literal purview of this language, we are yet constrained to the view that under the construction given to this statute an action for forcible detainer under it did not lie. This we say for the reason that it has been held that an action for for-

cible detainer may not be maintained when the defendant originally entered in pursuance of a contract with the plaintiff. *Carteri v. Roberts*, 140 Cal. 164, 166, 73 P. 818; *Baxley v. Western Loan & Building Co.*, 135 Cal.App. 426, 430, 27 P.2d 387. Respondents, however, were under no inhibition to proceed under this complaint merely because they misnamed it and if it can be said to state facts that exhibit a good cause of action either in forcible detainer on the one hand or in unlawful detainer on the other a judgment based upon it may if supported by the evidence be sustained.

[14-16] We are in the instant case of the opinion that though apparently intended to be framed under the provisions of Subdivision 1 of Section 1160 of the Code of Civil Procedure, the complaint is sufficient in form to state a cause of action under the first subdivision of Section 1161 of that Code. While this section starts out by saying that, "A tenant of real property, for a term less than life is guilty of unlawful detainer * * *" (proceeding then to specify the circumstances in which he is so guilty), and while it is true that a guest or lodger is, as we have seen, no tenant, yet in subdivision 1 of the section entitled "Possession after expiration of term," the statute proceeds to assimilate to the situation of a true tenant, others who do not occupy that status by using the language, "including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant or employer and employee or principal and agent or licensor and licensee has been lawfully terminated * * *." We find it laid down in 1 *McAdam on Landlord and Tenant*, that: "Guests in a hotel, boarders in a boarding house, and roomers or lodgers, so called, are generally, mere licensees and not tenants. They have only a personal contract and no interest in the realty."

So, then, though they are not tenants and though, as we have seen, their presence on the premises involved is not in strictness either a possession or an occupancy of such premises, since the possession and occupancy are in strictness all the time not in them but retained by the proprietor, yet as we have just seen guests or lodgers when their right to remain such has ceased, are, as having been licensees, by the above quoted language of the stat-

ute included expressly in the category of "persons to be removed."

[17] Coming, then, to the question of notice it will be at once observed that though a three day notice to pay (or vacate) is provided for in case of the class of persons described in the second subdivision of said Section 1161, no notice whatever is provided for as required by the first subdivision of that section except in the single case of a tenant at will, which is something wholly different from a licensee. We conclude, therefore, that so soon as a guest or lodger has, either by default in making payments due or otherwise, breached his contract he may by appropriate proceedings be ousted without the requirement of any advance notice. His actual right to remain having ceased, his continued presence amounts to little more than a trespass and, as said in *Gladwin v. Stebbins*, 2 Cal. 103, 105, "it would be absurd, in such a case, to require either a demand, or notice to quit."

Our conclusion, then, is that the present action was properly maintained not as, according to its title, it purports to have been brought, under Subdivision 1 of Section 1160, but rather under Subdivision 1 of Section 1161 of the Code of Civil Procedure, and that the circumstance that no formal notice preceded its institution was no obstacle to its maintenance. If we are right at all in deciding that the Municipal Court's determination that appellants were lodgers and not tenants must be sustained, then any other conclusion than that just announced would lead to an absurdity. It would be tantamount to saying that, though there are summary remedies available under Section 1160 against intruders and under Section 1161 against delinquent tenants, nothing in either of these sections is available to a hotel keeper or the proprietor of a rooming house as against a defaulting lodger and that the only courses open to such hotel keeper or lodging house proprietor are either to take the law into his own hands and forcibly remove a delinquent guest or lodger, or else for want of any statutory remedy by either a forcible detainer or unlawful detainer proceeding to be obliged to resort to the cumbrous remedy of an action in ejectment. Such a ruling would make the operation of hotels and lodging houses virtually impossible and it manifestly cannot be the law. It follows that the action of the trial court in holding all rights of appellants

to further use of the apartment in question to be at an end must be sustained.

[18] (4) We think, however, that in rendering its money judgment against appellants the trial court fell into error. The evidence clearly showed that a year's credit had by the taking of the note been extended by respondents to appellants with respect to so much of the indebtedness of the latter to the former as was represented by the note, that as to all that part of the indebtedness incurred prior to January 1, 1939.

[19] This affects all of the \$399.14, exclusive of costs for which respondents had judgment in the Municipal Court excepting only the \$45 treated as payable for January rent. As respects such remaining \$45, since respondents elected to oust appellants on January 23, 1939, it follows that they cannot claim rent for the final eight days of that month which would amount to \$11.31. That amount, therefore, is deductible from the \$45 for which respondents would otherwise be entitled to judgment, leaving the net amount of the money judgment to which respondents are entitled \$33.39.

Of course the circumstance that the remaining \$354.14 for which the Municipal Court rendered judgment must now be excluded therefrom will not prejudice respondents in their right to bring suit thereon at the end of one year from the date of the note should default meantime be made in its payment.

It is therefore ordered that the judgment of the Municipal Court be and the same is hereby modified by striking therefrom the paragraph in the words and figures following, to-wit: "It is Further Ordered, Adjudged and Decreed by the Court that said plaintiffs have and recover of the defendants Walter Casey and Marguerite Casey, and each of them, the sum of \$399.14, together with their costs and disbursements incurred in this action, which are hereby taxed in the sum of \$——."

In lieu of the matter so stricken therefrom there is hereby inserted in such judgment a paragraph in the words and figures following, to-wit: "It is Further Ordered, Adjudged and Decreed by the Court that the plaintiffs have and recover of the defendants Walter Casey and Marguerite Casey, and each of them, the sum of \$33.39, together with their costs and disburse-

ments incurred in this action, which are hereby taxed in the sum of \$——. It is Further Adjudged and Decreed that as to all sums owing from defendants to plaintiffs for any period prior to January 1, 1939, a credit of one year was extended by plaintiffs to defendants by the taking of a certain promissory note payable one year after its date, and therefore as to such sums the commencement of the present action was premature, but this judgment is without prejudice to the right of plaintiffs in case of default in the payment of said sums according to the terms of said note to sue therefor when the period for which credit was allowed by the terms of said note shall have expired."

As so modified the judgment of the Municipal Court is affirmed.

I concur: TURRENTINE, J.

MUNDO, J., not participating.



35 Cal.App.2d Supp. 758

PEOPLE v. GIDALY et al.

SAME v. ARAGON et al.

Cr. A1602, A1607.

Appellate Department, Superior Court, Los Angeles County, California.

July 18, 1939.

On Petition for Rehearing Aug. 16, 1939.

1. Municipal corporations ☞622

The section in Los Angeles ordinance prohibiting picketing must be read with following section rendering preceding section inapplicable to picketing during bona fide strike, etc., the various provisions of the following section being regarded as parts of the definitions of offenses created and not mere exceptions to preceding section.

2. Municipal corporations ☞622

Description of offense in section of Los Angeles ordinance prohibiting picketing in described manner is added to by following description which completes definition of offenses by provision that picketing shall not

be done in manner described in preceding section at place of business where there is no bona fide strike or by any person who is not a bona fide employee at the place picketed.

3. Torts $\S$ 10

The right to strike is fully recognized in California.

4. Municipal corporations $\S$ 622

The Los Angeles picketing ordinance has for its purpose the regulation and not the suppression of picketing which is recognized as a proper instrumentality for use in labor disputes.

5. Constitutional law $\S$ 213

The provision of the Fourteenth Amendment to the Federal Constitution guaranteeing equal protection of the laws applies to city ordinances. U.S.C.A.Const. Amend. 14.

6. Constitutional law $\S$ 211

In order that a statute shall be valid which contains a classification of persons or things for the purpose of legislation, such classification must be reasonable and must be based on real distinctions in the subject matter which bear some relation to the object sought to be accomplished. U.S.C.A. Const. Amend. 14.

7. Constitutional law $\S$ 211

The equal protection guaranteed by the Constitution forbids the Legislature to select a person, natural or artificial, and impose on him or it burdens and liabilities which are not cast on others similarly situated, or to make classification of individuals or corporations which is purely arbitrary and impose on such class special burdens and liabilities. U.S.C.A.Const. Amend. 14.

8. Constitutional law $\S$ 211

Under equal protection clause of Federal Constitution, even where selection for classification is not obviously unreasonable and arbitrary, if discrimination is based on matters which have no relation to the object sought to be accomplished, the statute is unconstitutional. U.S.C.A.Const. Amend. 14.

9. Constitutional law $\S$ 213

Provision of State Constitution guaranteeing equal privileges and immunities applies to statutes and ordinances enacted and sought to be enforced either by state or by political subdivisions thereof in which attempts have been made to discriminate in favor of or against particular persons or classes of persons as to whom no reason-

able basis of discrimination can be seen to exist. Const.Cal. art. 1, $\S$ 21.

10. Constitutional law $\S$ 211

A law is "general" and "uniform" in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such class is made upon some natural, intrinsic or constitutional distinction between the persons composing it and others not embraced in it, but the difference on which classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation. Const.Cal. art. 1, $\S$ 21.

11. Constitutional law $\S$ 211

Under State Constitution, classification for purposes of legislation must not be arbitrarily made for the mere purpose of classification, but must be based on some distinction, natural, intrinsic or constitutional, which suggests a reason for and justifies the particular legislation. Const.Cal. art. 1, $\S$ 21.

12. Constitutional law $\S$ 211

To justify classification for purposes of legislation under State Constitution, not only must the class itself be germane to the purpose of the law but the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation. Const.Cal. art. 1, $\S$ 21.

13. Municipal corporations $\S$ 622

The objects of the Los Angeles ordinance regulating picketing were to prevent obstruction of streets and other public places and other interference with their use for passage, to prevent in labor disputes acts of intimidation and violence directed at persons engaged in those disputes or at other members of public and to assure to the public and those affected by such disputes freedom from unlawful disturbance and annoyance arising from picketing.

14. Municipal corporations $\S$ 625

The standards by which city ordinance selects persons by whom picketing may be done and circumstances under which picketing may be done may not be arbitrary, but must have some reasonable relation to object and purpose of the ordinance. U.S.C.A. Const. Amend. 14; Const.Cal. art. 1, $\S$ 21.

15. Municipal corporations $\S$ 625

The provisions of the Los Angeles ordinance prohibiting picketing of a place of

business where less than a majority are on strike and prohibiting picketing by persons who are not or have not been continuously for at least 30 days employees at the place of business picketed are invalid as unreasonable and arbitrary. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 21.

16. Municipal corporations ☞642(4)

On appeal from conviction for violation of municipal ordinance, court would not determine validity of provisions of ordinance not involved in charges made against defendants.

On Petition for Rehearing.

17. Torts ☞10

In absence of legislative prohibition or judicial restraint, any person may use public streets and other public places for walking or patrolling to and fro or for standing, sitting or remaining in front of any place of business, or doing any acts comprehended within definition of picketing given in Los Angeles city ordinance regulating picketing, or may use his picketing as means of uttering, conveying or publishing an idea.

18. Constitutional law ☞205(1), 206(1)

A statute which undertakes to confer a privilege on any class of citizens is subject to provision of State Constitution prohibiting grant of special privileges or immunities not granted to all citizens and to Fourteenth Amendment of Federal Constitution. Const.Cal. art. 1, § 21; U.S.C.A.Const. Amend. 14.

19. Constitutional law ☞211

In determining whether classification in statute is valid, question is not whether classification is valid for any or some purposes, but whether it is valid for the particular purpose for which it is used. Const. Cal. art. 1, § 21; U.S.C.A.Const. Amend. 14.

20. Constitutional law ☞48

In the absence of facts proved in the case or judicially known on which to base a decision holding a law invalid, a court must presume that there were facts known to the legislative agency which justify law and warrant classification made. Const.Cal. art. 1, § 21; U.S.C.A.Const. Amend. 14.

21. Evidence ☞11, 14

A court may take notice of the propensities and tendencies of mankind and of their manifestations as disclosed by current history.

Appeal from Municipal Court of Los Angeles; Harold B. Landreth, Judge.

Charles Gidaly and others and Paula Aragon, Robert Burnside and Maria Bustillos were convicted of violation of ordinance No. 80170 of the City of Los Angeles regulating picketing, and from a judgment of the municipal court of the City of Los Angeles, defendant Charles Gidaly appeals, and from a judgment and order of the municipal court of the City of Los Angeles, defendants Paula Aragon, Robert Burnside and Maria Bustillos appeal.

Judgments reversed and appeal of Paula Aragon, Robert Burnside and Maria Bustillos from the order of the municipal court dismissed.

Rosecrans & Emme, and Bayard R. Rountree, all of Los Angeles, for appellants Gidaly and others.

James M. Carter and John C. Packard, both of Los Angeles, for appellants Aragon and others.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

Gallagher, Wirin & Johnson, of Los Angeles, amici curiæ for appellants.

SHAW, Presiding Judge.

These two appeals were argued together, they involve different provisions of the same ordinance and some of the points made are applicable to both appeals, so we consider them together.

The complaint in each case charges the defendants therein with violating the Los Angeles City initiative ordinance No. 80170, dealing with picketing, which was before us in *People v. Tilkin*, Cal.Super.1939, 90 P.2d 148, and each of the complaints was framed in accordance with our decision there, in such form that each presents the question of the validity of a separate set of provisions of this ordinance.

The ordinance contains in section 1 certain definitions, those material here being as follows:

"(a) The term 'to picket' shall mean and include to walk, march, patrol or ride to and fro, back and forth, or in any other repeated or successive or continuous manner, or to stand, sit or remain, in front of, in the vicinity of, or about any place of business, any place or residence, or any of

the approaches leading thereto or therefrom."

"(c) The term 'bona fide strike' shall mean and include any cessation of work by at least a majority of all of the bona fide employees of all classes of an employer in order to obtain or resist a change in wages, hours or conditions of their employment after demands made therefor on such employer, which cessation of work has taken place after a majority of all of the bona fide employees of all classes of such employer have by secret ballot voted to strike. A bona fide strike may exist against such employer generally, or may exist only at one or more of the separate places of business of such employer. In the latter case this subsection (c) shall be applied and interpreted, with respect to the determination of 'bona fide employees' and 'majority,' as if the place or places of business at which said bona fide strike exists were the only place or places of business of such employer."

"(d) The term 'bona fide employee' of any employer shall mean a real person (1) who is employed by such employer and has been continuously employed by such employer for a period of not less than thirty (30) days, or (2) who was employed by such employer and had been continuously employed by such employer for a period of not less than thirty (30) days at the time a majority of such bona fide employees of such employer voted for or commenced a bona fide strike against such employer; but shall not include any employee or former employee of an employer if such employee or former employee shall have entered such employment for the purpose of picketing or of creating an industrial dispute or strike."

[1,2] Other material parts of the ordinance were set forth in *People v. Tilkin*, supra, Cal.Super., 90 P.2d 148, and will not be repeated here in full. The prohibitions here in question appear in sections 3 and 4, which, as we held in *People v. Tilkin*, are to be construed together and create a considerable number of separate offenses, the various provisions of section 4 being regarded as parts of the definitions of these offenses, and not mere exceptions to section 3. The provision of section 3 which is a part of the charge in each of these cases refers to picketing on a public street "in a manner calculated * * * to induce or influence any person to refrain from entering, occupying or leaving any

place of business, or to refrain from performing services or labor, or to refrain from seeking or obtaining employment, or to refrain from purchasing, selling, using, delivering, transporting or receiving any goods, wares, merchandise, services, entertainment, accommodations or articles." Section 4, as construed in *People v. Tilkin*, supra, adds to this description, in completion of the definition of one of the offenses created by these sections—that charged here in *People v. Gidaly*, Cr. A 1602—provision that picketing shall not be done in the manner described in section 3 at a place of business where there is no "bona fide strike", and adds, in completing the definition of another offense—that charged in Count II of the complaint in *People v. Aragon*, Cr. A 1607—provision that picketing shall not be so done by any person who is not a "bona fide employee" at the place picketed. Count 1 of the last mentioned complaint charged an offense of which the defendants were found not guilty.

The facts in each case are undisputed and were presented to the trial court by a written stipulation. In *People v. Gidaly* it appears that the place of business picketed had twenty "bona fide" employees, that seventeen of them remained at work and three struck for higher wages. These facts prevented the strike from being "bona fide" within the definition above quoted. Appellant Gidaly, who picketed this place of business, was one of the three strikers. In *People v. Aragon*, there was a strike in which thirty of the thirty-two employees took part, and there is no showing that it was for any reason not "bona fide," but two of the appellants who picketed the place of business where the strike occurred were not and never had been employees there, being union organizers, and the third had been employed there continuously for only 24 days at the time of the strike. These three appellants were therefore not "bona fide" employees within the terms of the ordinance.

There is no contention in either case that the stipulated facts do not support the charge made, but both of the ordinance provisions on which the charges are based are attacked on constitutional grounds, one of which is that the classifications made by the ordinance in its definitions of "bona fide strike" and "bona fide employee," above quoted, are unreasonable and arbitrary and hence in violation of the Fourteenth Amendment, Const.U.S.C.A., particularly its pro-

vision forbidding a denial of the equal protection of the laws, and also of the provisions of the California Constitution. This contention must be sustained.

[3,4] In passing on the matter, we begin with two propositions. In the first place, whatever desire the framers of this ordinance may have had to discourage strikes, they gave no expression to any such desire by incorporating in the ordinance any prohibition of strikes. Neither this ordinance nor any other of which we are advised, nor any state law, forbids strikes. The right to strike is fully recognized in California. *Parkinson v. Building Trades Council*, 1908, 154 Cal. 581, 599, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; *Lisse v. Local Union No. 31*, 1935, 2 Cal.2d 312, 318, 41 P.2d 314. In the second place, the ordinance before us, as we held in *People v. Tilkin*, supra, Cal.Super., 90 P.2d 148, 153, has as its purpose the regulation, not the suppression of picketing, which it recognizes as a proper instrumentality for use in labor disputes. In pursuance of its purpose, and to set up criteria for determining who may picket and under what circumstances it may be done, classifications have been made by the ordinance, and the only question we have to pass upon is that of their validity.

[5-8] The rules governing the validity of legislative classification under the Fourteenth Amendment are well settled. That amendment applies to city ordinances. *Home Tel. & Tel. Co. v. Los Angeles*, 1913, 227 U.S. 278, 294, 33 S.Ct. 312, 57 L.Ed. 510, 518. "In order, however, that a statute shall be valid which contains a classification of persons or things for the purpose of legislation, such classification must be a reasonable one, and must be based on real distinctions in the subject matter which bear some relation to the object sought to be accomplished by the statute." 12 *Corpus Juris*, 1148-9. "The equal protection guaranteed by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. * * * Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of

unconstitutionality is affirmed." *Atchison T. & S. F. R. Co. v. Matthews*, 1899, 174 U.S. 96, 104, 105, 19 S.Ct. 609, 612, 43 L. Ed. 909, 913. "While the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation." *Bayside Fish Flour Co. v. Gentry*, 1936, 297 U.S. 422, 429, 56 S.Ct. 513, 516, 80 L.Ed. 772, 777.

[9-12] The same principles have been established by the California decisions in applying to city ordinances and other legislation the provisions of section 21 of Article I of the state constitution that "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." The supreme court said of this provision in *Re Blois*, 1918, 179 Cal. 291, 295, 176 P. 449, 450, "This latter section of the Constitution has been given direct application to statutes and ordinances which have been enacted and sought to be enforced either by the state or by political subdivisions thereof, and in which attempts have been made to discriminate in favor of or against particular persons or classes of persons as to whom no reasonable basis of discrimination can be seen to exist, and in all such cases the courts of this state have uniformly held such attempted legislation to be void." In *Re Sumida*, 1918, 177 Cal. 388, 391, 170 P. 823, 825, the court, dealing with a city ordinance, quoted the following language from *Ex parte Miller*, 1912, 162 Cal. 687, 698, 124 P. 427: "A law is general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such class is made upon some natural, intrinsic, or constitutional distinction between the persons composing it and others not embraced in it. * * * The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation." In *Martin v. Superior Court*, 1924, 194 Cal. 93, 100, 227 P. 762, 765, the court said: "The classification, however, must not be arbitrarily made for the mere purpose of classification, but must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation. That is to say, not only must the class itself be germane to the purpose of the

law, but the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation." See, also, *Gaetano Bocci & Sons Co. v. Lawndale*, 1930, 208 Cal. 720, 284 P. 654; *In re Gatsios*, 1928, 95 Cal.App. 762, 766, 273 P. 826; *In re Boehme*, 1936, 12 Cal.App.2d 424, 428, 55 P.2d 559, where the above mentioned California cases are cited and the rules stated in them approved, and *Bueneman v. Santa Barbara*, 1937, 8 Cal. 2d 405, at page 413, 65 P.2d 884, at page 889, 109 A.L.R. 895, where the same rule was applied, the court saying, "For mere difference in classification does not meet constitutional requirements. Classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.' *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 155, 17 S.Ct. 255, 257, 41 L.Ed. 666."

[13] Turning now to the ordinance in question, we find that, as applied to the facts of the cases before us, it makes several discriminations, and we are unable to see that any of them affords a proper basis for legislative classification in the matters now in hand. As already stated, the part of the ordinance involved in *People v. Gidaly*, Cr. A. 1602, is that prohibiting picketing of a place of business where less than a majority are on strike, and *People v. Aragon*, Cr.A. 1607, involved that part of it prohibiting picketing by persons who are not or have not been continuously for at least thirty days employees at the place of business picketed. To sum up the effect of these provisions, if a majority of the "bona fide" employees at a place of business or at all the employer's places of business, go on strike, such place may be picketed, but if less than that number strike none of them may picket; and no matter how many strike, persons not employees may not join them in picketing and employees who have been such less than thirty days continuously may not picket. How do these discriminations tend to promote the objects of the ordinance? Those objects, as we gather them from a consideration of its various prohibitions, are, first, to prevent obstruction of streets and other public places, and other interference with their use for passage; second, to prevent, in labor disputes, acts of intimidation and violence directed at

persons engaged in those disputes or at other members of the public; and, third, to assure to the public and those affected by such disputes freedom from unlawful disturbance and annoyance arising from picketing.

Considering the first of these objects, it is manifest that it can make no difference whether a picket is or has been for thirty days an employee of the place picketed, and that interference with passage over the streets is not less likely when a majority of the employees are on strike. Moreover, that object seems well accomplished by section 10 which prohibits a variety of acts which would hinder or prevent free passage along streets and other public places. As to the second and third objects, we note that sections 7, 8, and 9 of the ordinance prohibit any person, be he picket or not, from engaging in acts of intimidation or coercion in connection with any place of business, section 2 thereof specially forbids pickets to do so, and sections 7, 8 and 9 prohibit also a variety of acts which might amount to mere annoyance or disturbance. With the activities of pickets thus limited, what difference can it make to the accomplishment of the objects of this ordinance whether or not they are employees at all or have been such for any particular length of time, or how many of the employees at the place picketed are on strike? We can see no such difference.

Even were there no such other limitations on pickets, the classifications now under consideration would have no just or reasonable relation to the objects of the legislation, to use the phraseology of *Bay-side Fish Flour Co. v. Gentry*, supra, 297 U.S. 422, 429, 56 S.Ct. 513, 80 L.Ed. 772, 777. There is nothing in any experience to which our attention has been called and we see nothing in reason to suggest that pickets at a place where a minority of the employees are on strike will be any more given to violence, obstruction of streets, intimidation, annoyance and disturbance than those where a majority strike. Neither does it appear that the length of time a picket has been employed at the place he pickets bears any rational relation to the probability of his acting in a manner contravening the objects of this ordinance. We find no rational ground to suppose that a picket who is not employed at the place picketed, who may be a friend or relative of an employee, a person hired for the purpose, or an official of some union interest-

ed in the strike, will be any more active or urgent about the business of picketing or any more likely to engage in obnoxious conduct, than an employee. The latter has a personal interest in winning the strike, which furnishes him as strong an incentive to let the end justify the means, as any other picket is likely to have. The provision of the ordinance discriminating between employees and others and denying the latter the right to picket comes directly within this declaration made by the United States Supreme Court, *arguendo*, in *Truax v. Corrigan*, 1921, 257 U.S. 312, 335, 42 S.Ct. 124, 130, 66 L.Ed. 254, 264, 27 A.L.R. 375, 387: "Suppose the Legislature of the state were to provide that such acts as were here committed by defendants, to wit, the picketing or patrolling of the sidewalk and street in front of the store or business house of any person and the use of handbills of an abusive and libelous character against the owner and present and future customers, with intent to injure the business of the owner, should be a public nuisance and be punishable by fine and imprisonment, and were to except ex-employees from its penal provisions. Is it not clear that any defendant could escape punishment under it on the ground that the statute violated the equality clause of the Fourteenth Amendment? That is the necessary effect of *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679."

[14-16] Again we call attention to the fact that in the situations selected by this ordinance for its permissive effect the picketing of a place of business may be done in such manner as is likely (and ordinarily its object would be) to induce persons not to enter or leave the place, not to work or seek employment there, and not to buy, sell, deliver or receive goods there, subject to other provisions of the ordinance against violence, coercion, intimidation and annoyance and some other limitations not now requiring consideration. No question arises as to the prohibition of such picketing altogether, for there is no such prohibition, but only as to the reasonableness of the standards by which the ordinance has selected the persons by whom and the circumstances under which it may be done. By the established rules of constitutional law, such standards may not be arbitrary, but must have some reasonable relation to the object and purpose of the ordinance. Finding no such relation, we hold the prohibitions here in question invalid. The or-

dinance makes other discriminations, not here discussed, in its definitions of "bona fide strike" and "bona fide employee." The facts of these cases do not raise any question of the validity of those other discriminations, for it does not appear that any of the appellants is in any of the classes against whom such discriminations run. We have for that reason refrained from expressing an opinion regarding any of the other discriminations. For similar reasons we do not decide upon the validity of various other provisions of the ordinance not involved in the charges made against the defendants.

The judgments are reversed and the causes are remanded to the Municipal Court, with directions to dismiss the complaint in *People v. Gidaly*, Cr.A. 1602, and to dismiss Count 2 of the complaint in *People v. Aragon*, Cr.A. 1607. The appeal from the order denying motion to quash and dismiss the complaint, in Cr.A. 1607, is dismissed.

I concur: BISHOP, J.

SCHAUER, Judge (concurring).

I concur. I am in accord with the conclusion reached by my associates, and with the propositions of law which support it, but think, however, that as an even more fundamental and essential constitutional right (than that which is made the basis of the foregoing opinion) has been discussed by counsel in presenting this case and is pertinent to this decision, that it should not go unmentioned in our opinion. I refer to the right of free speech together also with the independent but constitutionally cognate and equal rights of freedom of press and of peaceable assembly. U.S. Const. Amendments I and XIV. Amendment I of the United States Constitution, which declares those liberties, is, in effect, made operative on the several states by Amendment XIV, *Hague v. Committee for Industrial Organization*, 1939, 59 S.Ct. 954, 83 L.Ed. —; see, also, *Civil Rights Act of 1871*, 17 Stat. at L. 13, and such rights are redeclared in the California Constitution (Sec. 9, Art. I).

One cannot read the provisions of the Ordinance here involved without knowing that it affects those constitutional rights in some measure. As was stated in the "Affirmative Argument on Proposition No. 1 to Regulate Picketing", which was a paper officially mailed to the voters preced-

ing the September 16, 1938 election, at which the ordinance was adopted, "The primary purpose of picketing is to advertise a dispute between employer and employees." As the "display of a flag or banner 'as a sign, symbol or emblem of opposition to organized government'" constitutes an exercise of the right of freedom of speech (*Stromberg v. California*, 1931, 283 U.S. 359, 365, 51 S.Ct. 532, 75 L.Ed. 1117, 1121, 73 A.L.R. 1484) so does picketing, to advertise a dispute between employees and employer, like other methods of expression or means of publication, likewise constitute an exercise of that right. Since it may differ, in its forms of manifestation, from the ordinary spoken or printed word, it may well be subject to reasonable regulations which might not be appropriate to the latter, but it is important that we frankly recognize it as a form of exercise of the fundamental liberty of speaking, writing and publishing one's views so that we shall not misapprehend the standards by which the validity of any regulations affecting it are to be tested. Pertinently, I find that the regulations involved in these cases cannot be sustained when so tested.

The term "to picket" is defined, in the ordinance, to include walking or riding back and forth, or standing, sitting or remaining, in front or in the vicinity of, any place of business or residence or its approaches. A "bona fide employee" is one who, among other things, has been continuously employed by the employer for not less than 30 days. On conditions enumerated a "bona fide employee while carrying on lawful picketing," which, among other prerequisites entails declaration of a strike by vote of a majority "of all the bona fide employees of all classes of an employer" for the limited purpose of obtaining or resisting "a change in wages, hours or conditions of their employment after demands made therefor," is authorized to "carry an arm band or other banner" of a limited size which is required to set forth "(i) the name or initials of the organization represented by the person wearing or carrying such arm band or other banner, and (ii) the word 'picket'," and such arm band or banner, may, says the ordinance, "also set forth (iii) the statement that a strike is in progress at the place of business so being picketed, including the name or address of such place of business, but such arm band or other banner shall have thereon no other words, lettering, numbering, picture or design what-

soever." The word "banner" is defined, in such ordinance [Section 1(e)], to "mean and include, but not be limited to, any banner, transparency, paper, sign, insignia, badge, emblem, symbol, ribbon, card, picture, arm banner, band or sign, hat band or sign, sash, waist band, banner or sign." Section 5, otherwise than as limited by sections 4 and 6, declares that "It shall be unlawful for any person to carry, show or display any banner in or upon any public place, or in or upon any private place within the view of any person who is in or upon any public place, in front of, in the vicinity of, or about any place of business, or any of the approaches * * * (ii) in a manner calculated or with the intent to induce or influence any person to refrain from entering, occupying or leaving any place of business" or, generally, from having any transaction therewith or therein. Lastly, for the purposes of this premise, section 4(c) provides that "The activity of any such bona fide employee while so picketing such place of business shall be limited to patrolling upon the public places in front of or about such place of business and to wearing or carrying such an arm band or other banner as is permitted by Section 6."

Thus we see that the ordinance, among other things, (1) permits a majority of all classes of employees to symbolize or otherwise express (under the conditions prescribed) their statement that a strike is in progress but denies that right to a minority; (2) permits "a bona fide employee" (on conditions) to "picket" but denies that right to any person who has not been continuously employed by the employer for not less than 30 days; (3) permits the majority (on conditions) to state on a banner that a strike is in progress but denies them the right to make that statement orally; (4) permits the majority to say (on conditions on a banner) that a strike is in progress but strictly censors what they may say concerning that fact; (5) permits a majority to advertise (on conditions) by picketing that a dispute between employees and employer exists but forbids both majority and minority, at the time and place, or in the manner, of such advertising, to express their views or present arguments on the merits, or even to define the grounds, of the dispute. Furthermore, by such ordinance (6) not only are all persons generally forbidden to "picket", which means that they may not walk or ride back and forth or sit, stand or remain in the vicinity of

the place of business involved, except on the conditions and with the qualifications prescribed, but also, by the strict terms of the law, no person—not even a regularly employed newsboy—“upon any public place, or in or upon any private place within the view of any person who is in or upon any public place, in front of, in the vicinity of, or about any place of business * * * in a manner calculated or with the intent to induce or influence any person to refrain from entering, occupying or leaving any place of business” or, generally, to refrain from having any transaction therein or therewith, may carry, show or display any “paper” (Sects. 1(e), 4(c), 5 and 6). A newspaper or handbill carrying the story of a labor dispute and expressing the claims of either side would clearly be prohibited from display to the public (whether on public or private property) in the vicinity of a place of business at which a strike was in progress. The practical effect of the sum of the foregoing epitomized elements of the “regulation” is a comprehensive prohibition of the exercise by an individual, in the vicinity of a strike, of his freedom of speech and publication.

It seems a work of supererogation to cite authorities other than Amendments Numbers I and XIV of the United States Constitution, and Section 9, Article I, of the Constitution of California, to the point that each of the six propositions above enumerated, as well as their combined effect, is constitutionally untenable. It is elementary that the individual's or minority's right to exercise freedom of speech is not a privilege or a provisional property which is subject to the control of the majority; on the contrary it is an essential characteristic of our constitutional democracy that that right, like those of freedom of press and peaceable assembly, shall perdure, inherent and implicit in the individual, subject to personal responsibility for abuse and to reasonable and necessary regulation as to time and place and circumstances, but not, as such, in scope or content, of exercise. As was said by Mr. Justice Brandeis (joined by Mr. Justice Holmes) in concurring in *Whitney v. California*, 1926, 274 U.S. 357, 377, 378, 47 S.Ct. 641, 648, 71 L.Ed. 1095, 1106, 1107, “Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. * * * Prohibition of free speech and assembly is a measure so stringent that it

would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. * * * The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State.” And to the same effect is this language in *Herndon v. Lowry*, 1937, 301 U.S. 242, 258, 57 S.Ct. 732, 739, 81 L.Ed. 1066, 1075, “The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the Legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution.”

“Democracy,” aptly says United States Commissioner of Education, John W. Studebaker, at p. 135 in “Plain Talk” (National Home Library Foundation, 1936), “is a technique by which the will of the majority becomes law, and by which the right of the minority to attempt to become the majority by peaceful means is scrupulously protected.” If we accept that definition, then we must acknowledge the right of the minority striker to “attempt to become the majority by peaceful means,” and we are bound to scrupulously protect that right. While picketing, like other personal activities, is, as heretofore observed, subject to reasonable regulation in its exercise, I find nothing in the California Constitution to make inapplicable or inappropriate the statement of the United States Supreme Court in *Senn v. Tile Layers Protective Union*, 1937, 301 U.S. 468, 481, 482, 57 S.Ct. 857, 863, 81 L.Ed. 1229, 1238, that “There is nothing in the Federal Constitution which forbids unions from competing with nonunion concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window display.” We have here no question as to absolute prohibition, under the police power, of a vicious or non-useful act—the ordinance, insofar as the provisions under consideration are concerned, is manifestly intended and expressed to be regulatory of a recognized lawful

and useful activity. The police power—the source of authority for most legislative remedies for municipal ills—is one of the most essential powers of government and one that is the least limitable (5 Cal.Jur. 687), but to be valid as affecting a useful and innocent endeavor it may not go beyond reasonable regulation (5 Cal.Jur. 709); the constitution fixes its outermost limits. To retain the character of being merely regulatory, legislation must not arbitrarily prohibit the exercise of any right and even if otherwise validly regulatory it will, as a general rule, fall if it at all impairs or unnecessarily impedes the exercise of a fundamental personal liberty such as freedom of speech. Certainly it will be held void if it unnecessarily or harshly impairs that liberty; it should be so held for two reasons: (1) Whatever the ill such a remedy is not constitutionally available and (2) if it were available the remedy would be worse than the ill.

While a law may be valid which in effect punishes the use of language which has the effect of inciting the unlawful use of violence or the commission of crime (Stromberg v. California, 1931, 283 U.S. 359, 368, 369, 51 S.Ct. 532, 75 L.Ed. 1117, 1123, 73 A.L.R. 1484), the end may not (save possibly in such extraordinary situations as are mentioned in the authority next hereinafter cited) be attained through the medium of censorship or previous restraint. Near v. Minnesota, 1930, 283 U.S. 697, 716, 719, 720, 51 S.Ct. 625, 75 L.Ed. 1357, 1367, 1369; Lovell v. Griffin, 1938, 303 U.S. 444, 451, 58 S.Ct. 666, 82 L.Ed. 949, 953; Hague v. Committee For Industrial Organization, 1939, 59 S.Ct. 954, 83 L.Ed. —. “These rights [freedom of speech, press and assembly] may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their Legislatures [or by the initiative] may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.” DeJonge v. Oregon, 1936, 299 U.S. 353, 364, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278, 284.

It is suggested by my learned associates that the proposition I have discussed is not raised by the facts of the cases before us. I cannot agree with that suggestion.

My opinion that picketing in general partakes of the nature of an expression or publication of an idea has already been

stated and as to the more specific provisions of the ordinance which have been mentioned, although no defendant on this appeal is charged, in his picketing, with making an oral statement regarding an industrial dispute, with stating orally or on a banner or paper any fact censored by the ordinance, or with otherwise offending than is denoted by the broad term “picketing”, I think that, in appraising the constitutional validity of the ordinance insofar as any of its regulatory features directly or incidentally affects freedom of speech, it is proper to examine not an isolated segment but all the component parts affecting that particular liberty. By so doing we can the better determine whether the precise and directly pertinent impingement on such liberty is an inconsequential impediment or a substantial impairment. As we held in *People v. Tilkin*, Cal.Super., 1939, 90 P.2d 148, 153, that “to discover the creation of these crimes in the ordinance, section 4 must be added to section 3, and sections 4 and 6 added to section 5,” so here, to fairly ascertain how and to what extent, and whether validly in these cases the ordinance directly or incidentally regulates or curbs freedom of speech, we should add sections 4, 5 and 6 to section 1, and thus view the forest instead of only the single sapling. From viewing the forest, I conclude that the sapling does not merit propagation—it can bear no fruit. By the standards of civil liberty, in each of the cases now before us, the provisions of the ordinance on which each respective conviction is based are void, not only for the reasons elucidated in Mr. Presiding Judge SHAW’S opinion, but also in that each of such provisions transgresses, in the particulars hereinabove delineated, the irremissibly vetitive provisions of Amendment Number XIV of the United States Constitution, making applicable here the rights declared in Amendment I, and of Section 9, Article I, California Constitution.

On Petition for Rehearing.

PER CURIAM.

[17, 18] By petition for rehearing, respondent urges that there is no common law right to picket, even peacefully, and hence the ordinance in question does not deprive would-be picketers of any right they would otherwise have, and apparently this is deemed to furnish a reason why a discrimination, even though arbitrary and unreasonable, may be made in the ordinance without

subjecting it to objection on that ground. We are somewhat at a loss to know what is meant by the statement that there is no common law right to picket in California. Certainly, in the absence of legislative prohibition or judicial restraint, any person may use the public streets and other public places for walking or patrolling to and fro, or for standing, sitting or remaining, in front of any place of business, or doing any of the other acts comprehended within the definition of picketing given in this ordinance, or may, if the term "picketing" is used in the broader sense adverted to in Judge SCHAUER'S concurring opinion, use his picketing as a means of uttering, conveying or publishing an idea, and no act of legislation is needed to confer upon him the right to do so. We are, of course, not referring to possible violations by persons so picketing of laws directed at other sorts of conduct. But were it otherwise, a legislative act which undertakes to confer a privilege on any class of citizens is subject to section 21, Article I of our state constitution, quoted in our opinion, and also to the Fourteenth Amendment.

[19] We are also reminded by respondent that majority rule is a fundamental tenet of our constitutional system. This may be so, but it is not universally applicable. As suggested in Judge SCHAUER'S concurring opinion, the bill of rights has numerous provisions whose purpose and effect is to prevent a majority from imposing their will on a minority in matters deemed of sufficient importance to justify such protection. Our attention is further called to various other purposes for which a majority classification has been used. When a matter of classification is involved, the question is not, is the classification valid for any or some purposes, but is it valid for the particular purpose for which it is used. The general use of a majority vote as the means of determining ordinary elections, or its adoption for selection of a bargaining agent for the employees in a business, or its use

by a labor union in determining whether to strike, all of which have been referred to, may be proper enough for the purposes there in hand, but it does not follow that the same criterion may be used for the quite different purposes of this ordinance. In our opinion, it has no rational relation to those purposes.

[20, 21] It is also insisted that we have overlooked the rule that in the absence of facts proved in the case or judicially known on which to base a decision holding a law invalid, a court must presume that there were facts known to the legislative agency which justify it and warrant the classification made. We have had this rule in mind. But the court may take notice of the propensities and tendencies of mankind, and of their manifestations as disclosed by current history. We cannot avoid the knowledge that, at least in this country, the great bulk of the picketing in labor disputes has been done by employees who have gone on strike, that many of the most serious riots, acts of violence and other breaches of the peace which have occurred in such cases have happened where a majority or more of the employees at some place of business had struck, and that the participation of picketing employees in such affairs, whether as actors or victims, has not been substantially less, in proportion to their numbers, than that of other persons acting in sympathy with them. In the face of those facts a limitation of picketing to employees and to cases where a majority of employees are on strike, permitting it where those conditions exist and prohibiting it elsewhere, cannot have any reasonable relation to the legislative purposes embodied in this ordinance. That those purposes are as stated in our opinion is not disputed in the petition for rehearing, and we see no reason to doubt the correctness of our conclusion thereon.

The petition of respondent for a rehearing is denied in both of the above entitled cases.

14 Cal.2d 272

KLEIN et ux. v. DUCHESS SANDWICH
CO., Limited, et al.

S. F. 16226.

Supreme Court of California.

Sept. 6, 1939.

Rehearing Denied Oct. 6, 1939.

1. Food ⇨25

In action against sandwich company which prepared and delivered sandwiches to restaurant, and against restaurant, for injuries to plaintiff as result of eating portion of sandwich allegedly containing maggots, evidence that sandwich had been delivered in sealed package to restaurant about an hour before sale by restaurant, led to conclusion that unfortunate incident was caused by negligence of sandwich company.

2. Food ⇨25

Sales ⇨441(3)

In action against sandwich company which prepared and delivered sandwiches to restaurant in sealed package and against restaurant for injury to plaintiff as result of eating portion of sandwich allegedly containing maggots, evidence that sandwich was covered with maggots, and that plaintiff was made ill by eating a portion of sandwich, was sufficient to support judgment for plaintiff against sandwich company, either on theory of negligence, or on theory of breach of implied warranty of fitness. Civ.Code, § 1735.

3. Sales ⇨255

It was legislative intent, in adopting Uniform Sales Act providing for implied warranty of particular fitness, that, with respect to foodstuffs, the implied warranty should inure to benefit of any ultimate consumer of food, and it was not intended that strict "privity of contract" would be essential for bringing of an action by such ultimate consumer for asserted breach of implied warranty. Civ.Code, § 1735.

4. Sales ⇨255

In action against sandwich company which prepared and delivered sandwiches to restaurant in sealed packages and against restaurant for injury to plaintiff as result of eating portion of sandwich allegedly containing maggots, even if plaintiff's husband and not plaintiff was purchaser, such fact did not defeat plaintiff's right to maintain action for breach of implied warranty of particular fitness. Civ.Code, § 1735.

5. Sales ⇨255

Where wife "sent" husband into restaurant for express purpose of purchasing a sandwich for her, wife was a "buyer" within terms of statute providing for an implied warranty of particular fitness. Civ.Code, § 1735.

[Ed. Note.—For other definitions of "Buyer," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Herbert Klein and Alvina Klein, his wife, against the Duchess Sandwich Company, Limited, and others, for injury to the wife as the result of eating a portion of a sandwich allegedly containing maggots. From a judgment directing a verdict for the defendant, the plaintiffs appeal.

Reversed.

Superseding former opinion, Cal.App., 86 P.2d 858.

Elliott Johnson and D. W. Brobst, both of Oakland, for appellants.

O'Connor, Fitzgerald & Moran, of San Francisco, and J. S. Blaine, of Oakland (Harold H. Cohn, of San Francisco, of counsel), for respondents.

HOUSER, Justice.

The action upon which the instant appeal is founded was for the recovery of a judgment for damages, which were alleged to have accrued to the plaintiffs by reason of the fact that one of them assertedly suffered an illness which resulted from the eating of a sandwich which was manufactured by one of the defendants and subsequently sold through the defendant restaurateur to one of the plaintiffs.

The following are among the essential facts which appear from the record that has been filed with the clerk of this court, to-wit: The plaintiffs, respectively, are husband and wife; the defendant Duchess Sandwich Company is a limited corporation, engaged in the business of manufacturing various kinds of sandwiches and thereafter selling them in wholesale lots to retailers, who, in turn, sell them to consumers. The defendant Kilpatrick is the owner and operator of the defendant Happy Daze Buffet, which is engaged in a

restaurant business, which includes the furnishing of sandwiches for consumption by the general public. On July 21, 1936, the two plaintiffs went in their automobile to the place of business that was then being conducted by defendant Kilpatrick, and then and there, at the direction of the wife, the husband purchased a ham and cheese sandwich, which was wrapped in waxed paper and sealed by two metal clamps, which had been placed thereon by the defendant Duchess Sandwich Company. The latter defendant had delivered and sold the said sandwich to defendant Kilpatrick about one hour before he sold the same to the plaintiffs. In that regard, it appears that the practice pursued by the said defendants was that—with the exception of cheese sandwiches—on the day which followed a sale and delivery of sandwiches, the sandwich company replaced with fresh ones all sandwiches which had not been sold to the public by defendant Kilpatrick. In other words, each day the unsold sandwiches, other than those made with cheese, were exchanged for fresh ones; and the unsold cheese sandwiches were replaced every second day following their sale to the retailer. After the husband had taken the ham and cheese sandwich to his wife, who had remained in the automobile in front of defendant Kilpatrick's place of business, she removed the seals which secured the waxed paper within which the sandwich had been wrapped. Thereupon, she removed the wrapper from the sandwich and "took a bite" of the sandwich and swallowed it. According to her testimony, the sandwich had "a peculiar taste". On immediate examination of the remainder of the sandwich, she discovered that it "was crawling with worms", or "maggots". She became ill and vomited. Shortly thereafter, she went to her home, where she again vomited. Immediately thereafter and as a result of that incident, the plaintiff wife was confined to her bed for four days, following which and by direction of her doctor, she was sent to a rest sanitarium, where she continued ill for a period of about two weeks. After again returning to her home, she remained ill for an additional period of about six months. The husband and wife thereupon commenced the instant action for a recovery of a judgment for the damages which they thus had sustained. On the trial thereof, her attending physician testified that the wife's condition was characterized by "a marked nervousness, with an obsession about eating";

that "she had an obsession against food * * *"; and that at the time of trial, her condition was "a mental condition", which, in his opinion, should be treated by a physician accordingly.

Predicated upon the foregoing facts, on motion made by the defendants, the trial court directed the jury to return a verdict in favor of the defendants. It is from the ensuing judgment that the instant appeal has been taken. No briefs have been filed by the respondents other than the Duchess Sandwich Company.

In their complaint herein, plaintiffs pleaded two separate causes of action: In substance, (1) that the defendants were guilty of negligence; and (2) that the defendants had breached an implied warranty that the sandwich was fit for human consumption.

[1] However, without insisting that, in appropriate circumstances, an action for negligence would not lie against a manufacturer, the defendant Duchess Sandwich Company urges the point that on the trial of the action no evidence was adduced from which properly it might be deduced that the said defendant had been guilty of any negligence in the premises. But in that regard, notwithstanding undisputed evidence to the effect that in the manufacture of sandwiches, generally, care had been exercised by the said defendant to prevent the happening of such an incident as befell one of the plaintiffs in the instant case, nevertheless, from the admitted fact that cheese-worms or "maggots" were present on or in the sandwich that was prepared by the defendant Duchess Sandwich Company and thereafter sold by defendant Kilpatrick to one of the plaintiffs, it becomes undeniable that at some time or place some person had failed to exercise the proper degree of care to prevent house-flies or cheese-flies from depositing their eggs on some of the material from which the sandwiches were manufactured, or the subsequent infestation of the particular sandwich in question by cheese-worms or "maggots". And evidence regarding the manner in which the respective businesses of the two defendants were conducted certainly admits of the inference that the negligence existed on the part of the defendant Duchess Sandwich Company rather than on the part of defendant Kilpatrick. To illustrate the possibility of negligence of the one, as well as to exculpate the other, it may be remembered that the evidence

disclosed the fact that after the sandwiches had been prepared at the place of business of defendant sandwich company, they were wrapped in waxed paper, and that the ends of the wrapper were folded and then sealed with metal clamps. Apparently, neither cheese-worms nor "maggots" are indigenous to either cheese or ham; and, since the evidence discloses the fact that "maggots" are the larvae which in two days ordinarily develop from eggs which have been deposited by house-flies, or cheese-flies, it would seem likely that the filling of the sandwich had been thus exposed before the sandwich had been wrapped,—especially in view of evidence to the effect that the sandwich had been in the possession of defendant Kilpatrick for a period of approximately one hour only before it was sold to the plaintiffs. In such circumstances, the conclusion that the unfortunate incident was caused by the lack of proper care on the part of the defendant Duchess Sandwich Company is but natural and one which is deducible from the facts in the case. Its contention that the evidence was sufficient to justify the rendition of a directed verdict in favor of the defendants, and the judgment thereon, cannot be sustained.

It is next urged by respondent Duchess Sandwich Company that no implied warranty as to the quality of the food existed in favor of the plaintiffs. In that regard, section 1735, Civil Code, supplies the basic law for a conclusion to the contrary. In effect, it is therein provided that such a warranty exists: "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

However, the respondent Duchess Sandwich Company, in effect, contends that the implied warranty created by the statute contemplates the existence of a warranty running only from an immediate seller to an immediate buyer. It is clear that were this contention to be upheld in the instant case, the resultant ruling would be that no recovery could be had against the manufacturer on the warranty theory because there was no privity of contract between either of the plaintiffs on the one hand, and the manufacturer Duchess Sandwich Company on the other, by reason of the fact that

defendant Kilpatrick—and not the defendant manufacturer—was the "immediate seller" in the transaction involved. The respondent sandwich company further contends, in effect, that, since by the language of the statute the warranty ran only in favor of the "buyer", and inasmuch as the husband was such immediate "buyer", no privity of contract existed between the wife and the "seller",—and that, consequently, no liability on the implied warranty theory was created in favor of the wife.

In view of the fact that the question concerning a manufacturer's liability to an ultimate purchaser or consumer on a warranty as to the fitness of food manufactured by it heretofore has not been passed upon directly by this court, and because of the fact that in some of the other jurisdictions which also have adopted the Uniform Sales Act, of which section 1735, Civil Code, is a part, the several courts recently have given considerable attention to the problem, it is deemed expedient at this time, in the light of those authorities, to give consideration to the question thus presented.

In *Rachlin v. Libby-Owens-Ford Glass Co.*, 2 Cir., 96 F.2d 597, 600, the court commented upon the fact that although the orthodox rule requires privity of contract between the parties in an action for breach of warranty, "Several courts * * * have recognized an exception to the general doctrine in the case of medicines and foodstuffs, and have held a manufacturer to warrant to the ultimate consumer that the article is fit for human consumption. * * *"

In volume 1, Uniform Laws Ann., pages 118, 119, it was said: "Because there is no privity of contract between the parties, no action will live [lie] for breach of an implied warranty on the sale of foodstuffs, except between the immediate parties to the sale [citing cases]. * * * It has, however, been declared that *foodstuffs* do not fall within the rule of want of privity between the manufacturer and ultimate consumer, with a retail dealer intermediate. *Hertzler v. Manshum* (1924) 228 Mich. 416, 200 N.W. 155, * * * *Ward Baking Co. v. Trizzino*, (1928) 27 Ohio App. 475, 161 N.E. 557, * * *." (Emphasis added.)

Likewise, in *Williston on Sales*, volume 1, page 489, the author makes the following comment: "The general rule that war-

ranties do not run in favor of any but an immediate purchaser has been held applicable in a number of cases where food has been sold to a subpurchaser. Several recent cases, however, have imposed the absolute liability of a warrantor on such a manufacturer in favor of the ultimate purchaser." (Citing among other authorities the cases entitled *Dothan Chero-Cola Bottling Co. v. Weeks*, 16 Ala.App. 639, 80 So. 734; *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649; *Parks v. C. C. Yost Pie Co.*, 93 Kan. 334, 144 P. 202, L.R.A.1915C, 179; *Ward v. Morehead City Seafood Co.*, 171 N.C. 33, 87 S.E. 958; *Catani v. Swift & Co.*, 251 Pa. 52, 95 A. 931, L.R.A.1917B, 1272; *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633, 48 L.R.A., N.S., 213, Ann.Cas. 1915C, 140; *Flesscher v. Carstens Packing Co.*, 93 Wash. 48, 160 P. 14.

In the case entitled *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557, 558, 559, 560, the plaintiff purchased a cake from a retail grocer. The cake was wrapped in waxed paper and bore the name of the baker (Ward Baking Co.) on the outside of the wrapper. As the plaintiff was eating some of the cake he swallowed a needle which had been imbedded in its texture, and an action thereafter was brought for injuries which allegedly had resulted to him from swallowing the needle. The complaint was predicated in part upon an implied warranty of the baking company as to "the wholesomeness and freedom from foreign and dangerous substances" of the cake. It was contended by the said company that there was no contractual liability—in that no privity existed between the plaintiff and the defendant baking company. After commenting on the fact that the authorities were conflicting on the question thus presented, the court said: "The groceryman, who is in effect merely a distributing medium for the articles of food furnished by the Baking Company, and the Baking Company, having full knowledge of that fact, dealt with each other and entered into a contractual relationship for the benefit of the public, which is the ultimate consumer. In other words, this contract between the groceryman and the Ward Baking Company to all intents and purposes was a contract entered into for the benefit of a third party, to wit, the ultimate consumer. * * * Considerations of public policy demand that the utmost care and caution be exacted from the manufacturer of articles of food, who not

only manufactures the same, but causes the same to be delivered to grocerymen, bakeries, and so forth, for the purpose of general distribution and sale to members of the general public. The consumer has a right to rely upon the implied representation of the Baking Company that these articles bearing its name are not only free from injurious substances, but are fit for consumption as food." (Emphasis added.)

And in the case entitled *Anderson v. Tyler*, Iowa, 274 N.W. 48, 50, it was held that the duty of a manufacturer is "to see to it that food products put out by him are wholesome"; that the implied warranty that such products were fit for use ran with the sale, and to the public, for the benefit of the consumer, rather than to the wholesaler or retailer; and that privity of contract was not controlling.

In *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E.2d 130, 135, it was said: "That there is a liability upon a negligent manufacturer who sells articles knowing they are intended for resale to subpurchasers is clear from the trend of modern authorities. The only controversy is as to the basis of the liability, some holding that the implied warranties are made for the benefit of the subpurchasers and form the basis of liability, and others holding that there must be proof of negligence to impose a liability. [Citing cases.]"

Likewise, in the case entitled *Hertzler v. Manshum*, 228 Mich. 416, 200 N.W. 155, 156, which was an action against both the miller and a retailer of flour, for death caused by the presence of arsenate of lead in the said flour, which had been used in the preparation of food eaten by the deceased, the court said: "Defendant Hanchett contends for nonliability under the general rule that the manufacturer of an article or commodity sold a retail dealer is not liable to a subsequent purchaser upon an implied warranty for injuries due to defects or impurities therein. This general rule is based on want of contractual relation. *But foodstuffs do not fall within the rule of want of privity between the manufacturer and ultimate consumer*, with a retail dealer intermediate. * * * The implied warranty, so called, reaching from the manufacturer of foodstuffs to the ultimate purchaser for immediate consumption is in the nature of a representation that the highest degree of care has been exercised. * * *. We are fully persuaded that the manufacturer of foodstuffs is liable to re-

spond in damages to the purchaser thereof, for immediate consumption, injured by a foreign poisonous substance therein; that the retail dealer may be joined as a party defendant; and the liability of both may be counted on in tort for negligence or breach of implied warranty as mentioned." (Emphasis added.)

And in *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382, 389, 17 A.L.R. 649, it was held that one seeking damages from a food manufacturer for injuries caused by eating unwholesome food was not compelled to elect between implied warranty and negligence as a ground for recovery. In that case also it was contended by the defendant packing company that there could be no warranty, express or implied, because there was no privity of contract between the defendant and plaintiff. There the court said: "The remedies of injured consumers ought not be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone upon privity of contract. * * * every consideration of law and public policy require that the consumer should have a remedy.' * * * In the case of *Parks v. C. C. Yost Pie Co.*, 93 Kan. 334, 144 P. 202, L.R.A.1915C, 179, 181, * * * The court says: 'A manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon an implied representation that it is wholesome for human consumption.' * * * In *Boyd v. Coca Cola Bottling Works*, 132 Tenn. 23, 177 S.W. 80, the court said: '* * * Some of the cases place the liability on the grounds heretofore stated; others place it on pure food statutes; others say there is an implied warranty when goods are dispensed in original packages, which is available to all damaged by their use; and another case says that the liability rests upon the demands of social justice.' * * * We are of opinion that the duty of a manufacturer to see to it that food products put out by him are wholesome, and the implied warranty that such products are fit for use runs with the sale, and to the public, for the benefit of the consumer, rather than to the wholesaler or retailer, and that the question of privity of contract in sales is not controlling, and does not apply in such a case." (Emphasis added.)

Also, the case entitled *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633, 48 L.R.A., N.S., 213, Ann.Cas.1915C, 140, although

decided prior to the time the Uniform Sales Act became a part of the law of the state of Washington, frequently has been cited in the later cases dealing with the question here being considered. See *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, 411, 15 P.2d 1118, 88 A.L.R. 521; *Stanfield v. F. W. Woolworth Co.*, 143 Kan. 117, 53 P.2d 878, 881. In the *Mazetti* case the defendant meat packing company was sought to be held liable in an action brought by a middleman who had purchased canned tongue from the former, some of which the plaintiff had sold to a patron. It was alleged that the tongue was foul and poisonous. In discussing the question of liability of the meat packer, the court said [75 Wash. 622, 135 P. 634, 48 L.R.A., N.S., 213, Ann.Cas.1915C, 140]: "It has been accepted as a general rule that a manufacturer is not liable to any person other than his immediate vendee; that the action is necessarily one upon an implied or express warranty, and that without privity of contract no suit can be maintained; that each purchaser must resort to his immediate vendor. To this rule certain exceptions have been recognized: (1) Where the thing causing the injury is of a noxious or dangerous kind. (2) Where the defendant has been guilty of fraud or deceit in passing off the article. (3) Where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous. * * * Another exception—the doctrine is comparatively recent—is referable to the modern method of preparing food for use by the consumer, and the more general and ever-increasing use of prepared food products. The following are among the more recent cases holding that the ultimate consumer may bring his action direct against the manufacturer: *Meshbeshier v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N.W. 428, 131 Am.St.Rep. 441; *Tomlinson v. Armour & Co.*, 75 N.J.L. 748, 70 A. 314, 19 L.R.A., N.S., 923; *Salmon v. Libby, McNeill & Libby* 219 Ill. 421, 76 N.E. 573; *Haley v. Swift & Co.* [152 Wis. 570], 140 N.W. 292; *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S.E. 152, 1 L.R.A., N.S., 1178, 110 Am.St.Rep. 157; *Ketterer v. Armour & Co.*, D.C., 200 F. 322. * * * Although the cases differ in their reasoning, all agree that there is a liability in such cases irrespective of any privity of contract in the sense of immediate contract between the parties. * * * Our holding is that,

in the absence of an express warranty of quality, a manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages, and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade." (Emphasis added.)

And in the case entitled *Menaker v. Supplee-Wills-Jones Milk Co.*, 125 Pa.Super. 76, 189 A. 714, 715, it was held that: "A manufacturer who puts upon the market food intended for human consumption in a sealed bottle or original package is held to represent to *each purchaser*, even though the purchase is made through a dealer, that the contents thereof are wholesome and suitable for the purpose for which they are sold. *Nock v. Coca Cola Bottling Works*, 102 Pa.Super. 515, 521, 156 A. 537; *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*, 296 Pa. 114, 145 A. 700; *Catani v. Swift & Co.*, 251 Pa. 52, 95 A. 931, L.R.A. 1917B, 1272."

The question here under consideration also has been the subject of review in the various law journals. For comments, see: 42 *Harvard Law Review* 417, 46 *Harvard Law Review* 162; 52 *Harvard Law Review* 328; 23 *California Law Review* 621. See generally: 17 A.L.R. 709; 105 A.L.R. 1511; 111 A.L.R. 1251.

It will be seen from a reading of the foregoing authorities that they are not in entire accord, one with the other, as to the exact reasoning employed in holding a manufacturer liable on a warranty theory, where an action has been brought by an ultimate purchaser or consumer—with a retail dealer intermediate—for injuries resulting from the eating of unwholesome food. Manifestly, however, the factor of public policy affords a background for these decisions. Many statutes have been enacted in recent years which have had for their purpose the safeguarding of the public health, such as the pure food and drug acts, the regulation of milk and dairy products, etc., the aim and purpose of which enactments are that, in the interest of the public welfare, only wholesome food may be sold for human consumption. *Stanfield v. F. W. Woolworth Co.*, 143 Kan. 117, 53 P. 2d 878, 881. As hereinbefore has been said, the remedies of an injured consumer of unwholesome food ought not to be made to depend "upon the intricacies of the law of sales", and the warranty of the manufacturer to such consumer should not be made

to rest solely on "privity" of contract. *Ketterer v. Armour & Co.*, 1912, D.C., S.D. N.Y., 200 F. 322, 323.

[2,3] It should at once be apparent that food which is covered with "maggots" is not wholesome, nor fit for human consumption; and if, as the evidence in this case discloses to be the fact, one of the plaintiffs partook of a sandwich which was thus infested, and for that reason became ill, the general provisions of the statute, together with the adjudicated cases with reference thereto, supply abundant authority for the affirmation of a judgment for damages in their favor arising from such a cause, either on a theory of negligence or on that of the implied warranty referred to in section 1735, Civil Code. In adopting the statute here concerned as a part of the Uniform Sales Act, it was the clear intent of the legislature that, with respect to foodstuffs, the implied warranty provision therein contained should inure to the benefit of any ultimate purchaser or consumer of food; and that it was not intended that a strict "privity of contract" would be essential for the bringing of an action by such ultimate consumer for an asserted breach of the implied warranty.

Although authorities to the contrary of the conclusion herein reached have imposed a strict privity of contract on a purchaser or consumer of assertedly unwholesome food as an essential requisite for the bringing of an action on the implied warranty theory, nevertheless, the rulings made in the authorities herein cited are based on sound principles,—affording as they do an adequate remedy for injuries which may result from the eating of unwholesome food by an ultimate consumer who, under modern economic conditions, almost of necessity, must purchase many items of food prepared in original packages by the manufacturer and intended for the consuming public, although marketed through an intermediate dealer.

[4,5] The second contention made by the respondent *Duchess Sandwich Company*,—that recovery was precluded by the plaintiff wife because she was not the "buyer" within the meaning of the statute and that, consequently, there was no "privity of contract" between the "seller" and the wife—in effect, has been answered by the ruling hereinbefore made. However, on analyzing the question,—in the light of the construction placed upon the statute by the

respondent sandwich company—it is evident that, should such contention be upheld, the result would be that should a father or a mother of an infant child purchase from a grocer a bottle of unwholesome milk, or other deleterious food, for consumption by the child and, ensuing from its consumption thereof, the child become ill,—no damages therefor by reason of a breach of an implied warranty would be recoverable. It would seem improbable that, in adopting the act, the legislature ever intended or even contemplated that such a construction would or could be placed upon the language of the section referred to herein. Moreover, in the instant case, the evidence shows that the wife “sent” her husband into the restaurant for the express purpose of purchasing for her the sandwich of which she thereafter partook, and thus in effect, she was the “buyer” within the terms of the statute. Furthermore in the case of *Jensen v. Berris*, 31 Cal.App.2d 537, 88 P.2d 220, the plaintiff, who allegedly sustained injuries from the eating of unwholesome food in a restaurant—in company with other members of a card club—was allowed a recovery as against the restaurateur on the warranty of the fitness of the food, although she did not pay for the food herself,—the court holding that there was sufficient privity of contract to support the warranty. And in the case entitled *Dryden v. Continental Baking Co.*, 11 Cal.2d 33, 77 P.2d 833, 835, the plaintiff wife was injured by the eating of bread purchased by her husband through a retail dealer, and although it was held that her recovery was in tort, where negligence on the part of the baking company was proven,—nevertheless, in answer to the contention of the defendant baking company that no recovery should have been allowed on the implied warranty theory because there was lack of privity of contract, the court observed that, “assuming that privity is an essential element of such an action, it might well be urged that the wife * * * was a third party beneficiary of the contract”.

However, as hereinbefore has been held, the warranty as to the fitness of foodstuffs intended for human consumption was not intended to be solely for the benefit of the immediate “buyer”, but was intended to be for the benefit of the ultimate consumer,—the existence of privity of contract not being essential in an action brought by such consumer on the warranty theory. To al-

low a recovery by such third person, who may have consumed unwholesome food purchased by another, would not impose a greater burden on the manufacturer or on the immediate seller of the food than would be thus imposed if the original purchaser had been injured by reason of the consumption thereof—since the warranty extended to *every consumer* is that the food is fit for the purpose for which it was intended, namely, for human consumption.

In the instant case, it follows that the jury should not have been directed to return its verdict in favor of the defendants.

The judgment is reversed.

We concur: SHENK, J.; CURTIS, J.; PULLEN, Justice pro tem.; SPENCE, Justice pro tem.



14 Cal.2d 285

HEROUX v. ATCHISON, T. & S. F. RY.
CO. et al.
L. A. 17126.

Supreme Court of California.

Sept. 6, 1939.

Rehearing Denied Oct. 6, 1939.

1. Courts ⇨488(1)

Where an appeal was determined on its merits by District Court of Appeal and Supreme Court denied petition for a hearing, the granting by the Supreme Court of a hearing after a decision of the District Court of Appeal denying respondent's motion to recall remittitur of District Court of Appeal on ground that fraud and imposition had been practiced did not transfer entire cause on its merits to the Supreme Court, but only motion to recall remittitur.

2. Courts ⇨486

When the subject matter of a motion is peculiarly within the province of the District Court of Appeal finally to decide and it appears that that court has regularly pursued its authority, its action should be deemed final by Supreme Court.

3. Courts ⇨204

The Supreme Court would not entertain originally a motion to recall a remittitur la-

sued in due course by District Court of Appeal.

4. Courts ⇨486

The District Court of Appeal has control of its own process and is in better position than Supreme Court to determine whether a motion to recall remittitur of District Court of Appeal on grounds that it has been subjected to fraudulent imposition, has acted improvidently and by mistake should be granted.

5. Courts ⇨488(1)

An order of transfer by Supreme Court has effect of setting aside judgment of District Court of Appeal and of lodging the cause in Supreme Court and placing it in same position as a cause originally commenced in Supreme Court.

6. Courts ⇨488(4)

Where Supreme Court, which granted petition for hearing after decision by District Court of Appeal refusing to recall its remittitur, determined that denial of motion by District Court of Appeal was regular, Supreme Court would not rule on the motion or dismiss the same, but would transfer it to District Court of Appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action for damages for injuries suffered in collision between automobile and locomotive by Marie Heroux against the Atchison, Topeka & Sante Fe Railway Company (a corporation), and A. E. Alverson. From a judgment for plaintiff, defendants appealed to the District Court of Appeal. On motion for hearing after the District Court of Appeal denied a motion to recall the remittitur.

Motion transferred to the District Court of Appeal. See 94 P.2d 820.

For prior opinion, see, Cal.App., 86 P.2d 841.

Robert Brennan, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellants.

Russell H. Pray and Mason & Windham, all of Long Beach (Henry F. Walker, of Los Angeles, and Roy J. Brown, of Long Beach, of counsel), for respondent.

SHENK, Justice.

Plaintiff brought this action to recover damages for personal injuries suffered in

a collision between an automobile and a locomotive. From a judgment on a verdict the defendants appealed. The judgment was reversed by the District Court of Appeal on September 8, 1938. *Heroux v. Atchison, Topeka & S. F. Ry. Co.*, 28 Cal.App.2d 401, 82 P.2d 620. No application for a rehearing in that court was made. A petition for a hearing in this court was denied November 7, and on November 9, 1938, the remittitur went down from the District Court of Appeal. On December 24, 1938, a notice of motion was filed in that court to recall the remittitur. The grounds of the motion were stated to be, (1) that the judgment of reversal was improvidently ordered upon false suggestion and under a mistake as to the facts in the case, and (2) that fraud and imposition had been practiced upon the court in procuring its judgment and upon counsel representing the respondent.

After hearing on the motion to recall, the District Court of Appeal found that the respondent was fully cognizant of the facts constituting the alleged fraud and mistake on and prior to that date of the judgment of reversal, to-wit, September 8, 1938; that notwithstanding such knowledge no petition for a rehearing was filed in that court. The court concluded that when the aggrieved party was cognizant or claimed the existence of fraud or mistake affecting the appellate court's decision, it was the duty of the litigant promptly and at his first opportunity to call the court's attention to the alleged fraud or mistake; that the respondent had the opportunity thus to call the same to the attention of the court by petition for a rehearing in that court; that failing to do so the respondent should not be permitted to delay this necessary and appropriate step until after the remittitur had gone down, and that the respondent was therefore guilty of laches in presenting the belated motion. See, *Heroux v. Atchison, Topeka & S. F. Ry. Co.*, June 26, 1939, Cal.App., 86 P.2d 841. The court based its conclusion in part on the case of *Haydel v. Morton*, 28 Cal.App.2d 383, 82 P.2d 623, where on motion to recall the remittitur under a situation very similar to the present one it was plainly indicated that it was the duty of the aggrieved party, having full knowledge prior to the reversal of all the facts on which the claim of improvidence and mistake on the part of the appellate court in reversing the judgment for the plaintiff was based, to acquaint the

court with such facts in its briefs before judgment and by petition for rehearing after the judgment was rendered.

[1] The respondent's petition for hearing after the decision by the District Court of Appeal of her motion to recall was granted. The effect of our order was to transfer the motion to this court. The respondent insists that our order had the effect of transferring the entire cause on the merits of the appeal. Such of course was not the case. The appeal on its merits was disposed of by the judgment of the District Court of Appeal reported in 28 Cal.App.2d 401, 82 P.2d 620, supra, and by the order of this court denying the respondent's petition for a hearing on November 7, 1938. The only matter transferred to this court by its order was the motion to recall the remittitur. The appellants contend that this court was without power to transfer the motion for the reason that the District Court of Appeal has exclusive control of its own process.

[2-4] When the subject matter of a motion is peculiarly within the province of the District Court of Appeal finally to decide and it appears that said court has regularly pursued its authority, its action should be deemed final. Certain it is that this court would not entertain originally a motion to recall a remittitur issued in due course by the District Court of Appeal. That court has control of its own process and is in best position to determine whether on such a motion originally addressed to that court it has been subjected to fraudulent imposition, or has acted improvidently or by mistake, or has been otherwise imposed upon.

[5, 6] The order of transfer was made because of what was deemed at the time to be an erroneous statement of law on the face of the opinion. Later examination disclosed that there were no exceptional circumstances which would require the granting of the petition and that the denial of the motion by the District Court of Appeal was regular and should have been permitted to stand. It is the rule that the order of transfer has the effect of setting aside the judgment of the District Court of Appeal and of lodging the cause in this court and placing it in the same situation as a cause originally commenced here. We are, therefore, confronted with a motion pending here which should properly be disposed of by the District Court of Appeal. It is deemed inappropriate for this

CAL.REP.93-94 P.2d-21

court either to rule on the motion or to dismiss the same. Said motion is, therefore, transferred to the District Court of Appeal, Second Appellate District, Division Two, for its further disposition.

We concur: CURTIS, J.; HOUSER, J.; EDMONDS, J.; PULLEN, Justice pro tem.



34 Cal.App.2d 481

PHILLIPS et al. v. PATTERSON,
County Clerk.
Civ. 6299.

District Court of Appeal, Third Appellate
District, California.

Aug. 9, 1939.

Rehearing Denied Sept. 6, 1939.

Hearing Denied Oct. 6, 1939.

1. Stipulations $\S$ 14(12)

Where parties to appeal stipulated in writing that sole issue to be determined on appeal was whether a third party was acting as appellee's agent at time of automobile accident in question, all other issues between parties to appeal were thereby waived.

2. Appeal and error $\S$ 460(2)

In the absence of a supersedeas bond, an appeal does not stay execution on a judgment for the payment of money. Code Civ. Proc. $\S$ 942.

3. Appeal and error $\S$ 460(2)

When no supersedeas bond is filed, the party in whose favor a judgment for the payment of money has been rendered is entitled to an execution immediately upon the entry of judgment. Code Civ.Proc. $\S\S$ 681, 942.

4. Execution $\S$ 171(1)

Where, on plaintiff's appeal from portion of judgment relieving codefendant, District Court of Appeal directed trial court to enter judgment against codefendant and a hearing was denied by Supreme Court and the trial court, in accordance with the direction, entered a money judgment against codefendant and codefendant had filed no motion for new trial, notice of appeal or supersedeas bond; the trial court was not authorized, on an ex parte application by codefendant, to restrain county clerk from is-

suing execution on directed judgment. Code Civ.Proc. §§ 53, 681, 942, 953a, 956a; Const. art. 6, § 4¾.

5. Judgment ⇨542

Where it was stipulated between parties to appeal that sole question was whether a third party was codefendant's agent at time of automobile accident, a judgment entered against codefendant by trial court in accordance with direction of District Court of Appeal was res judicata of issues determining liability of codefendant for injuries. Code Civ.Proc. §§ 53, 956a; Const. art. 6, § 4¾.

6. Judgment ⇨548

The final judgment of an appellate court is as conclusive of the issues determined by it as the judgment of a trial court.

7. Master and servant ⇨333

Where a principal is a party to an action for damages and has had an opportunity to present every possible defense which he possesses, the principal is bound, under doctrine of "respondeat superior," by a judgment which determines that his agent in the transaction in question is liable for negligence which proximately causes the injuries resulting therefrom.

[Ed. Note.—For other definitions of "Respondeat Superior," see Words & Phrases.]

8. Appeal and error ⇨1199

The entry of a modified judgment as directed by the Supreme Court or the District Court of Appeal is final and exhausts the jurisdiction of the trial court.

9. Appeal and error ⇨1197

When a cause is remanded, not for retrial, but to give effect to decision on appeal, the trial court can take no further proceedings except such as are necessary to give effect to judgment of appellate court. Code Civ.Proc. §§ 53, 956a; Const. art. 6, § 4¾.

10. Appeal and error ⇨1199

When a cause is remanded with directions to enter a particular judgment, the trial court must enter judgment in conformity with order of appellate court and such order is decisive of character of judgment, and the trial court cannot reopen the case on facts, allow the filing of amended or supplemental pleadings, nor retry the case. Code Civ.Proc. §§ 53, 956a; Const. art. 6, § 4¾.

11. Appeal and error ⇨1194(1)

A judgment of the appellate court was as binding on the appellee as it was upon the appellant.

12. Appeal and error ⇨1

The right of appeal is entirely statutory, and in absence of statute authorizing an appeal the privilege does not exist.

13. Appeal and error ⇨14(2)

When the method of the original appeal gives a party to the litigation no opportunity to review errors alleged to have occurred at the trial, an appeal may lie from a judgment directed by the reviewing court which for the first time fixes a liability upon such party.

14. Appeal and error ⇨1198

Where appeal was taken under statute which would have permitted appellee to present every material issue and appellee consented to waive all issues on appeal except issue of whether a third party was acting as appellee's agent at time of automobile accident, a money judgment entered against appellee by trial court in accordance with direction of decision of appellate court was final with respect to appellee's rights, and trial judge was without jurisdiction to thereafter perform any act except in furtherance of the directed judgment, especially where appellee had filed no motion for new trial, notice of appeal from directed judgment, or supersedeas bond. Code Civ.Proc. §§ 53, 942, 953a, 956a; Const. art. 6, § 4¾.

Proceeding by Homer A. Phillips and another, individually and as a person doing business under the style of Stilson Brothers, against T. F. Patterson, as Clerk of the County of Sacramento, for a writ of mandamus to compel the county clerk to issue an execution under Code Civ.Proc. § 681, after a final directed judgment by the District Court of Appeal had been entered by the trial court.

Judgment in accordance with opinion.

George L. Popert and Butler, Van Dyke & Harris, all of Sacramento, for petitioners.

Gerald M. Desmond and W. A. Green, Deputy Dist. Atty., both of Sacramento, for respondent.

Stanley W. Reckers, of Sacramento, amicus curiæ.

PER CURIAM.

This is a petition for a writ of mandamus to compel the county clerk of Sacramento county to issue an execution under section 681 of the Code of Civil Procedure, after a final directed judgment by the District Court of Appeal had been entered.

[1] The petitioners brought suit for damages against Singer Sewing Machine Company and its agent V. A. Larrabee, accruing as the result of an automobile collision. A trial by jury was waived. The trial court found that Larrabee was guilty of negligence as alleged, and rendered judgment against him in the sum of \$7,500 for personal injuries sustained by Homer A. Phillips. The trial court, however, found that at the time of the accident, Larrabee was engaged as an "independent contractor", and not as an agent of the company, and therefore rendered judgment that plaintiffs take nothing from the Singer Sewing Machine Company. The plaintiffs appealed under section 953a of the Code of Civil Procedure from that portion of the judgment which was rendered in favor of the Singer Sewing Machine Company. It was stipulated in writing by the respective parties that the sole question to be determined on appeal was whether Larrabee was acting in the capacity of an independent contractor at the time of the accident, and not as an agent of the company. All other issues were thereby waived. The negligence of Larrabee, as the proximate cause of the injuries received, was conceded. On appeal this court held, as a matter of law, that Larrabee was acting as the agent of the company, and not as an independent contractor, and that the company was therefore jointly and severally liable for the damages awarded. *Phillips v. Larrabee et al.*, Cal.App., 90 P.2d 820, 821. Regarding the issues to be determined on appeal, this court said: "The sole question here is whether or not the court was justified in finding that Larrabee was not an agent of the company." Having decided, as a matter of law, that Larrabee was an agent of the company, under the authorization of section 53 of the Code of Civil Procedure, this court then reversed that portion of the judgment which relieved the company from liability, and directed the trial court to enter judgment against the Singer Sewing Machine Company, as principal, for the amount of damages previously ascertained and determined. A petition for hearing that appeal was subse-

quently denied by the Supreme Court. Pursuant to that opinion and direction of this court, the modified judgment was entered against the company and its agent, jointly, on August 1, 1939, for the amount of damages previously determined by the trial court. Upon ex parte application of the company, the trial court thereafter made an order restraining the clerk from issuing execution for a period of fifteen days. A demand by the plaintiffs for execution was refused. No motion for new trial, notice of appeal from the modified judgment or stay bond had then been filed. This proceeding for a writ of mandamus to compel the clerk to issue execution was thereupon instituted.

The petition was heard August 9, 1939, George F. Popert, Esq., appeared as attorney for petitioners, and the deputy district attorney appeared for respondent county clerk. At the request of Stanley Reckers, Esq., he was permitted to appear and argued the case in behalf of Singer Sewing Machine Company. The facts were conceded by respective counsel as hereinbefore stated. It was further agreed that no motion for new trial, notice of appeal from the directed judgment or supersedeas bond had then been filed.

The respondent contends that since the original judgment was favorable to Singer Sewing Machine Company, and that it had no opportunity to challenge on appeal any errors which may have occurred at the trial, it is entitled to prosecute a motion for new trial, and to appeal from a denial thereof, or from the directed judgment which was entered against it, and that the trial court was therefore authorized to stay execution until those remedies were exhausted.

[2-4] The question presented on this proceeding is whether plaintiffs were entitled to an execution as a matter of law on August 1, 1939, when it was demanded. The opinion of this court was filed May 19th. A hearing was denied by the Supreme Court July 17th, and the remittitur was filed two days later. No motion for new trial, notice of appeal or supersedeas bond staying execution had been filed at the time of this hearing on August 9th, although twenty days had elapsed since the filing of the remittitur. In the absence of a supersedeas bond an appeal does not stay execution on a judgment for the payment of money. Section 942, Code Civ.Proc. When no supersedeas bond is filed the par-

ty in whose favor a judgment has been rendered, is entitled to an execution immediately upon the entry of the judgment. *Bailey v. Aetna Indemnity Co.*, 5 Cal.App. 740, 746, 91 P. 416; 11 Cal.Jur. 44, sec. 6; sec. 681, Code Civ.Proc. The trial court was therefore not entitled to restrain the clerk from issuing execution.

[5,6] We are of the opinion that, under the circumstances of this case, the trial court was without authority to stay the execution, or even to entertain a motion for new trial. The entry of judgment in the exact form directed by the Appellate Court exhausted the jurisdiction of the trial court. That constituted a termination of the litigation. The appeal from the original judgment was taken under section 953a, Code of Civil Procedure, which raised every essential issue involved in the directed judgment. The company waived all issues except the question of Larrabee's agency, which was determined on appeal as a matter of law with direction to the trial court to enter judgment accordingly. The question of Larrabee's negligence as the proximate cause of the injuries complained of, and the amount of damages adequate to compensate plaintiffs, were conceded by waiving those issues in the written stipulation signed by the company. The modified judgment finally determined the liability of the company on the doctrine of respondeat superior. It would be futile to grant a new trial in this case for the reason that the modified judgment became res judicata of the issues determining the liability of the company for the injuries complained of. To grant a new trial under the circumstances of this case and again try the issue of the company's liability would defeat the very purpose of sections 53 and 956a of the Code of Civil Procedure. The final judgment of an appellate court may be just as conclusive of the issues determined by it as that of a trial court. In 2 Freeman on Judgments, 5th Ed., 1345, section 639, it is said in that regard:

"The judgments of appellate courts are as conclusive as those of any other court. They not only establish the facts, but also settle the law, so that the law as decided upon any appeal must be applied in all the subsequent stages of the cause, and they are res adjudicata in other cases as to every matter adjudicated."

The Constitution and statutes of California provide for the very procedure fol-

lowed in this case, and declare they should receive a liberal construction for the purpose of terminating litigation, when, in the interest of justice, the issues involved may be disposed of "by a single appeal and without further proceedings in the trial court". Const. art. VI, sec. 4¾; secs. 53 and 956a, Code Civ.Proc. These provisions have so been construed by the courts.

[7] The alleged error of the Appellate Court in determining, as a matter of law, that the company was liable for the damages resulting from its agent's negligence became final and conclusive when the Supreme Court denied a hearing of the appeal. That opportunity for a hearing was the respondents' remedy for the asserted error, and furnished the established procedure for its day in court. The amended judgment finally determined the liability of the company. Where a principal is a party to an action for damages and has had an opportunity to present every possible defense which he possesses, he is bound, on the doctrine of respondeat superior, by a judgment which determines that his agent in the transaction is liable for negligence which proximately causes the injuries resulting therefrom. 15 R.C.L. 1026, § 501; 34 C.J. 1023, § 1448.

[8] Our courts have frequently held that the entry of a modified judgment as directed by the Supreme Court or the District Court of Appeal, is final, and exhausts the jurisdiction of the trial court. *Heinlen v. Beans*, 73 Cal. 240, 14 P. 855; *Lierly v. McEwen*, 208 Cal. 645, 283 P. 943; *Kirk v. Culley*, 202 Cal. 501, 508, 261 P. 994; *Cowdery v. London & S. F. Bank*, 139 Cal. 298, 73 P. 196, 96 Am.St.Rep. 115; *Chafoin v. Rich*, 92 Cal. 471, 473, 28 P. 488; *Keller v. Lewis*, 56 Cal. 466, 469; *Heinlen v. Martin*, 59 Cal. 181; *Argenti v. Sawyer*, 32 Cal. 414; *Lial v. Superior Court*, 133 Cal.App. 31, 23 P.2d 795; *Texas Co. v. Moynier*, 137 Cal.App. 112, 29 P.2d 873; *English v. Olympia Auditorium, Inc.*, 10 Cal.App.2d 196, 52 P.2d 267; *Security, etc., Bank v. Southern Pac. R. R. Co.*, 19 Cal.App.2d 420, 65 P.2d 818; *Snoffer v. City of Los Angeles*, 14 Cal.App.2d 650, 58 P.2d 961; *Brown v. Schroeder*, 88 Cal.App. 192, 263 P. 325; *Soule v. Dawes*, 14 Cal. 247; 2 Cal.Jur. 1051, § 625.

[9,10] The determination and effect of these cases is illustrated by the pertinent language of the Snoffer case, *supra*, in which a hearing was denied by the Supreme Court. In that case, after a judg-

ment on appeal was reversed and a modified judgment was entered as directed by the District Court of Appeal, the trial court granted a new trial, from which order a second appeal was perfected. The order granting the new trial was reversed. The court says [14 Cal.App.2d 650, 58 P.2d 962]:

"When a cause is remanded, as in this case, not for retrial, but to give effect to the decision on appeal, the trial court can take no further proceedings except such as are necessary to give effect to the judgment of the appellate court. *Soule v. Dawes*, 14 Cal. 247; 2 Cal.Jur. 1052. When a cause is remanded with directions to enter a particular judgment, it is the duty of the trial court to enter judgment in conformity with the order of the appellate court, and that order is decisive of the character of the judgment to which the appellant is entitled. *The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.*"

[11] The judgment of the Appellate Court is as binding on the respondent as it is upon the appellant.

In support of their contention that the company is entitled to prosecute a motion for new trial, or appeal from the directed judgment which was entered, the respondents rely on the following cases: *Klauber v. San Diego Street Car Co.*, 98 Cal. 105, 32 P. 876; *Tuffree v. Stearns Ranchos Co.*, 124 Cal. 306, 57 P. 69; *Lambert v. Bates*, 148 Cal. 146, 82 P. 767; *Hudgins v. Standard Oil Co.*, 5 Cal.App.2d 618, 43 P.2d 597; *Arena v. Bank of Italy*, 80 Cal.App. 61, 251 P. 338; *Milo v. Prior*, 210 Cal. 569, 292 P. 647; and *Rapp v. Southern Service Co.*, 116 Cal.App. 699, 4 P.2d 195.

[12] The right of appeal is entirely statutory. In the absence of statute authorizing an appeal that privilege does not exist. *United States v. Berg*, 202 Cal. 10, 13, 258 P. 942; *Strauch v. Bieloh*, 16 Cal.App. 2d 278, 280, 60 P.2d 582; 2 Cal.Jur. 111, § 4.

There is no specific statutory authorization to move for a new trial, or to appeal from a directed judgment, but the language of some of the last cited cases seems to indicate a recognition of a right to appeal from a failure or refusal of a trial court to enter judgment in the manner directed by a reviewing court, or from a di-

rected judgment against a party to litigation in whose favor the original judgment was rendered, when errors occur at the trial "*that were not presented in the record upon the former appeal*". In the present case, however, the entire record was presented on appeal under section 953a, Code of Civil Procedure. All issues were waived by the written stipulation of the respondents except the one of Larrabee's agency. The language upon which the respondents rely for their right of appeal from the directed judgment is found in the *Klauber* and *Lambert* cases, *supra*. The directed judgment in the *Lambert* case was affirmed on the ground that it was *res judicata* of the issues presented on the last appeal. The court said in that regard [148 Cal. 146, 82 P. 768]:

"The decision of this court upon the former appeal is, however, conclusive upon the point that the findings here do support the present judgment, and the contention of appellant is simply a request that this court reconsider its previous ruling. When this court directed this particular judgment to be entered upon these findings, it necessarily adjudicated that question against the contention of appellant, and we are not at liberty to consider the question anew upon this appeal. *The decision* upon that point has become the law of the case."

The court, however, did say in that case that:

"If, upon an appeal by one party, *upon the judgment roll*, the judgment is reversed and judgment ordered entered upon the findings in his favor, the other party may, by an appeal upon a proper record, present for consideration exceptions taken by him on the trial of the action."

In the *Klauber* case, *supra*, the court merely held that an appeal would lie from a directed judgment if errors are assigned in a proper proceeding "*that were not presented in the record upon the former appeal.*" [98 Cal. 105, 32 P. 877.] In that case the original appeal was from the judgment roll only, which was presented by means of a bill of exceptions.

The *Milo* case, *supra*, was not an appeal from a judgment directed by a reviewing court. In two consolidated actions involving the same automobile casualty, the trial judge denied relief to all parties, but announced that the judgment in one case would be rendered against the defendant "without prejudice" to plaintiff's right to bring a new action. From that portion of

the judgment the last-mentioned defendant appealed. On appeal the court merely held that the provision of the judgment that it should be "without prejudice to commencing another action", was not authorized. The judgment was reversed in that respect. It in no way involved the right to appeal from a judgment directed by a reviewing court. In the *Arena* case, *supra*, this court affirmed a directed judgment on its merits merely saying that [80 Cal.App. 61, 251 P. 339.]:

"It may be conceded *for the purposes of this opinion* that, inasmuch as on the former appeal the present appellants were respondents, they as such respondents were unable to attack the findings of fact for insufficiency of the evidence and, therefore, may in this appeal bring that issue before this court for review."

In the *Hudgins* case, *supra*, this court said, in accepting jurisdiction of the appeal from a directed judgment, that, "This court specifically omitted passing upon those questions in the former opinion." [5 Cal.App.2d 618, 43 P.2d 599.]

[13] In reconciling the cases relied upon by the respondents with those cited by the petitioners, in the light of the Constitution, article VI, section 4¾, and sections 53 and 956a of the Code of Civil Procedure, we assume that an appeal may lie from a judgment directed by a reviewing court which for the first time fixes a liability upon a party to the litigation, when the method of the original appeal gave him no opportunity to review errors alleged to have occurred at the trial. There is no doubt that, in justice, such a privilege should exist.

[14] In the present case, however, since the appeal was under section 953a, Code of Civil Procedure, which permitted the respondents to present to the Appellate Court on the former appeal every material issue involved, and the company waived the right to present all issues except that which is contained in the doctrine of respondeat superior, we are of the opinion the directed judgment became final, and the trial judge was without jurisdiction to perform any act except in furtherance of that judgment.

Moreover, there was no motion for a new trial, no notice of appeal, and no supersedeas bond on file when this petition was presented on August 9th. The respondents had ample warning of the judgment by the filing of the remittitur. The

prevailing party was entitled to immediate issuance of an execution upon the entry of the directed judgment, and the trial court was without jurisdiction or authority to stay that execution.

When this court announced from the bench in open court that, in its opinion, the writ of mandamus should issue as prayed for, it was stipulated between the petitioner and the respondent that the writ might become effective on August 16th, which was the day after the expiration of the stay ordered by the trial court. The writ was issued accordingly, and execution has been issued by the county clerk as directed by this court.

Let this opinion be filed nunc pro tunc as of August 9, 1939, at which date the decision of this court was announced in open court.



34 Cal.App.2d 490

SHERMAN v. SOUTHERN PAC. CO.

Civ. 10724.

**District Court of Appeal, First District,
Division 1, California.**

Sept. 7, 1939.

Hearing Denied Nov. 6, 1939.

1. Master and servant ⇨88(6)

Where a railroad company under a contract to act "solely as a bridge carrier in a private capacity" agreed to furnish transportation facilities and employees to a company engaged in freight forwarding, the contract could not affect the legal rights of those not parties to it, nor abrogate rights of railroad's employees to compensation under Federal Employers' Liability Act for injuries received in performing services for freight forwarder. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

2. Commerce ⇨27(5)

A railroad employee, who fell from railroad engine which was about to be attached to freight cars containing merchandise sent from outside state, was working on an interstate commerce undertaking, assuming that railroad company was engaged in such commerce and Federal Employers' Liability

Act applied. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

3. Commerce ⇨27(5)

If a railroad employee is killed while engaged in transportation of merchandise wholly within territorial confines of California, transportation constitutes "intrastate commerce" and the Federal Employers' Liability Act is inapplicable. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

[Ed. Note.—For other definitions of "Intrastate Commerce," see Words & Phrases.]

4. Commerce ⇨27(5)

Generally recognized and accepted commercial methods, the subject and purpose of transportation and weight to be given to all surrounding circumstances determine railroad employee's right to recover for injuries under Federal Employers' Liability Act. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

5. Commerce ⇨27(5)

Whether transportation is intrastate or interstate as respects applicability of Federal Employers' Liability Act is determined by continuity of movement combined with unity of plan. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

6. Commerce ⇨27(2)

As respects whether railroad carrier is engaged in "interstate commerce" and thus subject to Federal Employers' Liability Act, service by one of several transportation carriers may be wholly within one state and still be a part of interstate transportation if carrier is a cog or step in continuous transportation through or into a state. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

7. Commerce ⇨27(2)

As respects whether a railroad carrier is engaged in "interstate commerce" and thus subject to Federal Employers' Liability Act, a movement of freight from the point of origin to the place of ultimate destination may be so interrupted that from the point of interruption a new and local service is obtained and transportation from point of interruption would be "intrastate commerce." Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

[Ed. Note.—For other definitions of "Interstate Commerce," see Words & Phrases.]

8. Commerce ⇨27(4)

In determining whether a railroad carrier was engaged in transporting goods in interstate commerce and thus was subject to Federal Employers' Liability Act, the purpose of the shipper of the goods is a circumstance to be considered, but other facts must be examined and weighed to determine character of transportation. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

9. Commerce ⇨27(4)

As respects applicability of Federal Employers' Liability Act to an employee working on freight trains hauling freight which originated outside of state, to change character of transportation to that of intrastate commerce by a change, taking place within state, in name of consignor, consignee, or the carrier, or the means of traffic, would be an evasion of spirit and provisions of the Federal Employers' Liability Act. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

10. Commerce ⇨27(2)

When a common carrier casually and indiscriminately accepts merchandise for interstate transportation, it is subject to the provisions of the Federal Employers' Liability Act and knowledge of carrier as to particular contents of the car transported is unimportant. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

11. Commerce ⇨27(5)

A railroad employee, who was killed by fall from steam engine which was about to be attached to freight cars carrying freight originating outside of state, was engaged in "interstate commerce" and was subject to Federal Employers' Liability Act, although freight was transferred at a point within the state to freight forwarders and freight carrier by agreement with forwarders contracted to transport freight to ultimate destination without knowledge of origin of freight or purpose of consignor of shipment. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

12. Master and servant ⇨276(1)

In action under Federal Employers' Liability Act when it is necessary to determine from circumstantial evidence the cause, the way, or the means by which an accident occurred, an inference so drawn must be reasonable one, based upon evidence presented. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

13. Master and servant ⇨278(6)

In action under Federal Employers' Liability Act to recover for death of a railroad employee resulting from fall from engine allegedly caused by breaking of a bracket holding cutting lever used to open coupler of freight train, it was necessary to prove by substantial evidence that appliance failed in purpose for which it was designed. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51; Federal Safety Appliance Act § 1 et seq., 45 U.S.C.A. § 1 et seq., Federal Boiler Inspection Act § 2, 45 U.S.C.A. § 23.

14. Appeal and error ⇨996

The reviewing court will not disturb a judgment based on nonconflicting evidence, from which may be drawn conflicting inferences, unless inferences that sustain a verdict are conjectural.

15. Appeal and error ⇨996

The test of whether reviewing court will disturb a verdict based on nonconflicting evidence from which conflicting inferences may be drawn is whether or not inferences which may be drawn from evidence to sustain the verdict are reasonable.

16. Master and servant ⇨285(7)

In action under Federal Employers' Liability Act to recover damages for death of railroad employee, evidence presented jury question as to whether breaking of a cutting lever used to open coupler of freight train caused employee who was standing on footboard of engine to fall from engine. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51; Federal Boiler Inspection Act § 2, 45 U.S.C.A. § 23; Federal Safety Appliance Act § 1 et seq., 45 U.S.C.A. § 1 et seq.

17. Death ⇨99(4)

An award in death action under Federal Employers' Liability Act of \$25,000 for loss of future contributions towards maintenance of household and for pain and suffering of deceased, who had a life expectancy of 12.26 years, whose monthly earnings averaged \$155.05 per month, of which deceased retained for his own personal needs approximately \$150 a year, was not excessive. Federal Employers' Liability Act § 9, 45 U.S.C.A. § 59.

18. Death ⇨57

The reviewing court in determining question of excessiveness of \$25,000 verdict, in action under Federal Employers' Liability Act to recover for death of railroad employee, would consider sum of \$10,000, as

prayed for in complaint, as the maximum amount recoverable for conscious pain and suffering. Federal Employers' Liability Act § 9, 45 U.S.C.A. § 59.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action under the Federal Employers' Liability Act by Anna Sherman, as administratrix of the estate of Buel M. Sherman, deceased, against the Southern Pacific Company (a corporation). From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Arthur B. Dunne and Dunne & Dunne, all of San Francisco, for appellant.

Clifton Hildebrand, of Oakland, and Goodman & Brownstone, of San Francisco, for respondent.

WARD, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff as administratrix of the estate of Buel M. Sherman, deceased, for the death of her husband. The action was prosecuted under the authority of the Federal Employers' Liability Act (45 U.S.C.A. § 51) and specifically arose from an alleged violation of the Federal Boiler Inspection Act (45 U.S.C.A. § 23).

Sherman was regularly employed by the appellant company as a "herder" to supervise the removal of engines from a roundhouse located at Watsonville Junction in this state, and the attachment of such engines to cars. Prior to the happening of the accident the engine in question had been removed from the roundhouse and was backed through the yard to a point where Sherman had been manipulating a switch. This point is approximately 100 yards from a road crossing the track upon which the engine was backing. As the engine approached Sherman he mounted the footboard on the engineer's side and gave a "back-up" signal. The engine had moved fifty or sixty feet when Sherman was seen lying alongside the tracks. His torso had been crushed, both legs and one arm had been severed and he had received other injuries as the result of which he died about an hour and a half later. He was conscious up to five minutes prior to his death.

In compliance with the Safety Appliance Act, 45 U.S.C.A. § 1 et seq., the rear coupler on the engine in question was operated by a "cutting lever", located above the foot-board upon which Sherman had mounted, the purpose of which was to permit the coupling and uncoupling of cars without the necessity of the herder or other workman going between the cars. This lever was held in place by a bracket or ring in which it revolves as the handle is lifted. The lever and bracket were not designed as hand-holds; ordinary hand-holds being provided. After the accident the bracket was found broken, and Sherman, prior to his death, stated that the reason he fell was that the cutting lever broke.

One of the cars of the train to be attached to the engine upon which Sherman was killed contained three shipments; to the National Dollar Store, Woolworth and James Nelson, respectively, all in Salinas, California. The first-named shipment, consolidated with other shipments, had been sent by Acme Fast Freight, Inc., hereinafter referred to as the Acme Company, from an eastern point outside of the state and had been delivered to the Acme agent at Oakland, California, where it was redelivered to the Pacific Motor Transport Company, hereinafter referred to as the Pacific Company, for dispatch to the final point of destination at Salinas. The latter company received the freight from the Acme Company as shipper and consignor and issued its bill of lading to the National Dollar Store, as consignee. The Woolworth and Nelson shipments were dealt with in a similar fashion except that the Universal Car Loading & Distributing Company, hereinafter referred to as the Universal Company, was the consignor, and the Woolworth and James Nelson companies the respective consignees. The last two shipments were delivered to the Universal Company on its spur track and redelivered to the Pacific Company for shipment to Salinas. The business of the Acme and the Universal companies was that of collecting articles of freight and consolidating them into a single shipment so as to take advantage of the rates allowed for carload lot shipments. The Pacific Company furnished a door-to-door service.

An agreement existed between appellant and the Pacific Company whereby appellant granted to such company from time to time such transportation and other facilities, and the services of employees, as

might be mutually agreed upon. Appellant supplied all office stationery except that bearing the name of the Pacific Company. It was agreed that the Pacific Company's rates applying to movements over appellant lines would not be published without the concurrence of appellant. The contract provided, also, that appellant was acting "solely as a bridge carrier in a private capacity, * * * performing a physical service" for the Pacific Company "and not for the shipper or receiver of the commodities handled". The Pacific Company paid as compensation for the facilities furnished, the services of employees and other rights and privileges, ninety-nine per cent of the "income for division". The appellant was acting under this contract at the time of the accident.

Respondent refers to the Pacific Company as the alter ego of appellant. Assuming that the two corporations to some extent had common officers, etc., the record does not definitely establish the corporate unity of the two corporations. *Hollywood Cleaning & Pressing Co. v. Hollywood L. Service*, 217 Cal. 124, 17 P.2d 709.

[1] The trial court ruled that appellant was acting as a common carrier in interstate commerce and that decedent was employed in such commerce. There can be no recovery in this action in accordance with the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59, unless at the time of the accident appellant as a common carrier for hire and decedent as an employee thereof were both engaged in interstate commerce. That decedent was employed by appellant is not disputed. Except upon rare occasions, the business of appellant was that of common carrier for hire. In the present instance it acted through its railroad facilities in transporting the goods in question by train, which operated from Watsonville to Salinas. The engine through which Sherman received the injuries resulting in his death was used as a means of assistance in the movement of such train. The fact that appellant had agreed with the Pacific Company to act as a "bridge carrier in a private capacity" relates to the obligations and liabilities pertaining to the merchandise transported as between the contracting parties and cannot thereby affect the legal rights of those who are not parties to the private contract (*Zenz v. Industrial*

Accident Commission, 176 Cal. 304, 168 P. 364, L.R.A.1918D, 423), nor abrogate the rights of employees to a benefit bestowed by statutory enactment (45 U.S. C.A. § 51). Whether appellant was the principal or the agent in the transportation of the merchandise from Oakland to Salinas, it was nevertheless a common carrier under the Employers' Liability Act if such federal statute was applicable to the relationship of appellant and decedent, which brings us to the consideration of the real issue upon this subject, namely, whether the appellant and decedent were rendering local or interstate service.

Appellant contends that upon arrival in Oakland the bulk of the shipment was broken and that it was handled by the forwarders in the course of their business; that the service thus rendered was a local service, in the course of a local movement; that notwithstanding the movement was from a point in the east to Salinas, the journey was so interrupted at Oakland, and the shipment so "broken up" that its continuation was a new and distinctly intrastate movement; that the only outstanding contract of transportation was performed by delivery at Oakland, and further movement was independent and local; that in making the shipment the freight forwarders are treated as the owners of the goods, and when a shipment is offered by a freight forwarder, the carrier cannot inquire who owns the goods, nor does it matter from whence they came; that it is of no consequence whether the contents of the shipment are subjects of an interstate business conducted by the freight forwarder—the only question is the character of the service being performed by the freight carrier. Here appellant contends the goods were carried for the Pacific Company, a local concern engaged in local business; that all appellant agreed to do was haul the car containing whatever the Pacific Company might have loaded into the car on its journey from Oakland to Salinas; that it was ignorant of the point of origin of the contents of the car, or the purpose and intent of the consignor of the shipment.

[2,3] If appellant was engaged in interstate transportation of merchandise at the time of the occurrence of the accident, it may be conceded that the decedent employee, under the facts of this case, was likewise working toward the consummation

of the transportation of merchandise from one state to its destination in another and hence working on an interstate commerce undertaking. If the transportation was interstate for the purpose of traffic in trade, it may be classified as interstate commerce. *Adair v. U. S.*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436, 13 Ann.Cas. 764. If the merchandise transportation was entirely within the territorial confines of California, it was intrastate commerce, and the Federal Employers' Liability Act was not applicable. The precise question for solution is whether appellant in hauling the identified shipments through Watsonville Junction to Salinas was rendering local or interstate transportation service. This question may be determined by the essential nature of the transportation.

[4-7] Generally recognized and accepted commercial methods, the subject and the purpose of transportation and the weight to be given to all the surrounding circumstances determine whether the Federal Employers' Liability Act applies. *Public Utilities Commission v. Landon*, 249 U.S. 236, 39 S.Ct. 268, 63 L.Ed. 577; *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U.S. 257, 48 S.Ct. 107, 72 L.Ed. 270. In *Cott v. Erie R. Co.*, 231 N.Y. 67, 131 N.E. 737, 738, the court, in referring to the character of the transaction, said: "Its character is determined by continuity of movement combined with unity of plan." The plan or purpose of the original shippers and of all the forwarding and carrier companies was to transport the merchandise in question from a point outside of the state to Salinas, within this state. The merchandise was removed en route only by change of engines or to be placed in a different housing or storage car. No evidence appears in the record to indicate that in any removal the purpose of the shipper was disjoined from the primary purpose of transportation from the east to Salinas. The merchandise was in course of transit and any stoppage or removal was incidental to its continuous transit. *Philadelphia & Reading R. Co. v. Hancock*, 253 U.S. 284, 40 S.Ct. 512, 64 L.Ed. 907. Service by one of several transportation carriers may be wholly within one state and still be a part of interstate transportation. Such company might be liable for local and not federal taxes and still, as a cog or step in continuous transportation through or in a state, be performing transportation of an interstate character. A movement from

the point of origin to the place of ultimate destination may be so interrupted that from the point of interruption a new and local service is obtained. *State of New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U.S. 21, 24 S.Ct. 202, 48 L.Ed. 325, citing *Coe v. Town of Errol*, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715; *Diamond Match Co. v. Village of Ontonagon*, 188 U.S. 82, 23 S.Ct. 266, 47 L.Ed. 394; *Chicago M. & St. P. R. Co. v. Iowa*, 233 U.S. 334, 34 S.Ct. 592, 58 L.Ed. 988.

It is true that the general freight forwarding business of the Acme and the Universal companies was in part intrastate (*Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 136 N.E. 375, 27 A.L.R. 1131), and that upon receipt of interstate merchandise at Oakland they were free to use any means or facility which discretion dictated. It may be assumed that, considered from the point of view of the freight forwarder, the movement of the merchandise from the time it left Oakland was to some extent local. However, that assumption is not necessarily controlling and may be overcome by the fact that the forwarder received the merchandise through transportation facilities from a point outside of the state and that the agreement for transportation had not been completed; the trip was not at an end, and the ultimate point of destination, Salinas, had not been reached.

[8-10] As stated, the purpose of the shipper is a circumstance to be considered, but other facts must be examined and weighed to determine the character of the transportation. The preconceived intention was the performance of transportation from a point outside of the state to an ultimate destination. The essential nature of the transportation in this case was a through movement to a point beyond Oakland, namely, Salinas. To change the character of the transportation by a mere change in the name of the consignor, consignee or the carrier, or the means of traffic, would be an evasion of the spirit and the provisions of the Federal Employers' Liability Act; a coloring of the essential nature of the transportation by misleading designations. In *Buckingham Transportation Company of Colo., Inc. v. Black Hills Transportation Co., S.D.*, 281 N.W. 94, 96, the court said: "If it be admitted, as it must be, that the owners and the forwarder adopt this method or system of dealing in order to secure the advantage

of the pool car rate, it does not follow that the unity of the transportation from the point of origin to the points of ultimate destination is broken. If that which is done is in performance of a pre-conceived and pre-announced intention to move property to the selected destinations, the essential continuity or unity of transportation will not be destroyed by a multiplication of carriers and contracts, by changes in form or mode of transportation, by a re-billing or a re-shipping, or by any cessation of movement incidental to a mere change in form or mode of transportation. *Hughes Bros. Timber Co. v. Minnesota* [272 U.S. 469, 47 S.Ct. 170, 71 L.Ed. 359]; *Baltimore & O. S. W. Railroad Co. v. Settle* [260 U.S. 166, 43 S.Ct. 28, 67 L.Ed. 189]; *Western Oil Refining Co. v. Lipscomb* [244 U.S. 346, 37 S.Ct. 623, 61 L.Ed. 1181] and *Cott v. Erie Railway Company et al.*, supra." When a common carrier casually and indiscriminately accepts merchandise for interstate transportation, the knowledge of the carrier as to the particular contents of the car transported is unimportant. *Cott v. Erie Railroad Co.*, supra.

[11] From a study of the facts, aided by the comprehensive briefs of appellant and respondent, we believe the greater weight of well considered precedents establishes a logical and just conclusion that respondent proved by evidence overcoming any presumption to the contrary (*Johnson v. Southern Pacific Company*, 199 Cal. 126, 248 P. 501, 49 A.L.R. 1323) that appellant and decedent at the time of the accident (*Shanks v. Delaware etc. R. Co.*, 239 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436, L.R.A. 1916C, 797) were engaged in the interstate transportation of "things in commerce" (*Chicago & N. W. R. Co. v. Bolte*, 284 U.S. 74, 52 S.Ct. 59, 61, 76 L.Ed. 173) and that the trial court did not err in respect to the admission of evidence or in the denial of the motion for a directed verdict in so far as this point is concerned, nor in the instructions wherein the court informed the jurors that the Federal Employers' Liability Act applied as a matter of law.

The device which caused the injury resulting in death was a bracket holding in place the cutting lever of a coupler, the purpose of which mechanism was to permit the opening of the knuckle of the coupler. Appellant contends that the violation of a safety statute to constitute negligence can be claimed only when the defective device causing injury is being used for the pur-

pose for which it was designed or customarily used. It further contends in this regard that plaintiff had the burden of proving that Sherman at the time he was injured was using the cutting lever for the purpose for which it was designed—to open the coupler—and that plaintiff did not sustain this burden of proof; that the only evidence is circumstantial, and an inference of liability can be drawn from circumstantial evidence only where this is the only reasonable inference to be drawn therefrom; that Sherman was using the cutting lever as a hand-hold, which was not customary or the purpose for which it was designed; that within the few seconds after he boarded the engine it was his first duty to see that the locomotive could pass over the road crossing in safety; that he was faced ahead, and that in the interim of getting on the footboard and his fall, he could not have observed the switches, the crossing and still have turned and reached for the cutting lever.

[12] When it is necessary to determine from circumstantial evidence the cause, the way or the means by which an accident occurred, any inference so drawn must be a reasonable one, based upon the evidence presented. In this case there is no uncertainty about the fact that the bracket holding the cutting lever gave way when decedent took hold of it, and that he fell as a result. An inference that he fell when mounting the footboard was reasonably dispelled when it appeared in evidence, from decedent's own statement just before he died, that the lever broke and "that is the reason I fell". This evidence is corroborated by the inference reasonably drawn from the undeniable fact that after the accident the bracket was found broken.

[13-16] The issue of negligence in this case is specific, namely, whether a statute had been violated. *Atchison, T. & S. F. R. Co. v. Scarlett*, 300 U.S. 471, 57 S.Ct. 541, 81 L.Ed. 748. It was necessary to prove by substantial evidence that the appliance failed in the purpose for which it was designed. *Edgington v. Southern Pacific Company*, 12 Cal.App.2d 200, 55 P.2d 553; *Chicago, B. & Q. R. Co. v. Kelley*, 8 Cir., 74 F.2d 80. This substantial evidence might well be the reasonable inference drawn from the implied findings of the jury of the proven facts, which overcame any conjectural inference or mere guess.

When no conflict in the evidence appears, but there may be a conflict as to the inferences that may be drawn from

such evidence, unless the inferences that sustain the verdict are conjectural, appellate courts will not interfere. The test is whether or not the inferences which may be drawn from the evidence to sustain the verdict are reasonable. *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 53 S.Ct. 391, 77 L.Ed. 819; *Prichard v. Southern Pacific Co.*, 9 Cal.App.2d 701, 51 P.2d 426. The court correctly instructed upon this subject. The evidence is sufficient to sustain the implied finding that the cutting lever broke when used for the purpose for which it was designed and was customarily used.

[17, 18] The jury returned a verdict in the sum of \$25,000. In support of the claim of excessive damages, appellant contends that decedent at the time of his death had a life expectancy of 12.26 years and that his earnings averaged \$155.05 per month, in addition to which he earned from \$250 to \$300 a year in the operation of a small commercial garden. Of his total earnings there was evidence that Sherman retained for his own personal needs approximately \$150 a year and that the balance went into the maintenance of his household. From appellant's figures, the value of future contributions lost to the respondent by reason of her husband's death approximated less than \$12,000. Respondent, on the other hand, in fixing an arbitrary rate of interest, approximates the amount to be in excess of that fixed by the jury. The sum of \$10,000, as prayed for in the complaint, may be considered in the computation as the maximum amount recoverable for the conscious pain and suffering of the decedent. 45 U.S.C.A. § 59. In passing, it may be well to note that, in accordance with the history of the injury, the amount is not disproportionate to verdicts under similar facts and conditions. A fair computation upon the evidence presented relative to the earnings and receipts of decedent, and his family contributions, places the amount at a figure in excess of \$15,000, which, added to the \$10,000 prayed for in the complaint for suffering and pain, indicates that there was no passion, prejudice or undue influence in the minds of the jurors. *Karberg v. Southern Pacific Co.*, 10 Cal.App.2d 234, 52 P.2d 285; *Day v. General Petroleum Corp.*, Cal.App., 89 P.2d 718.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

34 Cal.App.2d 445

LUNDGREN v. CONVERSE.

CONVERSE et al. v. LUNDGREN.

Civ. 12205, 12206.

District Court of Appeal, Second District,
Division 2, California.

Aug. 31, 1939.

1. Automobiles ⇨245(14, 80)

Whether motorist, approaching intersection at which his vision to his right was limited to 80 feet by wall built around property on corner of intersection, was negligent in proceeding across intersection at slow rate of speed after observing no approaching automobiles within range of his vision, was for jury.

2. Automobiles ⇨171(9), 208

Motorist approaching intersection at which vision to his right was limited to 80 feet by wall built around property on corner of intersection was not obliged to constantly keep his eyes to the right while crossing intersection.

3. Automobiles ⇨171(11), 208

Even if motorist crossing intersection observed another automobile approaching on his right at distance of 80 feet, he was under no obligation to stop his own automobile to let the other automobile pass. Vehicle Code, § 550, St.1935, p. 186.

4. Automobiles ⇨171(13), 206

A careful driver who first enters an intersection may properly assume that another driver approaching at a distance of more than 80 feet will yield the right of way and thus prevent a collision. Vehicle Code, § 550, St.1935, p. 186.

5. Automobiles ⇨244(11, 43)

In action by motorist for injuries and for death of his wife as result of collision at intersection, consolidated with action by guests in defendant's automobile against plaintiff motorist for injuries arising out of same accident, physical facts as well as testimony of plaintiff motorist supported conclusion that plaintiff's automobile was first to enter intersection. Vehicle Code, § 550, St.1935, p. 186.

6. Automobiles ⇨243(2)

In action by motorist for injuries and for death of his wife as result of collision at intersection, consolidated with action by

guests in defendant's automobile against plaintiff motorist for injuries arising out of the same accident, permitting witness to testify that a green automobile passed her at speed of 50 miles per hour a block and a half from scene of accident, and that she proceeded to scene of accident and identified defendant's automobile as being the green automobile which had passed her, was not error, notwithstanding other witnesses testified that defendant's automobile was blue and not green.

7. Trial ⇨140(1)

It is function of jury to pass upon credibility of witnesses.

8. Automobiles ⇨243(7)

In consolidated actions for injuries arising out of automobile collision at an intersection, admission of evidence of speed of one of automobiles at distance of a block and a half from scene of accident was within trial court's discretion, as against objection of remoteness.

9. Automobiles ⇨243(7)

In consolidated actions for injuries arising out of automobile collision at an intersection, trial court did not abuse its discretion in admitting evidence of speed of one of automobiles at distance of a block and a half from scene of accident, where there were no through streets intersecting street on which such automobile was traveling between point where witness testified as to automobile's speed and the point of collision.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Charles J. Lundgren against Hazel M. Converse for personal injuries and wrongful death of plaintiff's wife as result of an automobile accident, consolidated with an action by Gertrude M. Converse and Flora Converse against Charles J. Lundgren for personal injuries arising out of same accident. From judgments in favor of Charles J. Lundgren in both actions, Hazel M. Converse, Gertrude M. Converse, and Flora Converse appeal.

Judgments affirmed.

Nourse & Jones, of Los Angeles, for appellants.

Joseph A. Spray, of Los Angeles (Charles P. Gould, of Los Angeles, of counsel), for respondent.

WOOD, Acting Presiding Justice.

This litigation arose from an automobile accident which occurred at the intersection of Santa Anita avenue and Blanche street in the city of Pasadena on the 23d day of December, 1937, at about 5:30 p. m. Respondent, Charles J. Lundgren, accompanied by his wife, was driving in a westerly direction on Blanche street. Appellant Hazel M. Converse was driving her automobile in a southerly direction on Santa Anita avenue and was accompanied by appellants Gertrude M. Converse and Flora Converse as well as by two other persons not parties to the litigation.

At the time of the accident it was dark and the headlights of both cars were lit. Respondent was operating his car in the north half of Blanche street about three feet from the north curb line. Appellant Hazel M. Converse was operating her car in the west half of Santa Anita avenue. The right front portion of respondent's car struck the left front fender and wheel of appellant's car. The point of impact was west of the center line of Santa Anita avenue and north of the center line of Blanche street. Respondent was driving at a speed of not more than 8 miles per hour. Appellant Hazel Converse was driving at a speed variously estimated at between 15 and 40 miles per hour. Each driver testified that he did not see the other prior to the accident.

Respondent commenced this action to recover for his personal injuries and for the wrongful death of his wife as a result of the accident. Appellants Gertrude M. Converse and Flora Converse commenced a separate action against respondent to recover for their personal injuries. The actions were consolidated and tried before a jury which returned all the verdicts in favor of respondent and the judgments from which these appeals are taken were rendered thereon.

[1-4] Appellants contend that respondent was guilty of negligence as a matter of law in entering the intersection in the manner shown by the evidence. The record discloses that respondent's vision north of 80 feet along Santa Anita avenue was obstructed by a wall which was built around the property on the northeast corner of the intersection. Respondent testified that as he approached the intersection he slowed down to a speed of about eight miles per hour, at which speed he was traveling at the time of the accident; that he looked

once to the left and twice to the right after reaching the east sidewalk line of Santa Anita avenue; that he could see for a distance of about 80 feet north of the intersection but did not see any automobile approaching the intersection on Santa Anita avenue. There were two "dips" in the street ahead of him, one on each side of the intersection. Appellant Hazel M. Converse testified that she did not remember looking either to the right or to the left as she entered the intersection and that she did not see respondent's car until after the collision. The situation presented with respect to respondent is not, as contended by appellants, one where a person entirely fails to look and in fact takes no precaution whatever for his own safety in crossing an intersection. The question of negligence under such circumstances would be for the court to determine as a matter of law. *Stephens v. Kaufmann*, 137 Cal.App. 328, 30 P.2d 536. It appears from his testimony that respondent did in fact look to the right before entering the intersection and observed no approaching car within the range of his vision, a distance of 80 feet. Whether it was reasonably prudent for him to proceed at a slow rate of speed across the intersection was a question of fact for the determination of the jury and the jury's finding in his favor is amply supported. There was no obligation upon him to constantly keep his eyes to the right. *Senegram v. Groobman*, 30 Cal.App.2d 514, 86 P.2d 859; *Lee v. Stephens*, 8 Cal.App.2d 650, 47 P.2d 1105. Even if he had observed a car approaching on his right at a distance of 80 feet he would have been under no obligation to stop his own car and let the other car pass. The requirement of section 550 of the Vehicle Code, St.1935, p. 186, that a driver "approaching an intersection shall yield the right of way to a vehicle which has entered the intersection" was applicable to the situation. A careful driver who first enters an intersection may properly assume that another driver approaching at a distance of more than 80 feet will yield the right of way and thus prevent a collision. *Keyes v. Hawley*, 100 Cal.App. 53, 279 P. 674; *Wynne v. Wright*, 105 Cal.App. 17, 286 P. 1057; *Robinson v. Clemons*, 46 Cal.App. 661, 190 P. 203.

[5] Appellants further contend that the "uncontradicted evidence establishes that the car occupied by the appellants entered the intersection at or prior to respondent's car entering said intersection; that as a

consequence thereof, it was the legal duty of respondent to yield the right of way". Appellants cite section 550(b) of the Vehicle Code, which provides: "When two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right." It is undoubtedly true that appellants entered the intersection on the right of respondent but in other respects the contention of appellants is not supported by the record. Aside from the testimony of one of the passengers in appellants' car to the effect that he believed he saw respondent's car and that the two cars entered the intersection at approximately the same time, there is no direct testimony on this point. If the jurors credited the testimony of respondent they could come to no other reasonable conclusion than that respondent's car entered the intersection first. He entered the intersection three feet from the north curb at a rate of speed of approximately eight miles per hour and the speed of the other car was placed at from 15 to 40 miles per hour. The collision took place in the northwest quarter of the intersection. Manifestly respondent's car while proceeding at a much slower speed must have traveled a greater distance than the distance traveled by the car of appellants. The physical facts as well as the testimony of respondent clearly lead to the conclusion that respondent's car was the first to enter the intersection.

[6,7] Appellants argue that the court erred in permitting the witness Louise Martin to testify that she was in a parked car on the west side of Santa Anita avenue at about a block and a half north of Blanche street; that just prior to the accident a green Oldsmobile car passed her going south on Santa Anita avenue, traveling at a speed of 50 miles per hour and that no other car passed her prior to the accident; that she proceeded to the scene of the accident and identified appellants' automobile as being the green car which had passed her. Other witnesses testified that the car of appellants was blue and not green. It is unnecessary to review the evidence and the arguments of counsel in which the difficulty is discussed of determining whether the car involved in the accident was blue or green. The witness identified the car that was in the accident as the car which she had seen pass her.

It was the function of the jury to pass upon her credibility.

[8,9] Appellants further argue that the testimony of the witness Martin should have been excluded because of the distance of the witness from the scene of the accident at the time she observed the Oldsmobile car pass her. There were no through streets intersecting Santa Anita avenue between the point where the witness had parked her car and the point of collision. The question of the remoteness of such testimony is addressed primarily to the discretion of the trial court. *Ritchey v. Watson*, 204 Cal. 387, 268 P. 345; *Traynor v. McGilvray*, 54 Cal.App. 31, 200 P. 1056. We see no abuse of discretion in admitting the testimony.

The judgments are affirmed.

I concur: McCOMB, J.



34 Cal.App.2d 451

HARPER et al. v. NORTHWESTERN PAC.
R. CO. et al.

Civ. 6078.

District Court of Appeal, Third District,
California.

Aug. 31, 1939.

Hearing Denied Oct. 30, 1939.

1. Trial $\hookrightarrow$ 165

On motion for nonsuit, every favorable inference fairly deducible, and every favorable presumption fairly arising from the evidence adduced, must be considered as facts proved in favor of plaintiffs.

2. Railroads $\hookrightarrow$ 309

A railroad company will not be held free from negligence because of having complied literally with various safety statutes, since neither the Legislature nor the Railroad Commission can foresee in advance what would, under all circumstances, constitute ordinary care. Civ.Code, § 486.

3. Evidence $\hookrightarrow$ 53

The presumptions that a person takes ordinary care of his own concerns and that

the law has been obeyed are evidence until rebutted. Code Civ.Proc. § 1963.

4. Railroads ⇨350(16)

Failure to see an unlighted object within the range of one's headlights is not "negligence per se," but question is one for jury.

[Ed. Note.—For other definitions of "Negligence Per Se," see Words & Phrases.]

5. Railroads ⇨326(4)

For the presence of a railroad car across a highway to constitute notice of obstruction of the highway, it must be presupposed that its presence could have been known to or anticipated by a person of reasonable prudence.

6. Railroads ⇨324(1)

Though a visible railroad track is itself a warning of danger, a track that is invisible on account of darkness or other concealment is not a warning of danger unless one knows just where to look for it, or observes or by the exercise of reasonable care should have observed the track, or knows that it is in a particular place and identifies the locality.

7. Railroads ⇨350(3, 15)

In action for death of driver of automobile which collided at crossing with railroad cars at night, wherein evidence showed that there were no lights or illuminated crossing signs, that unlighted crossing sign was obscured by trees, and that railroad did not ring bell or sound whistle, granting nonsuit on theory that defendants were not negligent as a matter of law, and that driver was contributorily negligent, was error. Civ.Code, § 486; Code Civ.Proc. § 1963.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Donald Harper and another, minors, by their guardian, Addie Gray, against the Northwestern Pacific Railroad Company and others, for death of their father in collision with train. From an order and judgment for defendants, plaintiffs appeal.

Reversed.

Pillsbury, Madison & Sutro, of San Francisco, and Frank W. Finn, of Sebastopol, for appellants.

Geary & Geary and C. J. Tauzer, all of Santa Rosa, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

An action was brought by the minor sons of John Fletcher Harper through their guardian, for the purpose of recovering damages for the death of their father, alleged to have been caused by the negligent operation of a train owned by the Northwestern Pacific Railroad Company, and operated by the other defendants as members of the train crew. At the conclusion of plaintiffs' case, a nonsuit as to all of the defendants was granted upon the ground that defendants were not negligent as a matter of law, and that the decedent was contributorily negligent. This appeal is from that order and judgment.

[1] In accordance with the well-established rules that govern upon a motion for nonsuit that every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs, we glean these facts from the record:

Wilson street is a paved public highway within the city limits of Petaluma, running in a general northerly and southerly direction. Crossing Wilson street at right angles and on the same grade is a spur track maintained by defendant railroad company, running from the main line lying to the west of Wilson street. A row of shade trees north of the spur extend along the west curb of Wilson street. At the northwest corner of this intersection was the usual unlighted cross-arm railroad crossing sign. This sign, however, was, to a driver of a vehicle until he was within a few feet from the crossing, completely obscured by the trees. There were no lights or illuminated crossing signs, bells or wig-wags at the crossing, the nearest light being a 60 candle power street lamp on a pole 300 feet from the crossing. This crossing was presumptively in a 45-mile traffic zone.

Shortly after midnight of July 23, 1934, the defendants were operating a train consisting of a locomotive and two box cars, in an easterly direction upon the spur track west of Wilson street. The engine was pushing the two cars and was proceeding toward Wilson street with the purpose of proceeding across that street to a box factory and there pick up other cars then waiting to be brought out to the main line.

As the engine and cars left the main line onto the spur, the conductor in charge of the train preceded the cars afoot until he came to Wilson street. He then took a position in the center of Wilson street near the south rail, at which time the forward end of the train of cars was two or three car lengths west of the intersection, traveling about three or four miles an hour. At the time the conductor took up this position he saw, toward the north on Wilson street, the lights of an automobile about 1500 to 1800 feet away. He saw nothing to the south of the track. When the box car passed the conductor as he stood in the center of Wilson street, his view of the vehicle to the north was cut off. It was then still in apparently the same position as when he first saw it.

The train continued eastward until a coupling was made with the other cars at the box factory west of Wilson street, during all of which time the conductor continued to stand in the center of the street, south of the crossing. When the coupling was completed, the trucks at the west end of the second car from the locomotive were directly opposite the center of the street. The locomotive did not come into the crossing, it being still west of Wilson street when the train stopped. The entire width of the street, however, was blocked by the string of cars. From the time the conductor took up his position in the center of the street until the first of the box cars entered the intersection from one to two minutes had elapsed, and it was another thirty seconds to one minute after that until the coupling was completed.

The night was dark and the cars were a dark red in color. Both the conductor and the brakeman who was riding the ladder on the south side of the front car, carried electric lanterns. During all this time no whistle was sounded nor bell rung.

Shortly after the coupling had been completed and while the train was still stopped across Wilson street, an automobile, driven in a southerly direction on Wilson street collided with the north side of the second car from the engine at a point a little to the west of the center of the street, and almost directly opposite the conductor, who was on the other side of the car. No skid marks were found in the street by the train crew. The father of plaintiffs herein was the driver of the car involved, and died from the effects of the accident.

It was upon these facts the trial court ordered the nonsuit from which this appeal is taken.

Plaintiffs first contend that defendants were negligent in that the defendant railroad company failed to comply with General Order No. 75-A of the railroad commission, which provides:

"Section V(b) of the General Order. Each crossing sign (Standard No. 1) herein illustrated shall be located in a conspicuous position facing highway travel, preferably at either corner of the crossing intersection on the right-hand side of the highway traffic flow and in advance of the railroad track."

It is also claimed that the crossing sign at Wilson street was by reason of the presence of the trees, not in a conspicuous position, and could not be seen even on a bright sunny day.

It is next claimed that defendants failed to comply with section 486 of the Civil Code which requires that a bell on the locomotive be rung at a distance of at least eighty rods from the crossing, and kept ringing until it had crossed the street or highway, and for a failure so to do the corporation is liable for all damages sustained; and lastly, plaintiffs contend defendants negligently failed to comply with the standard of due care required under the circumstances, and that statutory regulations constitute only the minimum measure of care required in the operation of a dangerous instrumentality, such as a locomotive or train of cars, and it was for a jury to determine whether something more than the minimum of care was required under the circumstances here in evidence.

Plaintiffs urge that the night was dark and the crossing made more so by the trees and unlighted buildings in the immediate vicinity; that the cars were almost black, and the only warning light was that of the lantern of the conductor; that this conductor was negligent in that he took up his position in the center of Wilson street to the south of the track, although at that time the only visible light was to the north thereof some 1500 or 1800 feet away, and he also knew his brakeman was riding not on the north but on the south side of the leading box car.

[2] As was said in *Bush v. Southern Pac. Co.*, 106 Cal.App. 101, 289 P. 190, the better and almost universal rule is that a

railroad company will not be held free from negligence even though it may have complied literally with various safety statutes, for neither the legislature nor the railroad commission can foresee in advance what would, under all circumstances, constitute ordinary care.

[3] To overcome the charge that the evidence establishes that decedent was contributorily negligent, plaintiffs rely in part upon the presumption "that a person takes ordinary care of his own concerns" and "that the law has been obeyed", (Code Civ. Proc. § 1963), which presumptions are evidence until rebutted. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529.

[4] Nor can it be said that the failure to see an unlighted object within the range of one's headlights is negligence per se. *Scoville v. Kegl*, 27 Cal.App.2d 17, 80 P.2d 162. Under such circumstances it was held to be a question for the jury.

Respondents cite many cases to the effect that the railroad corporation was lawfully occupying the crossing in the conduct of its business, and that the presence of a train across an intersection is of itself sufficient warning of danger.

[5] The right of the railroad company to occupy the street is conceded, but for the presence of a car across a highway to constitute notice of such an obstruction, we must presuppose that its presence could have been known to or anticipated by a person of reasonable prudence.

[6] "It is true that a visible railroad track is itself a warning of danger. But it is equally true that a railroad track which is invisible on account of darkness or because it is otherwise concealed from view, is not a warning of danger, unless one knows just where to look for it. It is only when one observes, or by the exercise of reasonable care should have observed, a railroad track, or when one knows that it is in a particular place and identifies the locality, that it becomes a warning of danger. Under the circumstances of this case, it may well be said in the language of the court in the case of *Gregoriev v. Northwestern Pac. R. Co.*, 95 Cal.App. 428, 433, 273 P. 76, 78: 'Considering all of the cir-

cumstances attending the accident, especially those relating to the physical conditions present at the scene thereof, that respondent's failure to observe the railroad track was not due to a lack of exercise of ordinary care on his part.'" *Hofstedt v. Southern Pac. Co.*, Cal.App., 1 P. 2d 470, 473.

[7] Here was not the situation of a moving car upon a crossing or standing upon an open lighted street, or where the existence of the spur was known to the deceased. The car was motionless and was no different than any other obstruction in the center of a dark street.

Defendants cite many cases from other jurisdictions which, upon examination are found to differ materially as to the facts, or were based upon rulings on a new trial, or affirmance of a judgment in favor of the defense, or from jurisdictions where the requirements of a nonsuit are not similar to our state. They also rely upon *Dunlap v. Pacific Electric Ry. Co.*, 12 Cal.App.2d 473, 55 P.2d 894. There a bell was rung and whistle blown and a wig-wag was in operation, and the train moving, none of which elements were here present.

It is here claimed that crossing signals are intended only to protect travelers against approaching trains and not against trains that have already reached the crossing, upon the theory that then the train itself is sufficient warning; but here where the presence of the spur itself was unknown to the driver of the car, a white cross-arm might have been seen where a dark box car would not, and in regard to the ringing of the bell, the section itself requires that it shall be kept ringing until the locomotive shall have crossed the street or highway. Admittedly that was not done here, as at the time of the collision the locomotive had not yet crossed the street and the bell was not ringing.

We believe it was error to grant a nonsuit under the conditions here existing, and the order and judgment must be reversed. It is so ordered.

We concur: THOMPSON, J.; TUTTLE, J.

34 Cal.App.2d 305

In re PATERSON'S ESTATE.

BLAKELY et al. v. LODER et al.

Civ. 10643.

**District Court of Appeal, First District,
Division 1, California.**

Aug. 24, 1939.

Hearing Denied Oct. 23, 1939.

1. Bastards ⇨103

Where proceeding to establish heirship was tried on theory that deceased's grandmother was illegitimate and conflicting evidence was submitted upon legitimacy question and petition of one petitioner was denied upon ground that evidence was insufficient to establish that his ancestor, who was deceased's grandmother, was legitimated by acts of her father relied on by petitioner, trial court would be deemed to have found that deceased's grandmother was illegitimate although there was no express finding as to her legitimacy. Probate Code, § 1080.

2. Descent and distribution ⇨1

The right of inheritance is a statutory right. Probate Code, § 226.

3. Bastards ⇨1

"Bastards" are such children as are not born either in lawful wedlock or within a competent time after its determination.

4. Bastards ⇨95

Under the common law, illegitimate children had no inheritable blood, could have no collateral kindred, and could not be heirs, nor have heirs save those of their own body.

5. Common law ⇨12

In California, the common law is applicable unless changed by statute. Pol. Code, § 4468.

6. Bastards ⇨102

The provisions of the Probate Code relating to illegitimate children and the estates of illegitimate children, generally speaking, with respect to the maternal line, have bestowed upon an illegitimate child the same inheritable blood as have legitimate offspring, and, subject to the limitations therein contained, provide that illegitimates may inherit and transmit property in same manner as legitimates. Probate Code, §§ 255, 256.

7. Bastards ⇨100, 104

Under provisions of Probate Code concerning illegitimate children and the estates of illegitimate children, the common-law doctrine that an illegitimate child has no inheritable blood for the purpose of taking or transmitting property has been abolished. Probate Code, §§ 255, 256; Civ. Code, § 3510.

8. Bastards ⇨104

Descent and distribution ⇨21

"Next of kin," as used in statute concerning succession to property when a decedent dies without surviving spouse, issue, or immediate family, means those upon whom, under circumstances defined in statute, the law has conferred the right to inherit property of one who dies intestate, and the quoted term, by reason of provisions of statute concerning estates of illegitimate children, includes those in the illegitimate line as well as in the legitimate line. Probate Code, §§ 226, 255, 256.

9. Bastards ⇨104

Under provision of Probate Code concerning the estate of an illegitimate child, an illegitimate child is endowed, for purpose of transmission of his property, with the same inheritable blood as that of a legitimate child, as therein limited, and his own heirs, as therein limited, are the same as those of a legitimate child. Probate Code, § 256.

10. Bastards ⇨104

In proceedings to establish heirship where respondents were claiming as deceased's next of kin and the maternal grandmother of deceased was an illegitimate daughter of common ancestor of deceased and respondents, in ascertaining meaning of "next of kin" as used in statute concerning succession when one dies leaving no surviving spouse, issue, nor immediate family, the court could look to statute concerning estates of illegitimate children to ascertain degree to which Legislature had conferred inheritable blood on illegitimates. Probate Code, §§ 226, 251, 255, 256, 1080.

11. Bastards ⇨102

Under the statutes concerning succession when a deceased dies without surviving spouse, issue, or immediate family and concerning illegitimate children and estates of illegitimate children, the Legislature has seen fit to unite the family tree of the illegitimate with that of his mother. Probate Code, §§ 226, 255, 256.

12. Bastards ⇨104

An illegitimate may act as a conduit for purposes of inheritance. Probate Code, §§ 255, 256.

13. Bastards ⇨104

The estate of a descendant of an illegitimate may be inherited by the mother of the illegitimate or her descendants. Probate Code, §§ 226, 255, 256.

14. Bastards ⇨104

Under provisions of Probate Code concerning estates of illegitimate children, an illegitimate may act as a conduit from his descendants to his mother since, by previous section of Code, an illegitimate may act as a conduit from his mother to his children. Probate Code, §§ 255, 256.

15. Bastards ⇨104

Where decedent's maternal grandmother was an illegitimate daughter of common ancestor of decedent and alleged cousins, who were related to decedent on his mother's side in the fifth degree, the cousins could inherit decedent's property as "next of kin," since the grandmother was entitled to inherit from her legitimate descendants and the statute concerning estates of illegitimate children operated in favor of the common ancestor and her descendants. Probate Code, §§ 226, 251, 255, 256.

16. Statutes ⇨239

Statutes in derogation of the common law are not to be strictly construed in California.

17. Bastards ⇨95

Provisions of the Probate Code concerning illegitimate children and the estates of illegitimate children were to be given a liberal construction. Probate Code, §§ 2, 255, 256.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Proceeding in the matter of the estate of Frank Paterson, deceased, by Norman N. Blakely and others to determine the parties interested in the estate, wherein Rosina Luise Loder, née Dick, and others filed statements alleging relationship and denying interest of the petitioners. From the judgment and decree of the superior court, petitioners, except Fritz Weyeneth, appeal.

Judgment and decree affirmed.

For prior opinion, see 76 P.2d 138.

Rittenhouse & Rittenhouse and Bert B. Snyder, all of Santa Cruz, for appellants.

Wyckoff, Gardner & Parker, of Watsonville, for respondents.

PETERS, Presiding Justice.

This is an appeal from the judgment and decree of the superior court establishing heirship in a proceeding under section 1080 of the Probate Code in the estate of Frank Paterson. The court found the only surviving heirs at law and next of kin of Paterson to be Rosina Luise Loder nee Dick, Marie Elise Pauli nee Dick, and Rosina Ponte nee Dick. These respondents are admittedly related to Paterson on his mother's side in the fifth degree. The appellants, Norman N. Blakely, Samuel Blakely and Margaret Daly, are admittedly related to Paterson on his father's side in the eighth degree. The trial court found against another claimant—one Fritz Weyeneth-Marolf—and he has not appealed. It is the theory of appellants that, although they are admittedly further removed in relationship from the decedent than are respondents, they are Paterson's lawful next of kin for the reason that respondents are descendants of an illegitimate grandmother, Anna Maria Weyeneth. It is contended that an illegitimate ancestor cannot act as a conduit for purposes of inheritance under the laws of this state.

The trial court, in dealing with the claims of respondents and appellants, made no express finding as to the legitimacy of Paterson's grandmother. It simply found that "Frank Paterson left him surviving as his only heirs of law" the respondents; "that the relationship of each of said three last mentioned claimants to said deceased is in the fifth degree." As to appellants, the court found that their relationship "to said deceased, if any, is that of second cousin once removed, and is a relationship in the eighth degree."

Respondents first contend that the evidence as to the legitimacy of Anna Maria was conflicting, and that, therefore, the finding as to relationship is amply supported on the theory that she was legitimate. An examination of the record indicates that upon the trial the great mass of the evidence introduced by both appellants and respondents on the issue of kinship was hearsay, and that all the evidence relating to the legitimacy of Anna Maria Weyeneth was hearsay. All of this testimony was admitted without objection and by stipula-

tion of the parties. There are several affidavits which contain general language which indicates that Anna Maria Weyeneth was the legitimate daughter of Elizabeth Suter. The evidence to the contrary, however, is practically overwhelming. Moreover, the record shows that the cause was tried on the theory that Anna Maria Weyeneth was illegitimate. The record also shows that in the trial court's order determining heirship, in denying the claims of Fritz Weyeneth the court stated:

"The petition of Fritz Weyeneth is denied upon the ground that the evidence is legally insufficient to establish that his ancestor Anna Maria Weyeneth was legitimated by the several acts of her father relied on by said petitioner. . . ."

[1] Under such circumstances it must be held that Anna Maria Weyeneth was found by the trial court to be illegitimate, and that respondents may recover, if at all, only upon the theory that an illegitimate ancestor may act as a conduit for purposes of inheritance.

[2] The right of inheritance being statutory, the solution of this problem is obviously one of construction. The pertinent statutory provisions are as follows:

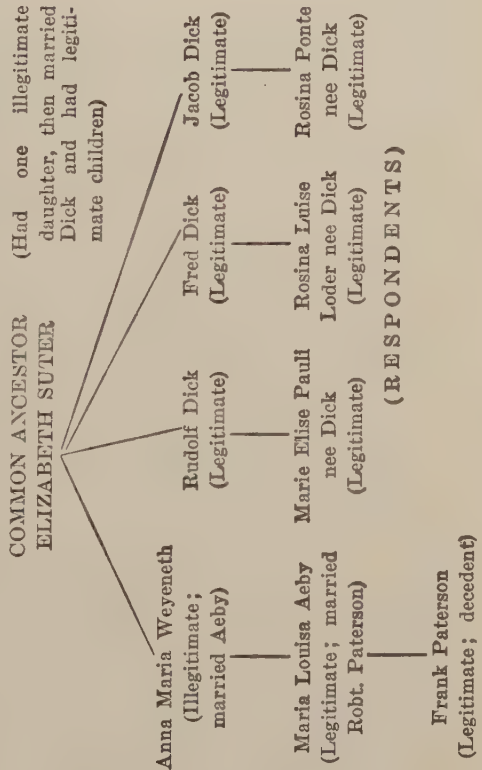
Section 226 of the Probate Code provides in part: "If the decedent leaves neither issue, spouse, parent, brother, sister, nor descendant of a deceased brother or sister, the estate goes to the next of kin in equal degree, * * *."

Section 255 of the Probate Code provides: "Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of the parent's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession."

Section 256 of the Probate Code provides: "The estate of an illegitimate child, who, having title to any estate not otherwise limited by marriage contract, dies without disposing thereof by will, is suc-

ceeded to as if he had been born in lawful wedlock, if he has been legitimated by a subsequent marriage of his parents or adopted by his father as provided by the Civil Code; otherwise, it is succeeded to as if he had been born in lawful wedlock and had survived his father and all persons related to him only through his father."

For convenience in considering the claims of respondents the following diagram graphically illustrates the problem involved:



If the inheritable line can properly ascend through Anna Maria Weyeneth to Elizabeth Suter, and through her to respondents, it is obvious that respondents are related to decedent Paterson in the fifth degree under the provisions of section 251 of the Probate Code.

[3] It is the contention of appellants that at common law an illegitimate child had no inheritable blood so far as his ancestors were concerned. This was undoubtedly true. The applicable principle has been stated by Blackstone, Cooley's 4th Edition, volume 1, page 633 as follows: "Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or

within a competent time after its determination. Such are held to be nullius filii, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur* (those who are the offspring of an illicit connexion are not reckoned as children). Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchaser; and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord."

And again at page 634 it is stated: "As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself."

[4] The rationale of this doctrine is clear. At common law illegitimates are the sons of nobody. They have no inheritable blood in them. They cannot be heirs, nor can they have heirs save those of their own body. Since an illegitimate can have no legal ancestors, he could, of course, have no collateral kindred.

[5,6] In this state the common law is applicable unless changed by statute (sec. 4468, Pol.Code), so that the sole question presented is whether the above common law rules have been changed by the above quoted statutes. An examination of sections 255 and 256 of the Probate Code, supra, demonstrates that these statutes of succession, generally speaking, with respect to the maternal line, have bestowed upon an illegitimate child the same inheritable blood as have legitimate offspring, and, subject to the limitations therein contained, provide that such illegitimates may inherit and transmit property in the same manner as legitimates. To illustrate: The opening clause of section 255 makes the illegitimate the heir of his mother—thus repudiating the common law rule to the contrary. The last clause of section 256 provides that the illegitimate is endowed with inheritable blood precisely the same as that of a legitimate child, insofar as the devolution of his estate to his mother and through her to collateral kindred is concerned. This section provides, in effect, that as to all relationships except those arising from his father, the illegitimate's property is to be

inherited as if he were legitimate. The doctrine of the common law that he has no inheritable blood has thus been abolished in this respect. That these sections have entirely changed the common law rules relating to the capacity of illegitimates to inherit and to transmit inheritance was expressly held in *Estate of Wardell*, 57 Cal. 484. In that case a testatrix died leaving surviving two legitimate sons, mentioned in the will, and an illegitimate daughter not mentioned in the will. The question presented was whether such illegitimate child was a pretermitted heir under the terms of section 1307 of the Civil Code (now substantially embodied in sec. 90 of the Probate Code). That section provided that "when any testator omits to provide in his will for any of his *children* * * * unless it appears that such omission was intentional, such *child* * * * has the same share in the estate of the testator as if he had died intestate * * *." The contention was made that the terms "children" and "child" as used in this statute included only legitimate children, on the ground that at common law such terms referred only to legitimate children. The court, while conceding this to be true at common law, pointed out that illegitimates under the laws of this and other states have been made (57 Cal. at page 491) "capable of inheriting and transmitting inheritance." After referring to section 1387 of the Civil Code from which section 255 of the Probate Code was substantially copied, the court pointed out (57 Cal. at page 491) that: "the State has regulated the inheritable capacity of all children illegitimate by birth." In holding that an illegitimate was a child within the meaning of Civil Code section 1307 the court stated (57 Cal. at page 492):

"The respondent was, therefore, though illegitimate by birth, endowed by the statute with inheritable blood. She possessed the same heritable rights as heir of her mother, as if born in lawful wedlock. *Rogers v. Weller*, 5 Biss. 166, [Fed.Cas. No. 12,022]; *Garland v. Harrison*, 8 Leigh. 368, [35 Va. 368]; *Bennett v. Toler*, 15 Grat. 588 [56 Va. 588, 78 Am.Dec. 638]. As an heir of her mother, she differed nothing in law from the other children, so far as the rights of inheritance which had been conferred upon her by law. To the full extent of those rights she was entitled to all the privileges and immunities of heirship. If her mother had died intestate, her right to a distributive share of the estate would

have been unquestionable. Dying testate, the legal relation between mother and daughter was not impaired or destroyed. The latter was still a legitimate heir, as much so as the children legitimate by birth, for the law made her an heir to the same extent 'as if she had been born in lawful wedlock.'

"It is not to be supposed that the law which attached to her person the rights and duties of inheritance, and endowed her with the capacity to exercise them, meant to leave her a bastard, under the disabilities of the common law, if the mother unintentionally omitted to make provision for her in her will. When placed by law in the state and condition of heir, and invested with the character and capacity of heir, *all the rights, privileges, and legal consequences incident to that relation were tacitly conferred upon her.*"

[7-9] The same general reasoning applies here. Section 226 of the Probate Code, above quoted, provides that the property of the decedent here involved must go to his "next of kin in equal degree." Appellants argue that the grandchildren of Elizabeth Suter, by Dick, who is the great grandmother of decedent, are not Paterson's next of kin because Paterson's grandmother, Anna Maria, was illegitimate. Stated another way, it is urged that the phrase "next of kin" must be interpreted to mean legitimate next of kin. This contention must be predicated on the theory that an illegitimate has no inheritable blood for the purpose of taking or transmitting property—the reason behind the common law rule already discussed. Under sections 255 and 256 of the Probate Code, *supra*, that doctrine has been abolished. When the reason for a rule ceases, the rule should cease. Civ.Code, sec. 3510. Next of kin simply means those upon whom, under the circumstances defined in section 226 of the Probate Code, the law has conferred the right to inherit the property of one who dies intestate. Under section 256 an illegitimate is endowed, for the purpose of transmission of his property, with the same inheritable blood as that of a legitimate, as therein limited. His own heirs, as therein limited, are the same as those of a legitimate. There can be no doubt that had Anna Maria, the illegitimate grandmother of decedent, been living at his death, and had Paterson left no issue, spouse, parent, brother, sister, or descendant of a deceased brother or sister, that Anna Maria would

have inherited her grandson's property under section 226. But the inheritable bloodstream does not end with her. Under the provisions of section 256 she, although illegitimate, has been endowed with inheritable blood as if she "had been born in lawful wedlock" and had survived her father. Without doubt, the great grandmother of Paterson, the mother of Anna Maria, Elizabeth Suter, would be the heir of Anna Maria. If Anna Maria had been legitimate it is obvious Elizabeth Suter would be the next of kin of Paterson had she survived under the circumstances set forth in section 226. Stated another way, the phrase "next of kin" in section 226, just as the term "children" in section 90 of the Probate Code, by reason of the provisions of section 256 must be interpreted to include those in the illegitimate line as well as in the legitimate line.

[10,11] Appellant urges that section 256 applies only where the estate of an illegitimate is before the court. This contention is without merit. We are here dealing with the interpretation of the phrase "next of kin" in section 226. Section 256 is looked to simply to ascertain the degree to which the legislature has conferred inheritable blood on illegitimates. It must be held that by these various sections the legislature has seen fit to unite the family tree of the illegitimate with that of his mother.

[12] Apparently there is no case in this jurisdiction directly holding that the mother of an illegitimate, or her descendants, are next of kin and may thus inherit from the legitimate descendants of an illegitimate. The principle, however, has been applied in analogous situations. It has been directly held in the Estate of Magee, 63 Cal. 414, that an illegitimate may act as a conduit for purposes of inheritance. This case refutes appellants' theory, and necessarily refutes the strict limited interpretation they seek to place on section 256. In the Magee case, Suez Magee died intestate. She was an illegitimate daughter of Susan Magee, who predeceased her. Susan Magee had another illegitimate daughter, the half sister of the deceased, named Elizabeth Magee, who also predeceased the decedent. Elizabeth left surviving a legitimate son, Albert Redmond. Albert, therefore, if he could properly use his illegitimate mother Elizabeth as a conduit for purposes of inheritance, was related to the decedent in the third degree. It was held that Albert

inherited the estate as against the claims of others related to the decedent in the fourth degree entirely through legitimate ancestors. In other words, it was held that under our statutory law, the legitimate child of an illegitimate, through his grandmother *and illegitimate mother*, could inherit the estate of the illegitimate half sister of his mother. Although it is true that in this case the estate of an illegitimate was before the court, the importance of the case is that it holds that the illegitimate mother of Albert could be used as a conduit through which Albert could inherit. The reasoning by which this conclusion was reached is instructive in the present case. In 63 Cal. at page 415 it is stated: "According to section 1388, Civil Code, if any illegitimate child (not acknowledged or adopted by his father) dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law. Suez Magee was illegitimate; she died intestate; Susan, her mother, had died before her; therefore, upon the death of Suez, the property of the latter was to go to the heirs of the mother, Susan. The next question, then, is who are the heirs of Susan? Section 1387, Civil Code, we think, answers the inquiry. Every illegitimate child *is in all cases* an heir of his mother, and inherits *in the same manner as if born in lawful wedlock*. There is no question as to the heirship of Albert E.; he is the legitimate son of his mother, Elizabeth. She (Elizabeth) was the illegitimate daughter of Susan. By section 1387, just referred to, Elizabeth was the heir of her mother, in the same manner as if born in lawful wedlock. If, then, Elizabeth had been born in lawful wedlock, she would unquestionably have been heir of her mother; being born out of wedlock, she is by the statute made heir of her mother in the same manner as if born in wedlock. Being, then, the heir of her mother, and dying leaving issue, the property of Suez goes to such issue; not because the issue is heir of Suez, but is heir of Susan."

And again in 63 Cal. at page 416 it is stated: "If Elizabeth had died intestate and without issue, doubtless the estate of Suez would have gone to the Cunninghams, as the heirs of Susan, the mother of Elizabeth and Suez; but as Albert E. is, through his mother, Elizabeth, the heir of Susan, he is entitled to the estate of Suez—not, perhaps, because he is the heir of Suez, but because he is the heir of the mother of

Suez, and as such is, under the statute, entitled to take."

[13, 14] Thus Estate of Magee holds that the son of an illegitimate mother may inherit through that mother the estate of a descendant of his maternal grandmother. That is the converse of the situation presented in the instant case. But the same reasoning applies. If the above premise is sound, and it has been reaffirmed in Estate of De Cigaran, 150 Cal. 682, 89 P. 833, and Estate of Smith, 2 Cal.2d 652, 42 P.2d 1011, it would seem to follow that the estate of a descendant (Paterson) of an illegitimate (Anna Maria) may be inherited by the mother of the illegitimate (Elizabeth Suter) or her descendants (respondents). If the illegitimate can act as a conduit going in one direction it would seem to necessarily follow that she can act as a conduit going in the other direction. Any other conclusion would be extremely illogical. The real question in each situation is whether the common law rule depriving the illegitimate of inheritable blood has been changed in this state, so that an illegitimate can act as a conduit for purposes of inheritance. The Magee case holds that it has. The language in the Magee case concerning the limitation upon the inheritable blood of an illegitimate in section 255 of the Probate Code is not here applicable. There is no such comparable limitation in section 256 with which we are here concerned. If under section 255 as held in the Magee case, the illegitimate may act as a conduit from his mother to his children—if his children may inherit from his mother through him, it follows that by section 256 the illegitimate may act as a conduit from his descendants to his mother. If by section 255 his descendants are permitted to inherit through him from his mother, it must follow that by section 256 his mother may inherit from his descendants because by that section she is made his heir.

[15] To summarize: Clearly, Anna Maria was entitled to inherit from her legitimate descendants, and as such she, if living, would have been the next of kin of Paterson. This being so, section 256 operates in favor of Anna Maria's mother, Elizabeth Suter, and her descendants—respondents here.

Appellants rely on three cases as establishing a contrary rule—Curtis v. Hewins, 52 Mass. 294, 11 Metc. 294; Hardesty v. Mitchell, 302 Ill. 369, 134 N.E. 745, 24 A.L.

R. 565; and Sanford v. Marsh, 180 Mass. 210, 62 N.E. 268. It must be conceded that these three cases interpreted statutes substantially similar to the ones here involved contrary to the interpretation here made. The Curtis case contains little or no discussion. The Hardesty case is predicated on the Sanford case. The underlying reasoning of the Sanford case is disclosed in the following quotation. In 180 Mass. 210, 62 N.E. at page 268 it is stated: "The case before us is not within the language of the statute for we are not dealing with the estate of an illegitimate child, but with the estate of the daughter of an illegitimate child, who had deceased before the daughter. *The question is whether the statute shall be construed strictly, or whether we discover in it a purpose to place all persons claiming through an illegitimate relation in the same position as if there were no illegitimacy in reference to the distribution of the property of persons dying intestate who are descended from an illegitimate ancestor. By the common law a bastard is nullius filius. He can be the heir of no one, nor have heirs, except of his own body. He has no ancestors from whom any inheritable blood can be derived. The common law on this subject is in force in Massachusetts, except as it has been changed by the statutes. The statutes which have been adopted here have all been construed strictly. * * * We see no good reason for departing from the rule that statutes of this kind are to be construed strictly.*"

[16] This is not the rule of construction in this state. Section 4 of the Code of Civil Procedure now reads, and has so read since 1872, that: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice."

Section 2 of the Probate Code provides: "The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments."

[17] In the Magee case section 255 was given such liberal construction. We must give the same liberal construction to section 256. The Magee case is opposed in theory to the above three cases. The rule of the

Magee case is followed generally. See Foster v. Lee, 172 Ala. 32, 55 So. 125, Ann.Cas. 1913C, 1335; Bales v. Elder, 118 Ill. 436, 11 N.E. 421; McKellar v. Harkins, 183 Iowa 1030, 166 N.W. 1061; Sutton v. Sutton, 87 Ky. 216, 8 S.W. 337, 12 Am.St.Rep. 476; In re Cameron's Estate, 170 Mich. 578, 136 N.W. 451, 40 L.R.A.,N.S., 516.

For the foregoing reasons the judgment and decree appealed from should be and each is affirmed.

We concur: KNIGHT, J.; WARD, J.



34 Cal.App.2d 441

HOOVER v. SWEITZER et al.

Civ. 12318.

District Court of Appeal, Second District,
Division 1, California.

Aug. 31, 1939.

Time ⇄ 10(9)

Plaintiff's notice of appeal from an order of nonsuit was filed within 60 days from entry of order as prescribed by statute, where sixtieth day after entry of order, excluding day order was entered, fell on Sunday, and plaintiff filed notice on following Monday. Code Civ.Proc. §§ 10, 12, 939.

Appeal from Superior Court, Los Angeles County.

Action by Eber L. Hoover against Marie E. Sweitzer and another for personal injuries. From an order of nonsuit, the plaintiff appeals. On defendants' motion to have appeal dismissed upon ground that plaintiff failed to file his notice of appeal within time prescribed by statute.

Motion denied.

Wm. J. F. Brown, of Los Angeles, for appellant.

Thornton, Menzies & Taylor, of San Francisco, for respondents.

YORK, Presiding Justice.

Respondents have moved this court to dismiss the within appeal upon the ground

that appellant has failed to file his notice of appeal within the time prescribed by section 939 of the Code of Civil Procedure, i. e., within sixty days from the date of the entry of the judgment or order appealed from.

According to the certificate of the clerk of the Superior Court of Los Angeles county attached to the notice of motion to dismiss, it appears that the trial court granted respondents' motion for a nonsuit in the instant action which is one for damages for personal injuries, and that on May 22, 1939, appellant filed his notice of appeal from such order of nonsuit which was entered on March 22, 1939.

"The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." Section 12, Code Civ. Proc. "Holidays within the meaning of this code are every Sunday and such other days as are specified or provided for as holidays in the Political Code of the state of California." Section 10, Code Civ. Proc.

Excluding March 22d and counting forward, the 60th day thereafter fell upon May 21st, which was a Sunday. Therefore, the notice of appeal which was filed on May 22d was within the period of time specified by section 939, *supra*.

The motion to dismiss appeal is denied.

We concur: DORAN, J.; WHITE, J.



34 Cal.App.2d 462

VITRANO et al. v. WESTGATE SEA PRODUCTS CO.

Civ. 2085.

District Court of Appeal, Fourth District, California.

Sept. 1, 1939.

1. Negligence ⇨32(1), 52

The owner of premises is not an insurer of invitee's safety, but owes a duty of ordinary care to see that the premises are reasonably safe, and among other things to warn invitee of any dangers of which he has

knowledge, which are not readily apparent to the eye.

2. Negligence ⇨52

An owner of premises has no duty to warn invitee of danger where dangers are obvious or as well known to invitee as to owner, or invitee should have perceived danger through the ordinary use of his own senses.

3. Negligence ⇨134(8), 135

In action for death of workman employed in fishing crew who fell into vat of boiling water, while helping to "tan" a fishing net, brought against canning company which owned vat and permitted fishermen to use it without charge, evidence held to establish that danger of falling was as obvious to workman as it could have been to the company, and hence that company was not negligent in failing to give warning, but workman was contributorily negligent.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Josephine Vitrano and others against the Westgate Sea Products Company and others for death of Dominic Vitrano. From a judgment on a directed verdict for defendants, plaintiffs appeal.

Affirmed.

A. T. Procopio, of San Diego, for appellants.

Wright, Monroe, Harden & Thomas, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to recover damages for the death of one Dominic Vitrano, the husband and father, respectively, of the plaintiffs. This appeal is from a judgment based upon a directed verdict in favor of the defendants.

The deceased met his death by falling into a vat of boiling water while assisting in the process of "tanning" a fishing net. He was a member of a crew of a boat used in commercial fishing. All of the fish caught from this boat were regularly sold and delivered to the respondent corporation. It appears from the evidence that the fishing nets used by such crews require "tanning" at intervals, approximately once a month. The purpose of this process was to remove the slime which accumulates upon the nets. In this process the fishermen would put ground tan-bark into a vat and

fill it with water. Steam was then turned on and the mixture boiled several hours, after which the nets were placed in the solution.

The vat here in question was about 12 feet long, 6 feet wide and $4\frac{1}{2}$ feet high. Along each of its two long sides there was a plank or platform about 35 inches below the top of the vat, upon which the fishermen were supposed to stand while they lowered the nets into the solution within the vat.

This vat was constructed by the respondent and stood near its fish cannery, where it had been in use for four years. It was furnished as an added inducement to commercial fishermen who regularly delivered their fish to this cannery. No charge was made to such persons for its use. Water and steam were furnished without charge and conveyed to the vat through pipes. The fishermen furnished their own tan-bark. A fisherman desiring to use the vat would apply to an employee of the respondent and be assigned a time when it was not being used by others. At the appointed time the fisherman would, by means of valves at the vat, turn on water and steam and after cooking the mixture turn off the steam. Employees of the respondent took no part in the tanning process but had on occasions repaired the pipes and vat when leaks developed therein. After using the vat it was the custom of the fishermen to remove their nets and leave the old water and tan-bark in the vat for the next user to clean out the debris. Ordinarily, the next user would draw off the water and shovel the debris over the two sides of the vat. Sometimes there would be very little of this debris around the vat, and at other times it would be piled up almost level with the top of the vat. At times the fishermen would clear away some of the debris and at times some nurserymen had taken some of the debris away to use as a fertilizer. On one or two occasions the respondent had removed some of the debris and used it to spread over the road for the purpose of laying the dust.

The accident here in question occurred at 3 o'clock in the afternoon of a clear day. The water was boiling and steam was rising from the water although the steam had been turned off. The only conflict in the evidence is as to whether the old debris had been shoveled out on that day before preparing a new mixture. The

captain of the crew of which the deceased was a member testified that they left the debris at the bottom of the tank and added new tan-bark. There is evidence that he had previously told others that the debris was shoveled out before the new mixture was prepared. In any event, he testified that on that occasion the debris was piled high around the tank but that they paid no attention to it. The evidence is that it completely covered the platform on which the men were supposed to stand and was piled to within six or twelve inches of the top of the vat, that the debris was dry on top but wet and slippery underneath, and that the men proceeded to get upon the piles of debris and pull the heavy net into the vat. The deceased was on top of the pile of debris assisting in getting the net into the vat when he slipped and fell headlong into the water. One of the members of the crew testified "As we commenced to tan the net Mr. Joe gave him (the deceased) one end of the net and he had this end of the net in his hand and he was trying to place himself solid." Again he testified: "He was trying to place himself in good position and while he was doing that he slipped and fell into the water." The deceased had been a member of this crew for about fourteen months, during which he had assisted in the tanning process on about twelve different occasions.

[1,2] For the purpose of this opinion it may be assumed that the deceased was an invitee upon these premises. The rule is well established that in such a case the owner of the premises is not an insurer but that he owes a duty of ordinary care to see that the premises are reasonably safe. *Shanley v. American Olive Co.*, 185 Cal. 552, 197 P. 793. Among other things, the invitor is under the obligation to warn the invitee of any dangers of which he has knowledge and which are not readily apparent to the eye. There is no such duty where the dangers are obvious or as well known to the invitee as to the owner of the premises. *Mautino v. Sutter Hospital Ass'n*, 211 Cal. 556, 296 P. 76. There is no obligation to give warning of an obvious danger or one which should have been perceived by the invitee through the ordinary use of his own senses. *Ambrose v. Allen*, 113 Cal.App. 107, 298 P. 169. In *Blodgett v. B. H. Dyas Co.*, 4 Cal.2d 511, 50 P.2d 801, 802, it is said: "The owner of property, in so far as an invitee is con-

cerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care."

The motion for a directed verdict was granted in this case upon the grounds that the dangerous condition prevailing here was obvious to the deceased, was just as apparent to him as it could have been to the respondent, that the evidence was not sufficient to establish negligence on the part of the respondent, and that the same evidence necessarily disclosed contributory negligence on the part of the deceased.

The appellants rely upon such cases as *Meindersee v. Meyers*, 188 Cal. 498, 205 P. 1078, and *Hayward v. Downer*, 65 Cal. App. 450, 224 P. 265, where it was held that although the injured party had knowledge or means of knowledge of the danger a question of fact existed as to whether a want of ordinary care was disclosed by the failure to keep the danger in mind at the time of the injury. In the cases cited, while there was some knowledge of the existence of a temporary excavation which had been left without any attempt at protection or warning, the injury occurred at night, the obstruction was in a normally used path, and it would have been more or less reasonable for the injured party to forget either its existence or its exact location. Under the existing circumstances, it was held that the question of whether reasonable care had been exercised was one upon which the minds of reasonable persons might well differ.

The instant case falls more nearly within the rules applied in *Weddle v. Heath*, 211 Cal. 445, 295 P. 832. It is true that there is here no admission that the danger to which the deceased was exposed was obvious to him. The platforms built for the purpose of giving the men a place to stand while dipping the nets were at a height which would not only enable the men to place the nets in the vat but which would prevent the possibility of their slipping and falling into the vat. The injury in question resulted not from the way in which the vat was built but from a condition which had been brought about by the various invitees in allowing the debris to accumulate to the extent that it not only covered the platforms but piled up to within a few inches of the top of the vat. It

would necessarily be apparent to any reasonable man that it would be dangerous to work upon a pile of loose material with his feet only a few inches below the top of a vat containing boiling water, when he was required to use his hands in handling and pulling a heavy object. The evidence is that while the debris was dry on top it was wet and slippery underneath. The deceased was familiar with the work in which he was engaged and it was daylight on a clear day. The deceased knew that the vat contained boiling water and beyond any possibility of a doubt he saw and knew that the debris was piled up to within a few inches of the top of the vat.

[3] Not only do the general circumstances rather conclusively show that the danger inherent to the situation should have been seen by the deceased and was known to him, but there is some direct evidence that such was the situation. One of the men assisting the deceased in this work testified that immediately before the accident the deceased was "trying to place himself solid" and that while "he was trying to place himself in good position" he slipped and fell into the water. Not only does this evidence show that the deceased was in a position where he found it necessary to make an active attempt to secure a foothold which would enable him to do his work, but it discloses an obvious difficulty and danger in so doing. This difficulty must have been clearly apparent to the deceased, for he was attempting to meet it. The fact that he was having difficulty in getting a footing on such a pile of debris was in itself a warning of danger, when he was trying to stand thereon at a point where his feet were almost even with the top of the vat full of boiling water and where there was nothing to cling to in the event he slipped and fell. Instead of taking steps to have the debris removed, a comparatively small task, he proceeded in disregard of the existing condition. It can hardly be said that reasonable minds might differ with respect to whether an obvious danger existed, or whether the deceased exercised ordinary care in disregarding a situation which was readily apparent to any one, and with which he was already having difficulty. The fact that the danger in question was an obvious one is almost admitted by appellant's counsel. In his opening brief, he says:

"The Decedent, while performing his respective duty in the tanbarking of the

nets on the date in question, climbed upon the side of the tanbarking vat which, as aforesaid, had been banked with tanbarking debris which had been allowed to accumulate, and attempted to secure a sure footing on the side of the vat and on the platform on which he had been accustomed to stand. *The platform being covered with tanbarking debris, naturally could not be used by the Decedent with safety.* The Decedent, while in the process of attempting to secure a sure footing on the side of the vat fell into the hot, boiling water which was in the tank and was killed." (Italics ours.)

The danger being as obvious to the deceased as it could have been to the respondent, we think the evidence fails to show negligence on the part of the respondent in failing to warn the deceased of the danger and, as was said in Weddle v. Heath, supra, "On the same facts it necessarily follows that the plaintiff was guilty of contributory negligence." [211 Cal. 445, 295 P. 835.]

The judgment is affirmed.

We concur: GRIFFIN, J.; MARKS, J.



34 Cal.App.2d 432

CITY OF LOS ANGELES v. PIERCE et al.
Civ. 12388.

District Court of Appeal, Second District,
Division 1, California.

Aug. 31, 1939.

Municipal corporations ☞259
Schools and school districts ☞87

Under statute providing for apportionment of election expenses between school districts and city in the ratio that "the total number of offices to be filled and propositions to be voted upon by the electors of the city and the school district or districts, respectively, bears to the total number," the phrase "electors of the city" referred to electors as a whole, notwithstanding that councilmen were elected by districts, and hence 15 full-term and one short-term councilmanic offices should be counted as 16 offices in ap-

portioning the expenses. School Code, § 2. 974, as added by St.1937, p. 1701, § 2.

[Ed. Note.—For other definitions of "Elector," see Words & Phrases.]

Original application by the City of Los Angeles against Clarence W. Pierce and others, as members of and constituting the Board of Education of the City of Los Angeles, and as ex officio members of the Board of Education of the Los Angeles City School District, the Los Angeles City High School District, and the Los Angeles City Junior College District, and others, for writ of mandate to compel defendants to pay specified amount to the city as share of expense of conducting municipal elections.

Writ denied.

Ray L. Chesebro, City Atty., Leon T. David, Asst. City Atty., Robert A. McMillan, Deputy City Atty., and Robert W. Anderson, Deputy City Atty., all of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondents.

WHITE, Justice.

This is an original application to this court for a writ of mandate to compel the Board of Education of Los Angeles City, various officers, and the Board of Supervisors of Los Angeles County to pay the sum of approximately \$85,000 to the City of Los Angeles as the school board's share of the expense of conducting the municipal elections under dates of April 4 and May 2, 1939.

A determination of the issue here presented is dependent upon a construction of section 2.974 of the California School Code (Stats.1937, p. 1701, § 2), of which section there heretofore has been no judicial interpretation. Said section reads as follows:

"In those cases in which the boundaries of the school district, high school district or junior college district, governed by a city board of education, are not coterminous with the boundaries of the city, and where elections, either primary, general or recall, of members of the board of education are by the provisions of the laws governing such cities held on the same day as municipal elections, general or special, a proportionate part of the actual cost and expense of such election shall be a legal

charge against the school districts governed by such board of education and the city shall be reimbursed for such proportionate cost and expense incurred in the conduct of such election. The cost and expense of such elections within the boundaries of the city shall be apportioned between the city and the districts therein in the ratio that the total number of offices to be filled and propositions to be voted upon by the electors of the city and the school district or districts, respectively, bears to the total number of such offices to be filled and propositions submitted. The cost and expense of such election in territory outside of the municipal boundaries shall be borne by the districts affected. As between such districts such costs and expense shall be apportioned as follows: In territory common to two or more districts the cost of conducting the election therein shall be borne in equal shares, and in territory within a single district the cost shall be borne by such district."

It is conceded that the City of Los Angeles conducted the aforesaid elections for the school district, advancing the city's funds and utilizing its facilities for such purpose. Petitioner, City of Los Angeles, claims to be entitled to reimbursement in the sum of \$85,087.90. Respondents, while admitting they owe the sum of \$9,052.76, for the election costs in precincts of the school district outside the city limits, contend that as to the balance, representing the cost inside the city limits, the sum due therefor is only \$48,882.49.

The sum in controversy, the mathematical computations of which are concededly correct, are as follows:

	City's Compu- tation	Respond- ents' Compu- tation
Los Angeles City School District (Elementary)	\$27,606.80	\$18,555.91
Los Angeles City High School District	28,079.20	19,028.31
Los Angeles City Junior College District	29,401.90	20,351.03
	\$85,087.90	\$57,935.25

Therefore, the sole issue presented by the controversy involves an interpretation of the following language in section 2.974 of the School Code: "The cost and expense of such elections within the boundaries of the city shall be apportioned between the city and the districts therein in the ratio that the total number of offices to be filled and propositions to be voted upon by the

electors of the city and the school district or districts, respectively, bears to the total number of such offices to be filled and propositions submitted."

The main controversy here centers around the fact that at both the involved elections the total number of councilmanic offices filled throughout the city was fifteen, with one additional councilmanic unexpired term to be filled at the primary election of April 4. Section 6 (2a) of the Los Angeles city charter provides for the division of the city into fifteen councilmanic districts. The city contends that the election of one councilman in each of the fifteen districts is only equivalent to the election of one councilman at large by "the electors of the city"; adding in the case of the primary election a proportionate one-fifteenth representing the selection of a short-term candidate in one councilmanic district. In presenting this argument petitioner urges that "the electors of the city" do not vote for any single councilmanic office, but on the contrary, only a portion of the electors (those voting in a designated councilmanic district) vote only for any one councilmanic office. Respondents contend that the School Code section apportions the election cost between the city and the school district in the ratio that "the total number of offices" to be voted upon by "the electors of the city", and not by each elector, bears to the total number of offices to be filled in the school district.

A careful reading and consideration of the questioned School Code section impels us to the belief that neither the reasoning nor the conclusion contended for by petitioner can be sustained. In clear and unequivocal language the section provides that the basis for the computation of election costs is to be "the total number of offices to be filled", etc., by "the electors of the city". It is at once apparent that "the electors of the city" voted for fifteen councilmanic offices at both elections and a short-term councilmanic office at the primary election. The fact that each elector of the city was entitled to vote for but one councilman does not alter the situation, because the basis for comparison is by the statute made the total number of offices that the city electors are called upon to fill; and the electors as a whole were called upon to and did fill fifteen full and one short-term councilmanic offices. They are no less "electors of the city" because they elect councilmen by councilmanic districts.

From the foregoing it follows that the city is entitled to payment upon the basis hereinbefore set out as contended for by respondents, and the writ of mandate sought by the city should be denied.

It is so ordered.

We concur: YORK, P. J.; DORAN, J.



34 Cal.App.2d 468

WOODS v. KERN COUNTY MUT. BUILDING & LOAN ASS'N et al.

Civ. 2213.

District Court of Appeal, Fourth District,
California.

Sept. 5, 1939.

1. Contracts ☞123(1)

Building and loan association's action, after accepting bonds in less amount than mortgage debt from Home Owners' Loan Corporation in full settlement of association's claim against mortgaged property, in taking a second trust deed, stock certificates, and grant deed as security from mortgagor for balance of indebtedness, was illegal and void. Home Owners' Loan Act 1933, 48 Stat. 128, 12 U.S.C.A. § 1461 et seq.

2. Cancellation of Instruments ☞37(5)

In action against building and loan association to have second trust deed canceled, stock certificates returned, and grant deed canceled, complaint alleging that the association, after accepting bonds in less amount than mortgage debt from Home Owners' Loan Corporation in full settlement of association's claim against mortgaged property, had taken those instruments as security for balance of indebtedness, was sufficient to state a cause of action, though it was alleged that those instruments were obtained "with any knowledge or notice" to the Home Owners' Loan Corporation, where it was clear that the word "not" had been omitted. Home Owners' Loan Act 1933, 48 Stat. 128, 12 U.S.C.A. § 1461 et seq.

3. Pleading ☞246(1)

Where, though the word "not" was omitted in complaint, the intent of the allegation

was clear, an amendment should have been permitted.

4. Cancellation of Instruments ☞37(6)

In action to have trust deed canceled, stock certificates returned, and grant deed canceled on ground that building and loan association, after accepting bonds in less amount than mortgage debt from Home Owners' Loan Corporation in full settlement of association's claim, had taken those instruments from mortgagor as security for balance of indebtedness allegations that the association obtained the instruments by fraud and misrepresentation were material only as bearing on the question of whether the mortgagor was in *pari delicto* with the association. Home Owners' Loan Act 1933, 48 Stat. 128, 12 U.S.C.A. § 1461 et seq.

5. Contracts ☞139

The fact that mortgagor took part in transaction whereby building and loan association, after accepting bonds in less amount than mortgage debt from Home Owners' Loan Corporation in full settlement of association's claim, took a second trust deed, stock certificates, and grant deed from the mortgagor as security for balance of indebtedness, did not make the mortgagor in *pari delicto*, so as to preclude cancellation of second trust deed, stock certificates, and grant deed, where the mortgagor was allegedly induced to take part in the transaction by fraud and misrepresentation. Home Owners' Loan Act 1933, 48 Stat. 128, 12 U.S.C.A. § 1461 et seq.

6. Cancellation of Instruments ☞34(1)

A void transaction whereby building and loan association, after accepting bonds in less amount than mortgage debt from Home Owners' Loan Corporation in full settlement of association's claim against mortgaged property, took a second trust deed, stock certificates, and grant deed from mortgagor as security for balance of indebtedness, was not validated by the mere lapse of three years, on ground that mortgagor was guilty of laches. Home Owners' Loan Act 1933, 48 Stat. 128, 12 U.S.C.A. § 1461 et seq.; Code Civ.Proc.Cal. § 338, subd. 4.

7. Appeal and error ☞422

Notice of appeal was sufficient, though it contained an error as to date of judgment, where notice was headed with title of the court and cause and stated that an appeal was taken from the judgment made and entered therein, and judgment had at that time been actually entered.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Lyle M. Woods against the Kern County Mutual Building & Loan Association and Ed. O'Boyle to recover a judgment canceling a trust deed, to secure the return of two stock certificates, and for cancellation of a grant deed, on ground that those instruments were obtained without consideration and in violation of the Home Owners' Loan Act. From a judgment sustaining a demurrer to the complaint without leave to amend, the plaintiff appeals.

Judgment reversed.

Frank Aspinwall, of Long Beach, for appellant.

A. J. Coogan and James M. McGrath, both of San Francisco, and Ewell D. Moore, of Los Angeles (Dudley J. Scholten, of Washington, D. C., of counsel), amici curiæ for Home Owners' Loan Corporation.

Borton, Petrini & Conron, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

In this action the plaintiff sought to recover a judgment canceling a trust deed, for the return of two stock certificates, and for the cancellation of a grant deed upon the grounds that these instruments had been obtained by the defendants without consideration and in violation of the Home Owners' Loan Act of 1933. 48 U.S.Stats. at Large, 128; title 12, U.S.C.A. § 1461 et seq. A demurrer to a second amended complaint was sustained without leave to amend and the plaintiff has appealed from the judgment thereafter entered.

Among other things, the complaint in question alleged that on February 25, 1931, the appellant executed and delivered to the respondents a note for \$3,000 secured by a trust deed covering certain real property in Bakersfield; that on October 16, 1933, at the suggestion and upon the instigation of the respondents she applied to the Home Owners' Loan Corporation for a loan in order to pay and discharge the aforesaid indebtedness; that on May 16, 1934, the respondents, by written agreement, consented to accept the sum of \$2,334 in Home Owners' Loan bonds with \$25 in cash and thereupon to release their claim; that thereafter the appellant executed and delivered to Home Owners' Loan Corporation a note and mortgage for

\$2,400; and that on or about January 16, 1934, the respondents falsely and fraudulently stated to her that in order to obtain the said Home Owners' loan it would be necessary for her to execute and deliver to them a note for \$700 secured by a second trust deed on the same property, to assign and transfer to the respondents two described certificates of stock of the face value of \$100 each, and to deliver to the respondents a grant deed for her one-third interest in certain other real property, in order to secure the balance of the original loan after deducting the face value of the Home Owners' Loan bonds, and that the said grant deed would be recorded upon her failure to make the monthly payments upon the \$700 second trust deed.

It is then alleged that, being a woman of little business experience, the appellant relied upon the statements made to her by the respondents; that on June 19, 1934, she executed and delivered to the respondents a note for \$700, secured by a trust deed; that on February 19, 1935, she transferred and assigned the two paid-up certificates of stock of the face value of \$100 each; that some time during the year 1934, the exact date of which she does not recall, she executed and delivered to respondents the grant deed covering her equity in the other real property to which we have referred; that she executed and transferred these instruments in the belief that such acts were necessary in order to obtain the benefits of a Home Owners' loan; that the statements made to her by the respondents were false in that these things were not necessary for the obtaining of a loan under the Home Owners' Loan Act; that on January 1, 1937, she learned for the first time that the statements made to her by the respondents were false and that it was unnecessary for her to deliver to them anything of value for the purpose of obtaining a loan under the Home Owners' Loan Act; and that on April 30, 1937, she demanded of the respondents that they return to her the various documents and evidence of title thus transferred and delivered to them, which demand was refused.

It is further alleged that on July 1, 1934, in conformity with their agreement of May 16, 1934, the respondents received and receipted for Home Owners' Loan bonds in the sum of \$2,334 and accepted the same in full discharge of their claim;

that upon the acceptance of said bonds the respondents had no further title or claim upon said real property; and that said trust deed for \$700, said shares of stock, and said grant deed were obtained by fraud and deceit and without consideration. In Paragraph XII it is alleged that these things were "obtained with any knowledge or notice, either actual or implied to the Home Owners' Loan Corporation and is a violation of the Home Owners' Loan Act of 1933".

The agreement signed by the respondents on May 16, 1934, is attached as an exhibit to the complaint and contains the following:

"The undersigned is a holder of a first mortgage or other obligation, which constitutes a lien or claim on the title to the home property of Lyle M. Woods, located at 1406-26th, Bakersfield California, in the sum of \$3308.74 including unpaid balance of principal and interest, to date.

"Being informed that said owner has made application to Home Owners' Loan Corporation to refund his said indebtedness, the undersigned has considered the method of refunding mortgages provided in Home Owners' Loan Act of 1933, as passed by Congress and approved by the President, and the undersigned hereby consents, if said refunding can be consummated, to accept in full settlement of the claim of the undersigned the sum of \$2334.00, face value of the bonds of Home Owners' Loan Corporation, to be adjusted with not exceeding \$25.00 cash and thereupon to release all the claim of the undersigned against said property."

The respondents contend that this complaint does not state facts sufficient to constitute a cause of action since it alleges that the execution of the trust deed and the transfer of the other property was procured by fraud, since it appears that the misrepresentations complained of were misrepresentations of law and not of fact, and for the reason that no damage was suffered since the original debt was not increased. It is further argued that the transaction was not illegal or void as against public policy. In this connection it is argued that the Home Owners' Loan Act of 1933 did not expressly forbid the taking of second liens securing the difference between the face value of the bonds to be accepted under the terms of the act and the balance of the original indebtedness, and that no regulation concerning

the taking of such a second lien was made by the HOLC until September, 1934, after the transactions here in question, at which time a regulation was adopted providing that no loan would be made where a separate understanding or agreement calling for any payments other than those required by the corporation was made between the debtor and the original creditor.

In *McAllister v. Drapeau*, Cal.Sup., 92 P.2d 911, 915, after quoting portions of the act and of regulations adopted on November 3, 1933, and January 9, 1934, which dates are prior to the transaction here in question, the court said:

"The rules and regulations contemplated that under some circumstances it would be to the interest of the home owner to give a second mortgage to the creditor to secure a part of the refunded debt, but such rules and regulations provided that the H. O. L. C. would not refund the first mortgage if the creditor demanded a second unless the financial ability of the debtor and the financial arrangements were such that the debtor would have a reasonable opportunity to pay off both mortgages. Obviously, before these facts could be ascertained, a full disclosure of the amount and the terms of the proposed second lien would have to be made to the H. O. L. C. The securing of a second lien by the creditor without such disclosure is clearly in violation of the letter and spirit of the statute and regulations. This is demonstrated not only by the terms of the statute and the regulations, but also by the language of the agreement above quoted that all creditors were required to sign wherein the creditor represented and agreed that he was accepting the bonds 'in full settlement of the claim of the undersigned.'"

In that case it appeared that the HOLC had no notice or knowledge of the existence of the second trust deed given to secure the balance of the original debt remaining after the acceptance of the Home Owners' Loan bonds. The court held that such a second lien to secure this balance was not permitted under the act, and the regulations adopted, unless a full disclosure of the amount and terms thereof was made to the HOLC, in order to enable it to determine the effect of such a second lien upon the Home Owners' loan. It was held that the consent agreement signed by the original creditor, which was practically identical with the one attached to the complaint in this case, constituted a valid re-

lease and an accord and satisfaction and that the second lien which was taken was void as in violation of the public policy expressed in the act.

[1-5] Under the authority just referred to it must be held that the transaction involved in the instant case was illegal and void. While this complaint was not a model in all respects it was sufficient to state a cause of action. The above-quoted portion of paragraph XII plainly attempts to allege that the documents purporting to secure the balance of the original indebtedness were obtained by the respondents without notice to, or the knowledge of, the Home Owners' Loan Corporation. While the word "not" was omitted the intent of the allegation is clear, and, to say the least, an amendment should have been permitted. The gravamen of the complaint is that the transaction was illegal and that the instruments obtained as purported security for the balance of the debt were void. The allegations of fraud and misrepresentation are material only as bearing upon the question of whether the appellant is in *pari delicto*. That contention is also here made by the respondents but is without merit. *McAllister v. Drapeau*, *supra*.

[6] The respondents next contend that this cause of action is barred by the provisions of section 338, subdivision 4, of the Code of Civil Procedure, and that the complaint shows on its face that it is barred by laches on the part of the appellant. The action was begun on June 30, 1937. In *Maryland Casualty Co. v. Fidelity, etc., Co.*, 71 Cal.App. 492, 236 P. 210, 212, it is said: "Estoppel does not apply in such a case. A contract, void as against public policy, cannot be treated as valid by invoking such principle; nor can a party thereto waive his right to set up the defense of illegality in an action thereon brought by the other party." If this transaction is void it cannot be validated by the mere lapse of three years. The instruments here executed and delivered to the respondents were clouds upon title to properties belonging to the appellant, and since those instruments were void and she was not in *pari delicto* she had the right

to bring an action to cancel them, and the code section relied upon does not apply.

[7] The only other point raised is that this appeal was taken from the order sustaining the demurrer and not from the judgment. In this connection, the following facts appear: A minute order dated October 22, 1937, recites that the matter having theretofore been heard and submitted it is by the court ordered that the demurrer be and the same is sustained without leave to amend. On November 18, 1937, notice of the sustaining of the demurrer without leave to amend was mailed to counsel for the appellant at Long Beach, California. Judgment on demurrer was entered on November 18, 1937, and notice thereof, dated November 19, 1937, was on that day mailed to appellant's counsel at Long Beach. Notice of appeal dated November 24, 1937, with an affidavit of the mailing of a copy thereof on that day to counsel for the respondents, was filed on November 26, 1937. This notice reads in part as follows: "You and each of you will please take notice, that the plaintiff in the above entitled action, hereby appeals from the judgment made and entered in the said Superior Court on the 22nd day of October, 1937, in favor of said defendants and against said plaintiff, and from the whole of said judgment, to the District Court of Appeals." While it thus appears that the notice of appeal refers to the date of the judgment as October 22, 1937, and that this date is incorrect as the judgment was actually entered on November 18, 1937, the notice is headed with the title of the court and cause and states that an appeal is taken from the judgment made and entered therein and from the whole of said judgment. The judgment had at that time been actually entered and the same appears in the transcript before us. Under these circumstances, the error as to the date of the judgment should be disregarded and we therefore hold that the notice of appeal was sufficient.

The judgment appealed from is reversed.

We concur: GRIFFIN, J.; MARKS, J.

34 Cal.App.2d 457

RODDY (PEOPLE ex rel. STATE DEPARTMENT OF PUBLIC WORKS, SAN FRANCISCO-OAKLAND BAY BRIDGE DIVISION, Intervener) v. AMERICAN SMELTING & REFINING CO. et al.

Civ. 10979.

District Court of Appeal, First District,
Division 2, California.

Sept. 1, 1939.

1. Automobiles ⇐246(4)

In action by flagman, who was stationed at bridge which was being painted, for injuries sustained when a truck swerved around bus, which had stopped after having been flagged by flagman, and struck the flagman, trial court did not err in refusing to give requested instruction of owner and driver of truck that it was duty of driver of bus to bring it to a stop in such a place as to allow not less than 15 feet of the width of the paved or improved or main portion of the highway unobstructed for the free passage of other vehicles. Vehicle Code, § 583, St.1935, p. 190.

2. Automobiles ⇐246(4)

In action by flagman, who was stationed at bridge which was being painted, for injuries sustained when a truck swerved around bus, which had stopped after having been flagged by flagman, and struck the flagman, trial court did not err in refusing to give requested instruction of owner and driver of truck that it was duty of operator of bus to stop the bus off of the main traveled or improved portion of the highway. Vehicle Code, § 582, St.1935, p. 190.

3. New trial ⇐163(2)

Where trial court had heard arguments concerning question whether plaintiff's counsel was guilty of misconduct in his closing argument and had read the conflicting affidavits of the attorneys as to what occurred, the effect of its denial of motion for new trial was an implied finding against the defendants on the facts.

4. Appeal and error ⇐688(2)

Where record did not contain anything purporting to be a transcript of reporter's notes of arguments to jury, and there were merely conflicting affidavits of attorneys as to what occurred when arguments were made, and trial court heard arguments concerning alleged misconduct of plaintiff's

counsel in closing argument and read affidavits, but denied defendants' motion for new trial, the District Court of Appeal was unable to determine that plaintiff's attorney was guilty of misconduct charged.

5. Trial ⇐296(4)

In action by flagman, who was stationed at bridge which was being painted, for injuries sustained when a truck swerved around bus, which had stopped after having been flagged by flagman, and struck the flagman, an instruction relating to the care required of flagman for his personal safety was not open to objection that flagman's engrossment in other tasks would excuse his contributory negligence, when read in connection with preceding instructions.

6. Automobiles ⇐245(75)

The fact that flagman, who was engaged in directing traffic on bridge which was being painted, stood in the middle of one of the lanes of traffic, did not make him guilty of contributory negligence as a matter of law, so as to preclude recovery for injuries sustained when struck by truck.

7. Damages ⇐132(7)

A verdict of \$9,000 to healthy flagman of about 55 years of age, for injuries sustained when he was struck by a truck, was not excessive, where he received a broken leg, bad bruises and lacerations, was confined in a hospital for 14 weeks, required five additional months for convalescence, was permanently disabled to some extent, and his special damages exceeded \$2,000.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Arthur Roddy against the American Smelting & Refining Company, Andrew J. McQueen, and others, for injuries sustained when the plaintiff was struck by a truck, wherein the People of the State of California, on the relation of the State Department of Public Works, San Francisco-Oakland Bay Bridge Division, intervened. From an adverse judgment, the named defendants appeal.

Judgment affirmed.

Hoge, Pelton & Gunther and J. Hampton Hoge, all of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

H. Raymond Hall, of Oakland, for respondent.

STURTEVANT, Justice.

The plaintiff, an employee on the San Francisco-Oakland Bay Bridge, while engaged as a flagman, at about 7:45 a. m. on the 11th day of October, 1936, was directing traffic on the eastern end of said bridge. The officers in charge of the bridge were commencing to paint the ceiling of the lower deck of the bridge. For that purpose they were using a movable gantry. From time to time the gantry was moved and in moving it it became necessary to protect the employees from being injured by passing traffic. Flagmen were stationed on each side and the plaintiff was stationed on the eastern side. A passenger bus operated by the Key System and driven by R. J. Brown, approached from the east and stopped. Almost immediately thereafter a truck operated by the American Smelting and Refining Company and driven by Andrew J. McQueen, also approached from the east behind the bus. The bus having come to a stop the truck swerved to the right, passed the bus, and collided with the plaintiff. To recover damages for the injuries sustained the plaintiff commenced this action against both corporations and both drivers. The jury returned a verdict in favor of the plaintiff against the American Smelting and Refining Company and its driver. From the judgment entered on that verdict those two defendants have appealed.

[1,2] When the passenger bus was first signaled it did not stop. The plaintiff blew his whistle and at the same time again signaled with his red lantern. The bus then stopped in its tracks. The evidence is somewhat conflicting but there was testimony that the bus at that time was on the south side of the traffic lane. The appellants asked the trial court to give an instruction which contained a passage " * * * I instruct you that it was the duty of the said Key System bus driver in bringing said bus to a stop, to stop said bus in such a place so as to allow not less than fifteen feet of the width of the paved or improved or main traveled portion of the highway opposite such stopped vehicle in order to leave a clear and unobstructed portion of the highway for the free passage of other vehicles. * * * " They also asked an instruction that contained a passage " * * * Then I instruct you that it was the duty of said bus operator to stop said bus off of the main

traveled or improved portion of the highway. * * * " The trial court refused to give either of those instructions. The appellants contend said instructions were clearly sound statements of the law. Vehicle Code, §§ 582 and 583, St.1935, p. 190. As addressed to voluntary acts of drivers, the instructions would have been applicable. But when, as here, drivers are signaled by traffic officers they are bound to follow the orders. If the plaintiff in giving directions wanted the vehicle parked to the right or to the left, doubtless he could and would have given that direction. However, there is no conflict in the record and the direction given to the bus driver was to stop. He obeyed that direction. The trial court did not err in refusing to give the two instructions which the appellants had asked.

[3,4] The appellants contend that the plaintiff's counsel was guilty of misconduct while arguing at the close of the trial. The record does not contain anything purporting to be a transcript of the reporter's notes of the arguments. However, in presenting their motion for a new trial the appellants offered in evidence the affidavit of their attorney as to what occurred when the arguments were made. Opposing that affidavit the plaintiff offered the affidavit of his attorney as to what occurred. The affidavits are distinctly conflicting. Furthermore, the trial court heard the arguments and it also read the affidavits. It denied the motion for a new trial. In effect that order was an implied finding against the appellants on the facts. On the record as made we are unable to state that the plaintiff's attorney was guilty of the misconduct charged against him.

Among others the trial court gave the following instructions, which followed consecutively. (Numbering ours.)

"(1) One who voluntarily places himself in a position of danger, assumes the risk ordinarily incident to such a position, and must exercise an amount of care commensurate with the additional danger.

"(2) One who places himself upon that paved and main traveled portion of the highway used by motor vehicles, must exercise the care of an ordinarily prudent person similarly situated, for his own protection and to that extent he must be vigilant and alert so as not to place himself in a position of obvious danger. In this regard I instruct you that one cannot

excuse himself from a charge of negligence by showing merely that he assumed that he would not be struck by a motor vehicle, if to a person of ordinary care and prudence acting under like circumstances, the position appeared to be one of peril, and a situation which would necessitate the person changing his position to one of safety.

[5] "(3) A person must exercise his senses of hearing and seeing and take ordinary precautions for his personal safety and protection but the jury should take into account that plaintiff Arthur Roddy in his capacity as a flagman on the highway at the time in question had duties to perform there other than looking after his own personal safety and that he had the right to expect that those traveling upon said highway would take into consideration that he had duties to perform and responsibilities not only to the highway employees then engaged on said highway but also to the occupants of the vehicles traversing said highway and that he could not look after himself as would one who did not have any such duties or responsibilities." The appellants contend that the instruction which we have numbered three was to the effect that the plaintiff's engrossment in other tasks would excuse his contributory negligence. That contention is too broad. From the face of the instruction we think it is a fair statement of the law. However, when read in connection with the two instructions that immediately preceded it we think it is clear that the jury was properly instructed.

[6] The record is not altogether clear but there was evidence that the plaintiff at the time he was hit was standing at a point approximately in the middle of the north lane of traffic. The appellants contend that he was guilty of contributory negligence as a matter of law. Considering the fact that he was engaged as a flagman directing traffic, it may not be said that he was guilty of contributory negligence as a matter of law. The question as to whether he was guilty of contributory negligence as a matter of fact was presented to the jury and the jury made its implied finding in his favor.

[7] The last point made by the appellants is that the verdict is highly excessive in amount. The amount of the verdict was \$9,000. At the time of the

accident the plaintiff was about fifty-five years of age, in the best of good health, and unusually active. When he was struck he was knocked a distance between twenty-four and forty feet. He was unconscious for many hours. He was badly bruised about his head, face and hands, and his nose and eyes were black. A laceration over one eye required three sutures. The left femur above the knee had a transverse fracture with an over-riding of about two inches. The fracture was such that the upper portion plowed through the muscles. He was placed in a splint, later in a cast, and still later he was put in traction. He remained in traction for over two months. He was confined to the hospital for fourteen weeks. He was then taken to his residence where he was five months in a slow convalescent condition. He was allowed to return to work June 13, 1938. He was then fifteen to twenty per cent less than normal. His doctor testified his disability was permanent and that he will never be able to do the type of work he had been doing prior to the accident. His special damages exceeded \$2,000. Considering all of these circumstances it may not be said that the verdict was excessive.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.;
SPENCE, J.



34 Cal.App.2d 436

EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES v. MILSTEIN et al.

Civ. 12120.

**District Court of Appeal, Second District,
Division 1, California.**

Aug. 31, 1939.

1. Appeal and error — 854(1)

An appellate court will affirm order or judgment denying motion to vacate default judgment for surprise, inadvertence, or excusable neglect, if any reasonable ground on which lower court can be upheld appears. Code Civ.Proc. § 473.

2. Judgment $\Rightarrow$ 143(3)

Where defendant, in mortgage foreclosure suit, did not appear at trial after entry of default and filing of answer, trial court's order denying her motion to vacate default judgment for surprise, inadvertence, or excusable neglect was justified and appeal therefrom without merit. Code Civ. Proc. § 473.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Equitable Life Assurance Society of the United States against Grace Milstein and others to foreclose a mortgage. From an order denying named defendant's motion to set aside a foreclosure judgment, she appeals.

Affirmed.

Grace Milstein, in pro. per.

Newlin & Ashburn and George W. Tackabury, all of Los Angeles, for respondent.

DORAN, Justice.

The above action was instituted to foreclose a mortgage upon the property of defendant Grace Milstein located in Beverly Hills, California, which mortgage had been executed on July 24, 1929, in favor of the Leo P. Schaefer Co., a corporation, for the purpose of securing the payment of principal and interest upon a promissory note of the defendant in the sum of \$11,000. The Leo P. Schaefer Co. subsequently assigned the note and mortgage to plaintiff, The Equitable Life Assurance Society, a corporation, the former company being the mortgage loan agent and correspondent in Los Angeles county for the latter.

The last payment upon the principal of said note was due August 1, 1934. The complaint, filed April 22, 1938, was in the usual form and alleged: "That neither the whole nor any part of the principal amount of said promissory note which became due and payable in installments as provided therein has ever been paid; that default has been made in the payment of the principal amount of said note and in the payment of each installment of principal which became due and payable under the provisions of said note; that neither the whole nor any part of the interest payable under the provisions of said note has ever been paid subsequent to the semi-annual installment of interest due and payable under the terms of said note on Au-

gust 1, 1937; that default has been made in the payment of the semi-annual installment of interest that became due and payable on February 1, 1938, and subsequent to August 1, 1937."

On May 4, 1938, summons and a copy of the complaint were allegedly served upon defendant Grace Milstein, appellant herein. No appearance was filed on her behalf, and thereafter, on May 16, 1938, defendant's default was entered. An answer consisting of denials of the allegations of the complaint was filed by defendant Grace Milstein with the clerk of the court on that day, namely, May 16th, subsequent to the default's being taken. In particular, with reference to paragraph VII of the complaint, above quoted, the verified answer denied: "* * * generally and specifically, each and every allegation contained in paragraph VII of the plaintiff's complaint, and alleges the fact to be that all of the payments specified and set forth in the mortgage and the note have been paid, and further alleges the fact to be that the principal has been reduced by successive payments according to the terms and tenor of the said mortgage. This defendant further alleges that the whole of the principal is not due, not owing and not unpaid, and that the action herein has been brought prematurely and in violation of the terms of the said mortgage; that all taxes, assessments, levies and other indebtedness have been paid, and the contract of mortgage has been faithfully performed by this answering defendant, and that all installments as provided in the said mortgage have been properly and duly paid in lawful money of the United States."

One Clive Daggett, a lienholder, also a defendant in this action, duly appeared and filed on May 4, 1938, an answer to plaintiff's complaint; the cause was set down for trial on June 3, 1938, on which date a decree of foreclosure and order of sale was signed by the court and filed. The decree read in part as follows:

"The above entitled action came on regularly for hearing on the above entitled court * * * on the 3rd day of June, 1938, * * * and none of the defendants appearing at the trial either in person or by counsel and it being shown to the satisfaction of the court by proof duly made that the above named defendants herein, Grace Milstein * * * and each of them, were duly and regularly served personally with summons and a copy of the

complaint herein; * * * that defendants Grace Milstein and * * * have, and each of them has, defaulted by not appearing herein within the time prescribed by law; that the default of said defendants Grace Milstein and * * * and each of them, has been duly and regularly entered herein; * * * and evidence, oral and documentary, having been introduced in support of the allegations of plaintiff's complaint, and the court having heard and duly considered the evidence, and it being fully advised in the premises, and it appearing to the court: * * * 4. That each and every allegation contained in the complaint on file herein is true. * * *

"From the foregoing facts the court concludes as a matter of law that plaintiff is entitled to judgment and a decree foreclosing said mortgage and ordering a sale of said premises, and to a judgment against defendant Grace Milstein as prayed for in said complaint."

Defendant and appellant Milstein subsequently moved to have the judgment set aside on the grounds that she had not been served with summons and complaint, and that she had not been properly advised as to the time of trial so that she could be present and present her defense. The motion came on for hearing on June 14, 1938, at which time defendant appeared in propria persona. Her affidavit, dated June 2, 1938, in support of said motion alleged as follows:

"Grace Milstein, being first duly sworn, deposes and says: That she is one of the defendants in the above entitled action; that heretofore on the 16th day of May, 1938, default was entered against her through surprise, inadvertence and excusable neglect, which said surprise, inadvertence and excusable neglect is hereinafter set forth as follows:

"That the affidavit of service upon this defendant states that this defendant was served on the 4th day of May, 1938, but that the said affidavit of service is false and untrue, in that this defendant was served on the 5th day of May, 1938, which time this defendant recalls due to facts which happened on the said 5th day of May, 1938, in connection with the service of said summons and complaint; that this defendant was advised by an attorney that she had ten days within which to file an answer, and that if the last day of said ten days fell on a Sunday or a holiday she

would have an additional day on which to file her answer; that the tenth day of service on this defendant fell on Sunday, May 15, 1938, and that thereafter on May 16, 1938, this affiant filed her answer; that on the same date the default of this defendant was entered prematurely;

"This defendant has consulted an attorney and is informed and believes, and therefore alleges, that she has a legal defense to the said action, as will appear by her answer on file, and that this defendant desires to avail herself of the privilege of appearing in court and having her day in litigation in the above entitled matter.

"Wherefore, affiant prays that the court make an order setting aside the default heretofore entered and allowing her answer to stand and proceed to trial."

Counteraffidavits were filed by plaintiff wherein it appeared, among other things, that defendant Grace Milstein had written a letter to the Leo P. Schaefer Co., on May 26, 1938, which letter is in words and figures as follows:

"520 N Linden Drive,
"Beverly Hills, Calif.
"May 26, 1938.

"Leo P. Schaefer Co.,
"215 W. 6th St.,
"Los Angeles, Calif.

"In re: Equitable Assurance
v. Grace Milstein.

"Gentlemen:—

"I am addressing this communication as the defendant in the above action, feeling that under the circumstances I am fully justified in making the request I will hereinafter set forth.

"As you know, this case has been set for trial on June 3rd, and this comes as a very urgent request that you allow this matter to go off calendar, or at least to be continued for a period of ninety days, for the reason that the property is now in the hands of my real estate broker for sale, and quite a number of prospective buyers have been inspecting and are daily inspecting the premises. * * *

"Very truly yours,

"Mrs. Grace Milstein."

As heretofore noted in the decree of foreclosure none of the defendants, including the defendant Milstein, appeared at the trial on June 3, 1938.

The court, upon reading the affidavits above referred to, and at the conclusion of the arguments of counsel, by its order de-

nied defendant's motion to set aside the judgment, from which order this appeal is taken. The appeal is presented on a bill of exceptions.

[1,2] It is contended that section 473 of the Code of Civil Procedure "is intended to afford relief to a defendant against whom judgment has been rendered through surprise, inadvertence or excusable neglect" and is applicable to the alleged state of facts upon which appellant purports to reply.

Did the trial court abuse its discretion in denying appellant's motion to vacate a default judgment, is the sole question presented on appeal. It is too well settled to require citation of authority that, under such circumstances as here presented, if it appears that there is any reasonable ground upon which the lower court can be upheld, an appellate court will affirm the order or judgment upon appeal. Not only does the record reveal that the trial court's action was clearly justified, but in addition thereto it also appears that the appeal herein is entirely without merit. A further discussion of the record would serve no useful purpose.

The order denying defendant's motion to set aside the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.



34 Cal.App.2d 475

HUBBARD v. MATSON NAV. CO. et al.

Civ. 10748.

District Court of Appeal, First District,
Division 1, California.

Sept. 6, 1939.

Rehearing Denied Oct. 6, 1939.

Hearing Denied Nov. 2, 1939.

1. Shipping ⇨166(2)

Under the law as it existed in 1934, before enactment of statute declaring invalid any provision limiting the filing of claims to less than six months, and the filing of suits to less than a year, provisions, in contract for passage on steamer, that written claim must be made within 30 days and suit commenced within 90 days, were not invalid be-

cause violative of public policy. 46 U.S.C.A. § 183b.

2. Carriers ⇨150

A contract between a carrier and shipper, completely exonerating carrier from liability for negligent injury to goods carried, is void as being against public policy.

3. Carriers ⇨154, 158(1)

A carrier may by contract with shipper partially exonerate itself and limit its liability for damages, but such agreement must rest on some consideration other than the mere agreement to transport at the regular rate.

4. Carriers ⇨154

If but one rate is offered to shipper, limitation of liability clauses are invalid.

5. Carriers ⇨154

The rule requiring special consideration for limitation of liability clauses is inapplicable to clauses limiting the time within which claims must be filed and suit must be brought.

6. Shipping ⇨166(2)

Steamship carriers, like insurance companies, may provide in their contracts reasonable regulations pertaining to the manner and time of bringing suit, which are supported by the same consideration that supports the contract.

7. Courts ⇨97(1)

In determining validity of clauses limiting time for filing claim and bringing suit for injuries received by passenger on steamer on the high seas, the federal cases are controlling.

8. Trial ⇨165

On motion for nonsuit, trial court must indulge in all reasonable inferences favorable to plaintiff.

9. Shipping ⇨166(2)

Where steamship company's claim agent, when asked whether it was necessary to file any form of claim and if they had any forms, or not, answered "No," the "No" could reasonably apply to both parts of the question, resulting in oral waiver of provision requiring filing of claim for injuries within 30 days.

10. Shipping ⇨166(2)

A provision, in steamship company's contract of passage, that suit for injuries must be brought within 90 days, was not waived by letter from company's claim agent, writ-

ten long after the 90 days had expired, stating that investigation had disclosed contributory negligence and denying liability.

11. Estoppel §90(1)

Failure to mention a defense, in the absence of some consideration or element of estoppel, cannot create or recreate an obligation otherwise not existing.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Marguerite Hubbard against the Matson Navigation Company and others, for injuries suffered while a passenger on steamship. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Frank S. Hamburger and George Olshausen, both of San Francisco, for appellant.

Brobeck, Phleger & Harrison, of San Francisco (Moses Lasky, of San Francisco, of counsel), for respondents.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit in favor of defendants Matson Navigation Company and the Oceanic Steamship Company. The plaintiff has dismissed as to the third defendant, S. Degnan.

Appellant was a cabin passenger for hire on respondents' steamship Monterey, traveling between Honolulu and San Francisco. According to the evidence, on January 27, 1934, she fell from her berth and suffered the injuries which form the basis of this action. She had taken passage under a signed written contract evidenced by a contract ticket. This ticket, on its face, states:

"This ticket is subject to passenger contract printed on reverse hereof and, when sold for passage locally between United States ports, to tariff regulations (not inconsistent with said contract) on file with the United States Shipping Board and at all offices of the companies."

On the back of the ticket appears the following:

"Passage Contract for Entire Trip

"To which Passenger, by signature or acceptance and use of Ticket, assents. * * *

"14. Claims and Suits. Carrier shall not be liable for any loss, damage, injury or delay in connection with this transportation (other than on account of death), unless written notice of claim therefor shall have been presented to Carrier against whom (or against whose vessel, or master or officer thereof) such claim is made, at its home office or at the office of its agent at place of landing, within thirty (30) days, and unless suit thereon be commenced and summons served within ninety (90) days, after (in each case) passenger is next landed, * * *."

At the conclusion of appellant's case (which we may assume for present purposes showed that the injuries were proximately caused by respondents' negligence), respondents moved for a nonsuit on the grounds that no written notice of claim had been filed with them within thirty days of the time of landing, and the action was not commenced within ninety days of that date, as required by the terms of the contract of passage above quoted. It is admitted that no written claim was filed with the companies until July 24, 1934, about six months after the accident, and that the suit was not commenced until October 4, 1934, some eight months after the termination of the trip. The trial court granted the motion on the grounds urged.

On this appeal appellant urges two main points: (1) That the time limitations contained in the contract of passage are invalid in that they are unsupported by consideration; and (2) even if valid, they were waived by respondents.

[1] It is admitted by appellant that, under the law as it existed in 1934, the time limitation provisions above quoted were not invalid because violative of public policy. This concession is in accordance with the decisions of the courts. See *Gooch v. Oregon Short Line Ry. Co.*, 258 U.S. 22, 42 S.Ct. 192, 66 L.Ed. 443; *The Ansaldo San Giorgio I v. Rheinstrom Bros. Co.*, 294 U.S. 494, 55 S.Ct. 483, 79 L.Ed. 1016; *Murray v. Cunard Steamship Co.*, 235 N.Y. 162, 139 N.E. 226, 26 A.L.R. 1371, and cases cited therein. It should be noted that in 1935, by statute, any provision limiting the filing of claims to less than six months and the filing of suits to less than a year were declared invalid (46 U.S.C.A. § 183b).

[2-4] It is the theory of appellant that, although such time limit clauses are not

violative of public policy, to be enforceable they must be supported by some special consideration other than the consideration that supports the contract of passage, such as a choice of rates. It is conceded that no case has been decided directly so holding, but it is contended that an analogous doctrine has been announced dealing with limitation of liability clauses in the carriage of goods. It is well settled that any contract between a carrier and shipper completely exonerating the carrier from liability for negligent injury to the goods carried, is void as being against public policy. It is equally well settled that a carrier may by contract with the shipper partially exonerate itself and limit its liability for damages, but to be valid, such agreement by the shipper to accept less than full damages, must rest on some consideration other than the mere agreement to transport at the regular rate. The usual form of such special consideration is to have two rates—the regular rate under which the carrier's liability is unlimited, and a lower rate under which the liability is limited. The consideration moving to the shipper is then the lower rate. If but one rate is offered then such limitation of liability clauses are invalid. *Union Pacific R. Co. v. Burke*, 255 U.S. 317, 41 S.Ct. 283, 65 L.Ed. 656; *Toyo Kisen Kabushiki Kaisha v. Willits & Co.*, 9 Cir., 17 F.2d 762; *Kilthau v. International Mercantile Marine Co.*, 245 N.Y. 361, 157 N.E. 267; *Illinois Cent. R. Co. v. Lancashire Ins. Co.*, 79 Miss. 114, 30 So. 43. The reasoning upon which this rule is predicated is that, since complete exoneration clauses are invalid, partial exoneration clauses will only be permitted where the shipper receives a special material benefit in the form of a special low rate in return for his promise to accept limited damages.

[5-7] In our opinion this rule, and the reasoning upon which it is predicated, have no application to time limitation clauses such as the one here involved. Such clauses do not purport to limit the quantum of the liability of the carrier. They do not purport to wholly or partially exonerate the carrier from liability. They, just as do similar provisions in insurance contracts, simply regulate the manner and time of bringing suit. Appellant's attempt to distinguish the legal effect of such clauses in insurance contracts from those in contracts of passage is unsound. Both the insurance company and the carrier have the lawful

right to provide in their contracts reasonable regulations pertaining to the manner and time of bringing suit. As long as such regulations are reasonable they are supported by the same consideration as supports the contract to carry the passenger—they are an integral part thereof. The United States Supreme Court has determined that such thirty-ninety day clauses are reasonable and valid. The alleged injury having occurred on the high seas, the federal cases are controlling.

It seems to us very significant that in none of the many federal cases discussing this general problem did the courts suggest that a special consideration is necessary to support such a clause. This, of course, is not conclusive, but it is entitled to some weight. It is quite unlikely that the same courts that have held that limitation of damage clauses must be supported by a separate consideration should overlook that doctrine when considering the validity of time limitation clauses, if that doctrine were applicable to such clauses. The many cases upholding the validity of such time limitation clauses inferentially at least determined that there was no element lacking in the clauses essential to their validity. A rather significant case which supports this view is *Missouri, Kansas & Texas Ry. Co. v. Harriman Bros.*, 227 U.S. 657, 33 S.Ct. 397, 57 L.Ed. 690. In that case the court considered the validity of a limitation of liability clause and a ninety-day time limitation clause. The limitation of liability clause was held valid because there was a choice of rates. The ninety-day clause was held valid because it was held to be reasonable. There was no special consideration to support this last-mentioned clause—no choice of rates whereunder the shipper could pay a higher rate for a longer period. Under such circumstances, where both types of clauses were being considered in the same opinion, it is not likely that the United States Supreme Court would have overlooked the argument here advanced had it been a valid one. Appellant relies on certain language appearing in *Gooch v. Oregon Short Line Ry. Co.*, *supra*. In that case the passenger was injured while riding on a so-called drover's pass. In recounting the facts, Justice Holmes stated, 258 U.S. at page 23, 42 S.Ct. at page 192, 66 L.Ed. 443: "In consideration of the pass the plaintiff agreed that the carrier should not be liable for any injury to him upon the

trip unless he * * * should within thirty days after the injury give notice in writing of his claim * * *." In discussing the law the court gave no indication at all that the drover's pass constituted any special consideration to support the time limitation agreement. It is quite significant that none of the many cases that have relied on the Gooch case since it was written, has even mentioned the point, or so interpreted the case.

[8, 9] Appellant's second major point is likewise without merit. Appellant contends that both the thirty and the ninety-day clauses were waived by certain actions of the officers of one of respondent companies. It will be remembered that the alleged injuries were received on January 27, 1934. One of appellant's attorneys, Mr. Sanborn, testified that on January 30, 1934, he had a conversation with Mr. Perrin, respondents' claim agent; that he told Perrin that he was seeking certain information on behalf of Mrs. Hubbard; that he was "there to find out whether it was necessary to file any form of claim, if they had any forms or not, and he said 'No'." Respondents contend that the "No" of Mr. Perrin refers only to the last part of the question and not to the first part. On the motion for a nonsuit the trial court must indulge in all reasonable inferences favorable to plaintiff. Applying this rule it is apparent that the "No" could apply and reasonably does apply to both parts of the question. In the absence of a controlling statute to the contrary, this would constitute an oral waiver of the provision requiring the filing of claim within thirty days. We do not find it necessary to interpret the various federal statutes relied on by both parties to determine whether existing statutes prohibit such waivers. They are not entirely clear. We may assume, for the purposes of this opinion, that the representation made by Perrin that it was not necessary to file a claim, estops respondents from now claiming that the filing of a written claim was necessary. Appellant concedes that such waiver in no way affects the other clause requiring the filing of suit within ninety days. In connection with this clause appellant contends it was waived by a letter from respondents to one of appellant's attorneys, dated August 8, 1934. In that

letter (signed by Mr. Perrin) receipt of a letter from Mr. Hamburger, one of appellant's attorneys, dated July 24, 1934, is acknowledged. After stating that the company had closed its files on the case, the letter continues:

"Our investigation disclosed that if Mrs. Hubbard sustained an injury aboard the Monterey, such injury was the result of her own negligence and we therefore regret that under the circumstances we must deny all liability in connection with her case."

[10, 11] It will be noted that this letter was written over six months after the accident, and long after the ninety-day period fixed for the filing of suit had expired. It is appellant's theory that because the letter mentioned one defense—contributory negligence—it waived all others. The letter does not purport to catalogue respondents' defenses. It indicates on its face no intent to waive defenses not mentioned. No element of estoppel is present because the time for filing suit had long expired. Failure to mention a defense, in the absence of some consideration or element of estoppel, cannot create or recreate an obligation otherwise not existing. Under such circumstances the better reasoned cases, and the weight of authority, is to the effect that such a letter does not constitute a waiver. *W. R. Grace & Co. v. Panama R. Co.*, 2 Cir., 12 F.2d 338; *The Texas Maru*, 2 Cir., 13 F.2d 538; *Cudahy Packing Co. v. Munson S. S. Line*, 2 Cir., 22 F.2d 898; *Ray v. Missouri, K. & T. Ry. Co.*, 96 Kan. 8, 149 P. 397, Ann.Cas.1918B, 1035. The only case cited to the contrary dealing with carrier contracts is *Oelbermann v. Toyo Kisen Kabushiki Kaisha*, 9 Cir., 3 F.2d 5. That case was considered in several of the cases discussed above and expressly disapproved.

For the foregoing reasons it must be held that the provisions of the contract limiting the time to file a claim and to bring suit are valid in all respects, and that, even if the thirty-day period were waived, the ninety-day period was not. Under such circumstances the judgment of nonsuit was proper.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

34 Cal.App.2d 422

LEWIS v. LEWIS et al.

Civ. 11078.

District Court of Appeal, First District,
Division 2, California.

Aug. 31, 1939.

Rehearing Denied Sept. 30, 1939.

Hearing Denied Oct. 30, 1939.

1. Army and navy ☞78

Where war risk policies had not been converted by insured into any one of the standard policies but remained a term policy for successive periods of one year each, right of assignment granted beneficiaries in other policies did not apply. World War Veterans' Act 1924, § 22, 38 U.S.C.A. § 454.

2. Army and navy ☞77(11)

Under the statute providing that, if beneficiary designated in war risk policy should not survive insured or if he should survive him and then die prior to receiving all installments payable to him under the policy, value remaining in unpaid installments should be paid to the estate of insured, where beneficiary died subsequent to insured, unpaid installments payable under the policy vested in estate of insured as of the instant of his death and as an asset thereof were subject to distribution in accordance with intestacy laws of California. World War Veterans' Act 1924, § 303, 38 U.S.C.A. § 514.

3. Army and navy ☞78

Where during probate proceedings of veteran's estate interest of estate in commuted value of war risk policy was regularly ordered to be and was assigned and transferred out of the estate to veteran's father and mother named beneficiaries in policy for valuable consideration, no interest in the policy or proceeds thereof remained on which omnibus clause in decree of distribution could operate, since there is nothing which prohibits such assignment and transfer. World War Veterans' Act 1924, §§ 22, 303, 38 U.S.C.A. §§ 454, 514.

4. Joint tenancy ☞3

A joint tenancy agreement, by which "all notes, bonds, debentures, certificates of indebtedness, and other obligations and evidences of debt belonging to" husband and wife as community property or either as separate property were assigned and set over as joint tenants with right of survivorship, was

sufficient to convert title to all personalty which they or either of them held into one of joint tenancy with right of survivorship.

5. Army and navy ☞77(19)

Where administratrix of veteran's estate for valuable consideration released all claims to war risk policy or to proceeds thereof or to any of the moneys payable thereunder and assigned all such claims to veteran's father and mother who were beneficiaries under war risk policy, whether alleged assignment by its terms applied to past and present claims and not to future claims was a mixed question of law and fact for trial court.

6. Appeal and error ☞1008(3)

Where trial court's construction of instrument appeared to be consistent with true intent of the parties, reviewing court would not substitute another interpretation, though it should seem equally tenable.

7. Army and navy ☞78

Where insured under war risk policy designated father and mother as beneficiaries, who on death of insured paid valuable consideration to estate in return for release of all claims which estate might have under policy, and father after executing joint tenancy agreement with wife died and commuted value of policy was paid to the estate, surviving mother was entitled to the commuted value of the policy by virtue of the assignment by the administratrix, since prohibition against assignment does not extend beyond insured and beneficiary. World War Veterans' Act 1924, §§ 22, 303, 38 U.S.C.A. §§ 454, 514.

Appeal from Superior Court, City and County of San Francisco; Donald Geary, Judge.

Action by Henrietta Lewis against Rosalie G. Lewis as administratrix of the estate of Clarence E. Lewis, deceased and others to recover the commuted value and interest in a policy of war risk insurance. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Esmond Schapiro, of San Francisco, for appellants.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for respondent.

STURTEVANT, Justice.

The defendants have appealed from a judgment in favor of the plaintiff rendered in an action to recover \$2,058, the commuted value of and interest in a policy of life insurance paid by the United States of America to the defendant, Rosalie G. Lewis, as administratrix of the estate of Clarence E. Lewis, deceased. The action was tried before Honorable Donald Geary, Judge of the Superior Court of Sonoma county, presiding in department extra session number two in the city and county of San Francisco. After the trial the judge presiding prepared a written opinion. We have examined the record and the authorities cited by counsel with much care. The written opinion prepared by the trial judge is so clear and convincing that we adopt it as the opinion of this court. It is as follows:

"Clarence E. Lewis, unmarried, on April 9, 1918, became the insured in a yearly renewable term insurance policy for \$10,000 issued by the Bureau of War Risk Insurance. The beneficiaries named therein were his father Edward J. Lewis and his mother Henrietta Lewis, the plaintiff herein. On August 23, 1921, Clarence E. Lewis married Rosalie G. Lewis, defendant herein, and a child, Clare Lewis was the result of that union. On January 15, 1924, Clarence E. Lewis died, and his widow Rosalie G. Lewis became the legal administratrix of his estate. Thereafter, on September 8, 1924, this court by its order in the matter of the Estate of Clarence E. Lewis, deceased, authorized Rosalie G. Lewis, administratrix, to compromise all claims the estate of Clarence E. Lewis might have against the mother and father of said decedent, including 'any and all claims to a certain policy of insurance', being the one here involved. Thereupon, on September 13, 1924, there was paid to defendant herein, as administratrix of the Estate of Clarence E. Lewis, deceased, the sum of \$21,500 in full settlement of all claims the said estate might have against Edward J. Lewis, and Henrietta Lewis, the plaintiff herein. On the same day there was paid to defendant Rosalie G. Lewis by said Edward J. Lewis and Henrietta Lewis the sum of \$2,500 in compromise of any and all claims which said Rosalie G. Lewis, individually might have against said parties. Upon the payment of the above mentioned sums Rosalie G. Lewis, as administratrix, and individually, executed two instruments acknowledging payment and

the purposes thereof. On April 9, 1925, the Estate of Clarence E. Lewis was distributed to Rosalie G. Lewis and the minor child. No mention is made in the decree of distribution of the insurance policy in question, nor of monies due or to become due thereunder, although the decree does include an 'omnibus' clause.

"Subsequent to the death of the insured veteran, his mother and father, as beneficiaries, received the monthly benefit payments as provided in the policy. On April 29, 1937, Edward J. Lewis, father of the deceased veteran, died. At his death there remained the sum of \$2,058 unpaid on the policy which Edward J. Lewis would have received had he lived until January 16, 1944. Shortly before his death, Edward J. Lewis and the plaintiff herein executed a writing wherein they declared that all claims and obligations held by them were their joint property.

"Thereafter and about May 1, 1938, the Bureau of War Risk Insurance, pursuant to the provisions of World War Veterans' Act, §§ 303 and 22 (38 U.S.Code, §§ 514 and 454 [38 U.S.C.A. §§ 454, 514]) paid to defendant the sum of \$2,058 as the commuted value of the unpaid instalments which would have been paid to Edward J. Lewis, plaintiff's husband, had he lived the full instalment period. Plaintiff, mother of deceased, thereupon instituted this action to recover said amount so paid to defendant herein.

"Section 303, of the World War Veterans' Act, 38 U.S.C.A. § 514, as applicable here, provides:

"If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or *if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award: * * **' (Italics by court.)

"The former section 22, of said Act (38 U.S.Code § 454 [38 U.S.C.A. § 454]) provides:

"The compensation, insurance, and maintenance and support allowance payable under Parts II, III, and IV, respectively,

shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts II, III, or IV; and shall be exempt from all taxation. Such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Parts II, III, IV, and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable.

"The provisions of this section shall not be construed to prohibit the assignment by any person to whom *converted* insurance shall be payable under Part III of this chapter of his interest in such insurance to any other member of the permitted class of beneficiaries.' (Italics by court.)

[1] "The policy in question here was never converted by the insured into any one of the numerous standard policies but remained a term policy for successive periods of one year each. Hence the right of assignment granted by section 454 to beneficiaries mentioned in Part III, chapter 10, does not apply here. *Perrydore v. Hester*, 215 Ala. 268, 110 So. 403, 405.

"The defendant herein contends that the written instruments upon which plaintiff relies cannot be construed to apply to, nor include the commuted value of the life insurance policy; and, even granting that these instruments executed by defendant are assignments (as contended by plaintiff) the same are void by reason of the provisions of section 454.

"In the Matter of the Estate of Clarence E. Lewis, deceased, S. F. No. 38846, defendant, as administratrix, on or about September 2, 1924, filed her Petition for Leave to Compromise, wherein was recited, that a certain policy of insurance was issued upon the life of said deceased by the United States Veterans Bureau; that the beneficiaries named in said policy were Edward J. Lewis and Henrietta Lewis, his parents, and the policy was for the aggregate sum of \$10,000 payable in monthly installments to said beneficiaries. By paragraph VIII it is alleged 'Said Edward J. Lewis and Henrietta Lewis have offered to settle and compromise said pending litigation and the whole thereof, and all claims and demands of every kind, character and description whatsoever, including any and all claims to said policy of insurance aforesaid, and to all monies payable thereunder, that at the time of his death, said Clarence

E. Lewis had against them or either of them, or that said petitioner, or the estate of Clarence E. Lewis now has or ever had against said Edward J. Lewis and Henrietta Lewis, and each of them, for or by reason of any matter or thing whatsoever, for the sum of \$21,500 lawful money of the United States.

"Wherefore, your petitioner prays * * * that an order be made authorizing, empowering and directing your said petitioner, as Administratrix of the Estate of said Clarence E. Lewis, deceased, to accept said offer, and for said sum of \$21,500 * * * to settle, compromise and adjust all of said litigation and all claims and demands of every kind, character and description whatsoever that said Clarence E. Lewis ever had, or that your petitioner, or the Estate of Clarence E. Lewis, deceased, ever had, or now has against said Edward J. Lewis and Henrietta Lewis * *.'

"Thereafter, on September 8, 1924, the said court made its order Authorizing Compromise, which reads in part:

"Now, therefore, it is hereby ordered, that said petitioner Rosalie G. Lewis, as administratrix of the Estate of Clarence E. Lewis, deceased, be and she is hereby authorized, empowered and directed * * to settle, compromise and adjust all of said litigation and claims and demands of every kind, character and description whatsoever that said Clarence E. Lewis ever had or that said petitioner as such administratrix, or the Estate of said Clarence E. Lewis, deceased, *ever had or now has against said Edward J. Lewis and Henrietta Lewis* or either of them, *including any claim and all claims to said insurance policy or to any of the proceeds thereof, or to any of the moneys payable thereunder.'* (Italics by the court.)

"As a result of the petition and order mentioned two separate releases and acquittances were executed by defendant, as administratrix and individually which recite in part:

"Know all Men by These Presents

"That I, Rosalie G. Lewis * * * have released and forever discharged, and by these presents do release and forever discharge the said parties of the second part, and their and each of their heirs, executors, administrators and assigns of and from all moneys, dues, accounts, obligations, agreements, damages and all other claims and demands of every kind, character and description whatsoever, both in

law and equity, which, at the time of his death, said Clarence E. Lewis had against said parties of the second part or either of them, or which I * * * have or ever had or the estate of said deceased has or ever has had against said parties of the second part, or either of them for or by reason of any matter or thing whatsoever from the beginning of the world to the date of these presents, including any and all rights or claims *which I, * * * have or ever had or which the estate of said deceased has or ever has had to, through, under or by reason of a certain policy of life insurance* (being the one in question), * * * in which policy the said parties of second part were named as beneficiaries and all claims which I, as administratrix of the estate of said deceased has or ever had through or by reason of premiums paid for such insurance. And *I do hereby waive, surrender and assign* unto the parties of the second part *all right and claim which I as such administratrix may have, or which the estate of said deceased has in or to said insurance and any money now or hereafter payable thereunder.* These releases were witnessed by Theo. J. Roche then attorney for Rosalie G. Lewis, Administratrix. (Italics by court.)

"A fair reading of the Petition for Leave to Compromise, The Order Authorizing Compromise and the 'release and acquittance' executed by defendant both as administratrix and individually when considered together convinces it was the clear intent and purpose of all parties concerned that defendant individually and as administratrix was to, and did, release and assign all past, present, and future claims in all sums due or to become due under the policy. Indeed, no other import can be drawn from the language of the instruments and the facts and circumstances surrounding seem conclusive. As a consideration for the 'release and acquittance' defendant as administratrix, and individually received the sum of \$24,000 cash; not an inconsiderable sum. While it is true this sum was paid to discharge claims other than those arising from the policy, the amount paid and the language of the acknowledgments indicate it was the intent of the parties to effect a final and complete settlement and assignment of all claims of defendant, individually and as administratrix, past, present, and future.

[2,3] "By the terms of the insurance certificate it was expressly provided that it

was subject to the provisions of the War Risk Insurance Act, or any amendments thereto, and of all regulations thereunder, 'now in force or hereafter adopted', which language has been held to include changes in the Act itself as well as in the regulations. It has likewise been held that in view of the peculiar character of the insurance contract between insured and the United States the rights of beneficiaries thereunder were subject to any subsequent modification. *White v. United States*, 270 U.S. 175, 46 S.Ct. 274, 70 Law.Ed. 530, 538. On March 4, 1925, and subsequent to the death of the insured, the Act was amended so to provide if the designated beneficiary should not survive the insured or, if he should survive him and then die prior to receiving all of the instalments payable to him under the policy, the value of the remaining unpaid instalments shall be paid to the estate of the insured. This amendment by its terms was retroactive and in effect as of October 6, 1917. Hence, the value of the unpaid instalments payable under the policy to Edward J. Lewis vested in the estate of Clarence E. Lewis as of the instant of his death, and as an asset thereof was subject to distribution in accordance with the intestacy laws of this state. *Singleton v. Cheek*, 284 U.S. 493-497, 52 S.Ct. 257, 76 Law.Ed. 419-422, 81 A.L.R. 923; *Estate of Schwall*, 123 Cal. App. 106, 110, 10 P.2d 1013, and cases there cited. As an asset of the Estate of Clarence E. Lewis such monies would ordinarily be subject to and distributable by the 'omnibus' clause in the decree of distribution therein. Since, however, during the probate proceedings of said estate the interest of the estate in the commuted value of the policy was duly and regularly ordered to be, and was assigned and transferred out of the estate for a valuable consideration no interest in the policy or the proceeds thereof remained upon which the omnibus clause could operate. Court and counsel must be deemed to have acted in the matter with knowledge of the existing provisions of the War Risk Act, 38 Stat. 711, and the possible effect of amendments thereto. There is nothing in the Act that prohibits such assignment and transfer as is involved here. By the terms of the Act and the amendments thereto the value of the unpaid instalments had vested in the estate and were part and parcel thereof during the course of probate. There remained the mere mechanics of payment by the Bureau to the estate.

By vestment of these monies in the estate of Clarence E. Lewis under the control of the probate court the obvious purpose and the express provisions of the statute were met. The United States had no further interest therein. *Wilson v. Fisher*, Tex.Civ. App., 105 S.W.2d 304, 311, certiorari denied 302 U.S. 746, 58 S.Ct. 264, 82 L.Ed. 577; *Bostrom v. Bostrom*, 60 N.D. 792, 236 N.W. 732, 735. This must be deemed particularly true, where as here, the very purpose of the statutory provision against assignment is not frustrated but properly applied under the guidance and judgment of the probate court.

[4] "On April 28, 1937, the day before his death, Edward J. Lewis and plaintiff herein executed a joint tenancy agreement by which 'all notes, bonds, debentures, certificates of indebtedness and other obligations and evidences of debt' belonging to them as community property, or to either as separate property were assigned and set over to them as joint tenants with the right of survivorship. It appears clear it was the plain intent of the parties to convert title to all the personal property which they, or either of them, held into one of joint tenancy with the right of survivorship. The declaration is sufficient. At all events the deficiency therein—if any there be—is of no direct concern to defendant Rosalie G. Lewis and ought, and will not be permitted to relieve her of any measure of her liability as declared in her written obligation."

[5-7] After the trial court had rendered its judgment, the defendants made a motion for a new trial. They earnestly contended, and now contend, that the alleged assignment by its terms applied to past and present claims and not to future claims. That contention presented a mixed question of law and fact. The trial court, as shown above, ruled against the contention of the defendants. Its construction appears to be consistent with the true intent of the parties and where that is the case a court of review will not substitute another interpretation though it should seem equally tenable. *Kautz v. Zurich General Accident & Liability Ins. Co.*, 212 Cal. 576, 582, 300 P. 34. Again they ear-

nestly claimed, and now claim, that the alleged assignment was null and void. *Waltz v. Waltz*, 121 Ohio St. 46, 166 N.E. 896; *Robertson v. McSpadden*, D.C., 46 F.2d 702. Neither authority supports their contention. In the first case the facts were that Roy O. Waltz, a soldier in the world war, took out the insurance. He designated his father and mother as the beneficiaries. Later he married Dorothy Waltz. On August 9, 1918 he died intestate without issue. On May 30, 1918 he directed his father and mother to pay a part of the insurance to his wife. On December 19, 1927 the father died and shortly afterwards an administrator of the estate of the deceased soldier was appointed. The insurance was commuted and \$3,065 was paid to the administrator of the estate of the insured. Out of that money a family allowance was set aside to the widow of the deceased. That order was affirmed. The judgment was clearly in harmony with the judgment in the instant case and not opposed to any part thereof. In the *Robertson* case the beneficiary attempted to make an assignment and the parties appeared in court and the trial court entered a consent decree approving the purported assignment. On appeal it was held that the purported assignment was prohibited by the provisions of section 454 of Title 38, U.S. C.A. We do not understand either party in the instant case questions that rule. In the instant case the trial court ruled against the defendants and in effect held that section 454 does not extend the exemption beyond the insured and beneficiary. Its ruling was clearly correct. Since the findings were signed similar questions have arisen and at this time the question is not even an open one. *Pagel v. Pagel*, 291 U.S. 473, 476, 54 S.Ct. 497, 78 L.Ed. 921; *Walker v. Queener*, Tenn.Supp., 124 S.W.2d 236; *In re Henry's Estate*, 153 Misc. 208, 275 N.Y.S. 454; *Hale's Adm'r v. Taylor*, 235 Ky. 435, 31 S.W.2d 695; *Eblen v. Jordan*, 161 Tenn. 509, 33 S.W.2d 65.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

34 Cal.App.2d 393

**WATSON v. STOCKTON MORRIS PLAN
CO. et al. (three cases).
Civ. 6009, 6030.**

District Court of Appeal, Third District,
California.

Aug. 30, 1939.

Hearing Denied Oct. 26, 1939.

1. Building and loan associations §6(2)

Where assignment of savings and loan association passbook to secure assignee who paid assignor's note authorized sale of passbook on assignor's failure to pay note, surplus remaining after payment of note and costs of sale to be payable to assignor, assignee did not acquire title to entire savings account by virtue of purported sale of account as pledge after account had been converted, since assignment was a conditional assignment and balance of proceeds after the sale belonged to assignor. Civ.Code, §§ 3000 et seq., 3336.

2. Pledges §36

Where an assignment contract securing assignee specifies that assignee shall receive only limited interest in property sufficient to compensate him for money expended and costs, remainder to be paid over to assignor, in assignee's suit for conversion, assignee can recover only a sum which will fully compensate him for detriment sustained from the transaction. Civ.Code, §§ 3000 et seq., 3336.

3. Building and loan associations §6(2)

Where savings and loan association passbook was assigned pro tanto to secure assignee for expenses incurred in paying assignor's note, and depositary, with knowledge of assignment, issued duplicate passbook to assignor who withdrew entire deposit, assignee, in conversion action, could recover only amount of expenditures incurred in paying note and in selling passbook.

4. Judgment §725(1)

Where savings and loan association passbook was assigned pro tanto to secure assignee for expenses incurred in paying assignor's note, and depositary, with knowledge of assignment, issued duplicate passbook to assignor who withdrew entire deposit, and assignee recovered for all expenditures in conversion action, assignor was thereafter precluded from making any claim against assignee for proceeds of sale of passbook in excess of expenditures.

5. Building and loan associations §6(2)

In action for conversion of deposit, where savings and loan association passbook was assigned pro tanto to secure assignee for expenses incurred in paying assignor's note, evidence authorized finding that depositary wrongfully converted deposit by issuing duplicate passbook to assignor with knowledge of assignment and permitting assignor to withdraw entire deposit.

6. Trover and conversion §4

Conversion lies against one who, without consent of owner, wrongfully exercises dominion or control over owner's property detrimental to and in conflict with right of possession or vested title which owner has therein.

7. Building and loan associations §6(2)

Relationship between savings and loan association and its depositor is primarily that of debtor and creditor.

8. Trover and conversion §2

Where relationship of debtor and creditor only exists, conversion of funds representing indebtedness will not lie against debtor unless he holds deposit in a fiduciary capacity and is bound to return identical money to owner.

9. Building and loan associations §6(2)

In action against depositary for conversion of deposit, where savings and loan association passbook was assigned pro tanto to secure assignee for expenses incurred in paying assignor's note and depositary issued duplicate passbook to assignor who withdrew entire deposit, evidence supported finding that depositary had notice that assignee claimed title to passbook prior to issuance of duplicate.

10. Building and loan associations §6(2)

An assignee of savings and loan association passbook who notified depositary of assignment at depositary's principal place of business was not required to notify depositary at its branch office where deposits were made as respects depositary's liability for conversion upon issuance of duplicate passbook to assignor who thereupon withdrew deposit.

11. Banks and banking §301(1)

A savings account, being a "chose in action," may be assigned with or without a delivery of passbook.

[Ed. Note.—For other definitions of "Chose in Action," see Words & Phrases.]

12. Banks and banking Ⓒ301(1)

A delivery of passbook together with formal written assignment of account represented by passbook is the best evidence of assignment.

13. Banks and banking Ⓒ129

Assignment of bank account carries with it all remedies which assignor possessed, including right to sue bank for misappropriation of funds.

14. Banks and banking Ⓒ301(1)

The wrongful conversion of passbook carries with it no title to account represented thereby, since wrongful transfer of passbook is void.

15. Banks and banking Ⓒ301(1)

The real owner of converted passbook may maintain action, independently of his possession of passbook, to establish his title to account represented thereby.

16. Building and loan associations Ⓒ6(2)

In action by assignee of savings and loan association passbook against depository for conversion of deposit, depository, which had issued, upon an affidavit known to be false, a duplicate passbook to assignor and which had paid assignor entire deposit, thereby waived notice of proposed withdrawal of funds by assignee. St.1931, p. 500, § 6.01, as amended by St.1933, p. 1095, § 4.

17. Banks and banking Ⓒ305

Notice of withdrawal of savings funds or presentation of passbook upon withdrawal may be waived by conduct of officers of savings bank.

18. Banks and banking Ⓒ154(1)

Trover will not ordinarily lie to recover money deposited in a bank where relationship between plaintiff and defendant is that of debtor and creditor.

19. Building and loan associations Ⓒ6(2)

In action by assignee of savings and loan association passbook against assignor and depository to determine ownership of passbook and account represented thereby, allegations that assignee was real party in interest and that he was owner and holder of passbook and account represented thereby, no part of which had been paid, supported judgment for assignee for expenses incurred in paying assignor's note.

Suits for conversion of a savings account by Stanley E. Watson against the Stockton Morris Plan Company and others. From the judgment, the plaintiff appeals in the first action, and from the judgment in the second action, plaintiff and the Pacific States Savings & Loan Company appeal.

Affirmed.

For prior opinion, see 86 P.2d 927.

Erling S. Norby, of Marysville, and A. B. Reynolds, of Nevada City, for Watson.

Mace & Tuthill, of Los Angeles, for Pacific States Savings & Loan Co. et al.

PER CURIAM.

On rehearing, which was granted for the reason that both parties petitioned for it, we have again carefully examined the entire record. We are persuaded that the original opinion of this court correctly determines the issues presented, and we therefore adopt that opinion in toto.

The appellant, Stanley E. Watson, strenuously contends that both the trial court and this court erred in determining that he did not acquire title to the entire savings account involved in this litigation by virtue of his sale of that account as a pledge under the provisions of section 3000 et seq. of the Civil Code. We are unable to support that theory of the appellant for the reasons that this is a suit for conversion which the complaint and findings declare occurred on March 20, 1936, and which upon adequate evidence we have held to be true. The sale of the account as a pledge did not occur until three months later. The sale of the account as a pledge was made under the express terms of a written assignment of the account which was conditional and limited the title to that portion thereof which is sufficient to pay the note and accrued interest, the costs of sale and counsel fees, specifically providing that "*the surplus, if any, being payable to the undersigned*", assignors.

The pledge was therefore limited by the express terms of the written assignment. The original opinion is therefore adopted as follows:

"The plaintiff and the defendant Pacific States Savings and Loan Company have separately appealed from a judgment which was rendered jointly against the defendants, except The Stockton Morris Plan Company, in a suit for conversion of a savings account of \$4,994.26.

Appeal from Superior Court, Sutter County; Harry Deirup, Judge.

"The plaintiff also gave separate notice of appeal from a judgment rendered against him after the demurrer of the defendant The Stockton Morris Plan Company had been sustained without leave to amend the pleading. That judgment was to the effect that plaintiff take nothing by his action against that company.

"The court found that the passbook representing the amount of credit which Mary C. Thomas owned in a savings account with the Pacific States Savings and Loan Company, had been assigned to the plaintiff as a pledge, only, to secure the repayment to him of money advanced to pay a note of Mrs. Thomas in the amount of \$2,000, together with interest and costs, and that the plaintiff was entitled to recover only the sum of money which he had expended on that account.

"Mary C. Thomas owns a savings fund in the amount of \$4,994.26, deposited with the Pacific States Savings and Loan Company, a corporation, of San Francisco, which account was represented by a passbook numbered 17-A-87. October 25, 1933, for value received, Mrs. Thomas and her son Roy S. Thomas executed and delivered to The Stockton Morris Plan Company, a corporation, their promissory note for \$2,000, together with the passbook and a written assignment of the savings account, to be held as a pledge to secure the payment of the note upon the terms therein expressed. The assignment reads in part:

"I, I/We hereby deposit with The Stockton Morris Plan Company, as collateral security for the payment of that certain promissory note in the sum of Two Thousand Dollars, * * * the following property, to-wit:—Pacific States Savings & Loan Company Pass Book #87, \$4,994.26. * * *

"4. In case that I/we fail to make payment of said promissory note, or any installments thereon when due, * * *, than I/we hereby invest the payee hereof with the power irrevocable to sell at any time the whole or part of said pledged property, either at public or private sale, at its discretion, without the giving of notice of any kind in advance of such sale. * * * The proceeds of the sale of said securities, in whole or in part, shall first be applied to the expenses of making said sale, costs of collection and attorney fees; the balance thereof shall be applied pro tanto to the payment of said promissory note and interest accrued thereon, * * *

the surplus, if any, being payable to the undersigned. * * *

"6. On payment of the above note and interest according to its terms, and all charges in connection therewith, this agreement shall be void and the above specified pledged property shall be returned unto me/us.'

"Two days later the holder of the note and collateral security notified the Pacific States Savings and Loan Company in writing of the assignment to the payee, as pledgee, of the ownership and possession of the pass book and savings account, and requested the transfer thereof on the books of the company in accordance therewith. The savings company acknowledged in writing the receipt of that notice and asserted that it had 'caused an entry to be made upon the books of this corporation accordingly'.

"Mrs. Thomas, being unable to meet the payments on the promissory note, requested the plaintiff Stanley E. Watson to do so and he thereupon paid the entire note in ten installments from January to November, 1934. April 10, 1934, Mrs. Thomas and her son executed and delivered to The Stockton Morris Plan Company, the payee and holder of the note, the written authorization to deliver to plaintiff the pass book and canceled note when the indebtedness was fully satisfied, which request reads as follows:

"'By reason of Mr. Stanley E. Watson having made certain payments to you upon our obligation; namely, a \$2,000.00 note dated October 25, 1933, and secured by assignment of Pacific States Savings & Loan Company Pass Book #87; we desire that upon full payment of the said obligation, that you deliver to Mr. Stanley E. Watson the aforesaid note and Pacific States Savings & Loan Company Pass Book.

"Signed this 7th. day of Feb. 1934.

"(Signed) Mary C. Thomas

"Roy S. Thomas'

"January 28, 1935, after the note had been paid, The Stockton Morris Plan Company endorsed the note as fully paid, and delivered it to Stanley E. Watson, together with the pass book and the assignment to plaintiff of the entire savings account represented thereby. In February, 1935, the plaintiff notified the Pacific States Savings & Loan Company, in writing, that the Thomas pass book and assignment of account represented thereby had been

transferred to him and that he was the owner thereof. The following month Mrs. Thomas and her son filed with the Savings and Loan Company their sworn affidavits averring that she was the owner of the savings account of the principal sum of \$4,994.26; that the pass book numbered 17-A-87 was lost and that the account represented thereby had not been pledged, assigned or transferred. The bank possessed facts charging it with knowledge that Mrs. Thomas was not the owner of the account and that the affidavit was false. In spite of that knowledge, the Savings & Loan Company issued to Mrs. Thomas, on March 26, 1935, a duplicate pass book for the full amount of said account, and on application therefor, paid to Mary C. Thomas, on April 2, 1935, the sum of \$4,108.98, in full for said account, receiving and canceling her duplicate pass book and the account represented thereby.

"After fully paying the note and receiving from The Stockton Morris Plan Company the assignment of the pass book and account represented thereby, the plaintiff Stanley E. Watson demanded of Mrs. Thomas repayment of the money which he had expended on that account, which was refused. He then consulted his attorney, Erling S. Norby, who wrote to Mrs. Thomas three different letters, dated, respectively, February 21st, March 28th and June 2d, 1936, demanding of her repayment of the money expended by him in the aggregate sum of \$2,287.87, or an absolute transfer and conveyance to him of her savings account held as collateral security therefor, which she failed and refused to do. The plaintiff then proceeded to sell the savings account as a pledge under the provisions of section 3000 et seq. of the Civil Code, and transferred and assigned the account to N. Swift, who is not a party to this suit. The pass book and account were thereafter reassigned to the plaintiff.

"Upon formal demand in writing for Mary C. Thomas and her son to pay the indebtedness then amounting to \$2,287.87, after learning of the previous issuance of the duplicate pass book, and the payment to Mrs. Thomas on April 2, 1935, of the sum of \$4,108.98, in full for her account with the Pacific States Savings & Loan Company, this suit for conversion was brought March 19, 1937. The cause was tried by the court sitting without a jury. Findings were adopted in accordance with

the preceding statement of facts. The court further found that plaintiff had paid the note at the request of Mrs. Thomas as alleged, and had received an assignment of the pass book and savings account which he held as pledgee to collaterally secure him for the money expended; that with full knowledge of the assignment, by subsequently issuing a duplicate pass book and paying to Mrs. Thomas the account in full, she and her son Roy and the Pacific States Savings and Loan Company, who participated in that transaction, thereby converted the savings fund to their own benefit. Judgment was accordingly rendered in favor of the plaintiff for the ten installments paid by him on the note, together with interest thereon and the costs incurred. From that judgment both the plaintiff and the Pacific States Savings and Loan Company have appealed.

[1] "The plaintiff contends that he became the owner of the entire savings account of \$4,994.26 by virtue of the title acquired at the sale of the pledge pursuant to section 3000 et seq., of the Civil Code, and that he is therefore entitled to judgment for the full amount of the value of the savings account. We are of the opinion this is not true under the circumstances of this case. The plaintiff's contention is inconsistent with the language of the assignment, and with the specific finding of the court that the account was actually converted on March 26, 1936, three months before the purported sale. The language of the original assignment of the pass book and account authorizes the sale thereof for failure to pay the note according to its terms. From the proceeds of sale it is provided the costs shall be first paid and that 'the balance thereof shall be applied pro tanto to the payment of said promissory note and interest accrued thereon, *the surplus being payable to the undersigned*' assignors, Mary C. Thomas and Roy S. Thomas. This language constitutes a conditional assignment to secure the pledgee for the amount of money paid by him on the note, together with interest and costs of sale, only, and that the balance of the proceeds of sale shall belong and be paid to the assignor of the account, Mary C. Thomas. The complaint alleges and the court found that the conversion occurred on March 26, 1936. Section 3336 of the Civil Code provides for the measure of damages in a suit for conversion as follows:

"The detriment caused by the wrongful conversion of personal property is presumed to be:

"First—The value of the property at the time of the conversion, with the interest from that time, *or, an amount sufficient to indemnify the party injured* for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; * * *

"In 21 California Jurisprudence 342, section 48, it is said regarding the measure of damages in a suit for conversion:

"A pledgee may maintain an action for damages against one converting property pledged. * * * He may, in an action against a stranger, recover the full value of the property, as he is answerable over to the pledgor for the surplus. *But if the property is converted by the owner or by anyone acting in privity with him, he may recover only the value of his special interest in the pledge.*"

"In the case of California Cured Fruit Association v. Ainsworth, 134 Cal. 461, 66 P. 586, which was a suit for conversion of a crop of prunes which was 'sold and transferred to plaintiff', the court said with respect to the measure of damages:

"The rights of the plaintiff are to be measured by the terms of its contract * * *

"The general rule in regard to the measure of damages for the conversion of goods when the plaintiff is the general owner, or is accountable over to another for the goods, is their value at the time of conversion; *but, if the plaintiff has only a special interest or limited property in the goods, he can recover from the owner of the remaining interest, or from one claiming under such residuary owner, only to the extent of his interest therein.* The amount of damages which he is entitled to recover is such as will indemnify him for the loss he has sustained in not obtaining the possession of the goods. *Suth. Dam. § 1136; Benjamin v. Strengle, 13 Ill. 466; Sheldon v. Southern Express Co., 48 Ga. 625; Burk v. Webb, 32 Mich. 173; Fowler v. Gilman, 13 Metc. (Mass.) 267; King v. Bangs, 120 Mass. 514; White v. Allen, 133 Mass. 423.*"

"Likewise, in the case of Goldberg v. List, 11 Cal.2d 389, 79 P.2d 1087, 1090, 116 A.L.R. 900, it is said with relation to

a conditional sales contract for personal property:

"The rights and liabilities of the parties to a conditional sales contract are controlled by the terms of the particular contract under which they are bound. Some of such contracts contain provisions for continued liability after the retaking of possession of the property by the vendor. If so, the vendee therein should be permitted to recover against the convertor of the personal property to the extent to which the vendee continues liable to the conditional sales vendor.'

[2] "Under a contract like the assignment in the present case which clearly specifies that the assignee shall receive only a limited interest in the property sufficient to compensate him for the money expended and his costs, *wherein it is expressly provided the remainder of the proceeds shall be paid to the assignor*, in a suit for conversion against the vendor, as distinguished from a suit to quiet title to the property, it appears to be just and in accordance with reputable authorities that the plaintiff should be limited in the amount he may recover under such circumstances to a sum which will fully compensate him for the detriment sustained on account of the transaction.

[3, 4] "We therefore conclude the plaintiff in this case was not entitled to recover more than the sum which was awarded to him by the judgment. While it is true that under the terms of the contract the plaintiff was accountable to Mrs. Thomas for the balance of the proceeds of sale, after he had been fully compensated, he received no such balance. On the contrary, she is in possession of the entire proceeds of the savings account wrongfully received by her upon unlawfully converting and transferring the account to the Pacific States Savings and Loan Company by fraudulent means. The judgment precludes her from thereafter making a valid claim against the plaintiff for further reimbursement. The terms of the contract and the equities of the case are entirely fulfilled by the judgment which was rendered.

"The appellant Pacific States Savings and Loan Company, contends that the evidence fails to support the finding and judgment that it was guilty of conversion of the pass book and account represented thereby; that the relationship of debtor

and creditor which existed between it and the owner of that account precludes the maintenance of an action against the debtor for converting the account.

[5] "We are of the opinion the evidence adequately supports the finding and judgment for damages against the Pacific States Savings and Loan Company for conversion of the pass book and for misapplying and paying to the wrong person the account represented thereby.

[6] "Conversion lies against one who without the consent of the owner wrongfully exercises dominion or control over his property detrimental to and in conflict with the right of possession or vested title which the owner has therein. *McCaffey Canning Co. v. Bank of America*, 109 Cal.App. 415, 424, 294 P. 45; *Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp.*, 1 Cal.2d 121, 129, 34 P.2d 139; *Hull v. Laugharn*, 3 Cal.App. 2d 310, 315, 39 P.2d 478. In *Poggi v. Scott*, 167 Cal. 372, 375, 139 P. 815, 816, 51 L.R.A.,N.S., 925, it is said that:

"The foundation for the action of conversion rests * * * upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results."

[7] "It is true that the relationship between the depositor in a savings and loan association and the institution with which the money is deposited, is usually and primarily that of debtor and creditor, similar to the deposits of funds in a savings bank. In *re Western States Building-Loan Association*, D. C., 50 F.2d 632; *Aberdeen Savings & Loan Association v. Chase*, 157 Wash. 351, 289 P. 536, 290 P. 697, 71 A.L.R. 232; 7 Cal.Jur. 863, sec. 900; *Wells v. Black*, 117 Cal. 157, 48 P. 1090, 37 L.R.A. 619, 59 Am.St.Rep. 162; *City of Los Angeles v. State Loan & Trust Co.*, 109 Cal. 396, 42 P. 149.

"With respect to the relationship which exists between a depositor and a savings bank, it is, however, said in 7 Corpus Juris, page 863, section 906:

"It is difficult if not impractical to define accurately, for all purposes, the legal relation that exists between a savings bank and its depositors, for while the courts have frequently stated the character of this relation, it has usually been with respect to the particular circumstances presented by the particular case under consideration. Thus it has been said that the

relation is simply that of debtor and creditor; but on the other hand a number of cases considered that the relation partakes largely of the character of a trust by the bank for its depositors; and it has also been considered that the relation of the depositor to the bank is analogous to that of stockholders in banks of discount or even in business corporations.' See 4 Cal. Jur. 190, sec. 83.

[8] "It has been held, as a general rule, that, where the relationship of debtor and creditor only exists, conversion of the funds representing the indebtedness will not lie against the debtor, unless he holds the deposit in a fiduciary capacity and is bound to return to the owner the identical money. *Rothchild v. Schwarz*, 28 Misc. 521, 59 N.Y.S. 527; *Wright v. Holmes*, 100 Me. 508, 62 A. 507, 9 L.R.A.,N.S., 769, 4 Ann.Cas. 583; note, 50 A.L.R. 1171; 26 R.C.L. 1102.

"Under the circumstances of the present case, however, there existed something more than a mere relationship of debtor and creditor between the plaintiff and the Pacific States Savings and Loan Company. With notice and implied knowledge that the plaintiff held the pass book and an equitable assignment of the account of Mrs. Thomas represented thereby, to secure the repayment of the money he had expended in satisfaction of the note, the Pacific States Savings and Loan Company was a party to procuring from Mrs. Thomas a false affidavit upon which it wrongfully issued to her a duplicate pass book in lieu of the original one held by the plaintiff, representing funds on deposit in the amount of \$4,994.26 and accumulated interest, and then discounted and wrongfully paid to her in full satisfaction of her claim the sum of only \$4,108.98. The company profited by that transaction to the extent of several hundred dollars. It may reasonably be assumed the company and Mrs. Thomas, conspired to defeat the plaintiff's just claim for reimbursement of \$2,287.87, paid by him at the request of Mrs. Thomas to satisfy her promissory note, and to thereby destroy the effect of the equitable assignment of the pass book and account represented thereby, which were held by Mr. Watson as collateral security for the payment of her indebtedness. The conduct of Mrs. Thomas in that transaction was certainly reprehensible. Except for the aid which was given to her by the Pacific States Savings and Loan Company,

she probably would not have thus succeeded in circumventing the valid security which she had given to the friend who was kind enough to pay her debt. It appears that the affidavit of the lost pass book was prepared for her by the company. That affidavit not only averred that Mrs. Thomas had misplaced or lost the pass book, but it also asserted that:

"I have not transferred, assigned, pledged or set over said Certificate (pass book), either in whole or in part, nor any of the money represented thereby, to any person, firm or corporation, and that no person, firm or corporation (other than myself) has any interest or claim upon said certificate, or the money represented thereby."

"The essential averments of that affidavit were false, as Mrs. Thomas well knew. Both the Pacific States Company and Mrs. Thomas knew she had assigned and transferred the pass book and the account represented thereby to The Stockton Morris Plan Company to secure her note. Mrs. Thomas also knew exactly where that pass book was. She had directed The Stockton Morris Plan Company in writing to deliver it, together with her canceled note and assignment, to the plaintiff. That transaction constituted an equitable assignment of the account to the plaintiff. There is ample evidence that the Pacific States Company also knew of the delivery of those instruments to Mr. Watson. Mr. Watson personally went to the principal place of business of the Pacific States Company at San Francisco, with Miss Engel, in March, 1935. He was first introduced to Mr. Kellogg, an agent of the company who occupied a desk in an outer office of the principal place of business. The manager of the company testified that Kellogg then represented the company, 'to contact people on the outside of the office with respect to complaints which they may have.' Kellogg, however, told the plaintiff that the transfer of the Thomas account on the books of the company was outside of his duties. He then took the plaintiff and Miss Engel into an inner office, and introduced them to a man who held himself out as an agent of the company with authority to transact the business of satisfying the plaintiff's claim to an assignment of the account to secure Mrs. Thomas' indebtedness to him. Neither of these witnesses remembered the name of that representative of the company. He did not advise

them that they should present their claim to the branch office at Sacramento. That man informed the plaintiff the company could undoubtedly adjust the claim, but advised plaintiff that the best way to proceed to avoid controversy or trouble would be to secure a direct written assignment from Mrs. Thomas. The plaintiff then exhibited to that officer of the company the pass book and the original assignment of the account to The Stockton Morris Plan Company, upon which there was an endorsement signed by the last-mentioned company, dated January 28, 1935, as follows:

"For value received, without recourse, we hereby assign our right, title, and interest in this Collateral Pledge Agreement to Stanley E. Watson."

"The representative of the company then furnished the plaintiff with duplicate printed forms of assignment of the account from Mrs. Thomas to the plaintiff. The name of the plaintiff as assignee and the principal amount of the account were written in the forms by the agent of the company."

[9, 10] "The foregoing facts furnish evidence of sufficient notice to the company that the plaintiff claimed title to the pass book and account represented thereby. It was not necessary to also formally notify the company at its branch office at Sacramento as a prerequisite to the right to maintain this action. The San Francisco office was the principal place of business of the corporation."

[11-15] "A savings account being a chose in action may be assigned with or without a delivery of the pass book though such assignment is best evidenced by a delivery of the pass book together with a formal written assignment of the account. 2 Zollmann, Banks and Banking, Perm. Ed., p. 356, § 1205. That is exactly what was done in the present case. The assignment of the account carries with it, and confers upon the assignee, all the remedies which the assignor possessed, including the right to sue the bank for a misappropriation of the funds. Winchester v. Howard, 136 Cal. 432, 445, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153; 2 Zollmann, Banks and Banking, Perm. Ed., p. 358, § 1205. The wrongful conversion of a pass book carries with it no title to the account represented thereby. The wrongful or fraudulent transfer of a pass book is void. 7 Cal. Jur. 863, sec. 900. The real owner may maintain an action independently of his possession of the

pass book, to establish his title to the account represented thereby.

[16,17] "It is contended the plaintiff is not entitled to judgment in this case against the Pacific States Savings and Loan Company, for the reason that he failed to give a written notice of his proposed withdrawal of the funds six months in advance, as required by section 6.01 of the Building and Loan Association Act of California. Stats.1931, p. 483, and amendments; 1 Deering's Gen.Laws of California of 1937, p. 554, Act 986, St.1933, p. 1095, § 4. It is true that the plaintiff did not furnish the company with written notice of the withdrawal of the fund six months in advance. That notice, however, was waived by the conduct of the company in issuing, upon a false affidavit, the duplicate pass book and paying to Mrs. Thomas the sum of \$4,108.98 in full satisfaction of her entire claim. It is apparent that the claim of the plaintiff would not have been recognized or paid under any circumstances with or without notice. When the pass book and claim were presented for payment at the principal place of business of the company in San Francisco it was refused, not for lack of notice, but for lack of a formal executed assignment from Mrs. Thomas and her son Roy to the plaintiff. More than a year elapsed after that demand for payment was made before this action was commenced. Notice of the withdrawal of savings funds or the presenting of the pass book, which is ordinarily required, may be waived by the conduct of officers of a savings bank. 7 C.J. 867, § 912; Mallett v. Tunncliffe, 102 Fla. 809, 136 So. 346, 137 So. 238, 80 A.L.R. 785, 793; Ruffino v. Queen Ins. Co., 138 Cal. App. 528, 535, 33 P.2d 26, 883. In 7 Corpus Juris, supra, it is said in that regard:

"Among the usual rules of savings banks is one whereby they reserve to themselves the right to require of the depositor notice for a specified period of his intention to withdraw his deposit before he may become entitled to a return of his money. It has been said that such provision is not for the benefit of the bank solely, but that it is intended also to protect the depositor against fraud or forgery. The bank, through its appropriate officers, may waive the right to the notice of withdrawal stipulated for in the by-laws; and if a bank refuses to pay on the ground that the money already has been paid to another, such notice need not be given."

"In section 919 of the last-cited authority it is further said:

"Such a rule (that the bank is exonerated from liability by payment of funds to the person presenting the bank book) cannot, however, relieve a bank from its obligations to exercise care and diligence to prevent payment to the wrong person; and where the bank has been negligent in this respect, a payment does not release it from liability to the true owner of the deposit even though the person receiving payment presented the pass book."

"Regarding the waiver of the ordinary rule requiring the presenting of the pass book when funds are withdrawn from a savings bank, it is said in the Mallett case, supra:

"The rule as to the presentation of the bank book was one that could be waived. We hold that it was waived in this case when the bank refused Mrs. Mallett's requisition for withdrawal of her deposit, not on that ground, but on another ground."

[18,19] "While it is true that trover will not ordinarily lie to recover money deposited in a bank where the relationship between the plaintiff and defendant is that of debtor and creditor, we are of the opinion the findings of the court in this case that the appellant, Pacific States Savings and Loan Company, was guilty of conversion is amply sustained by the evidence, since by either tort or design the bank wrongfully exercised dominion and control over not only the genuine pass book, but the account which it represents, and by discounting and cashing the account for a sum less than its real value, to the profit of the company. But, regardless of the application of that principle, the real action is one to determine the ownership and the right to possession of the pass book and the account represented thereby, to the extent of the plaintiff's indebtedness for the security of which he held an equitable assignment of both the book and the account. That was the theory upon which the cause was tried, and that is the effect of the findings adopted and the judgment which was rendered, which are adequately supported by the pleadings. The plaintiff pleaded that he is the real party in interest of the property in question and that he is the owner and holder of the pass book and the account which is represented thereby, no part of which has been paid. That is sufficient to support the judgment under the circumstances of this case, even though it be held

that there was not a technical conversion of the account on the part of the Pacific States Savings and Loan Company.

"There is no merit in the separate appeal of the plaintiff from the judgment which was rendered May 5, 1937, following the order sustaining the demurrer of the defendant The Stockton Morris Plan Company to the complaint without leave to amend. That separate appeal is evidently waived since it is not discussed in the briefs on appeal. The complaint alleges no cause of action against that defendant. That company merely loaned the money represented by the promissory note to Mrs. Thomas and her son Roy, and took their assignment of the pass book and savings account as collateral security for payment of the note. The note was fully paid to that company by Watson, and transferred with the collateral security to him at the request of Mary C. Thomas. There is nothing in the allegations of the complaint creating a liability against The Stockton Morris Company on account of the transaction. The demurrer was properly sustained and the judgment dismissing the action against that company was properly rendered."

The judgments are affirmed.



34 Cal.App.2d 408

SECURITY FIRST NAT. BANK OF LOS ANGELES v. SARTORI et al.
Civ. 2309.

District Court of Appeal, Fourth District,
California.
Aug. 30, 1939.

1. Execution ⇨129

Where affidavit of employee of counsel for execution creditor, desiring to levy on property covered by a chattel mortgage, alleged that on a certain date judgment debtors gave a duly recorded chattel mortgage to a third party and that more than four years had elapsed since filing and recording of such mortgage and that therefore the mortgage was of no effect as to execution

creditor, such affidavit was sufficient to comply with statute concerning the levy of attachments and executions on property covered by chattel mortgages, although affidavit did not specifically state mortgage had not been re-recorded or that execution creditor had filed necessary indemnity bond. Civ. Code, §§ 2957, 2969.

2. Execution ⇨129

The statute providing, in substance, that, when a creditor of a chattel mortgagor desires to levy an execution or attachment on the mortgaged property, such creditor shall deliver to officer making levy a sufficient indemnity bond in double the amount of mortgage debt or double the value of mortgaged property, as officer may determine and require, does not require an execution creditor to anticipate trial court's findings on question of value of mortgaged chattels. Civ.Code, § 2969.

3. Sheriffs and constables ⇨157(4)

Although the indemnity bond required, by statute, of a creditor desiring to levy execution or attachment on property covered by a chattel mortgage is for the indemnification of both the sheriff and chattel mortgagee, in event of an unlawful levy, the officer is liable to mortgagee for any misfeasance on his part under his official bond. Civ.Code, § 2969.

4. Attachment ⇨164

Execution ⇨129

Under statute requiring creditor of a chattel mortgagor, desiring to levy an attachment or execution on the mortgaged property, to deliver to officer making levy a sufficient indemnity bond in double the amount of the mortgage debt or double the value of mortgaged property, as officer may determine and require, the Legislature has invested the officer making the levy with authority to determine, in a preliminary way, the value of mortgaged property in order to determine amount of undertaking to be required of creditor. Civ.Code, § 2969.

5. Execution ⇨129

Under statute requiring creditor of a chattel mortgagor, desiring to levy an attachment or execution on the mortgaged property, to deliver to officer making the levy a sufficient indemnity bond in double the amount of mortgage debt or double the value of mortgaged property, as officer may determine and require, if in making his determination of the value of the mortgaged property the officer makes a bona fide use of

his judgment, that is all that the law demands, but if officer is guilty of misconduct in the matter his liability therefor on his official bond is presumably sufficient protection for mortgagee. Civ.Code, § 2969.

6. Execution ⇨129

The validity of the levy of an execution on cattle covered by a chattel mortgage was not affected by the fact that valuation placed on cattle by officer in determining amount of indemnity bond to be required from execution creditor was only one-half the value subsequently found correct by trial court, in absence of fraud on part of creditor. Civ. Code, § 2969.

7. Property ⇨2

A lender, who has taken a mortgage of personal property and has had it executed and recorded as required by law, has acquired a "right of property." Civ.Code, § 2957.

[Ed. Note.—For other definitions of "Right of Property," see Words & Phrases.]

8. Constitutional law ⇨191

The time following the maturity of a cause of action allowed for commencing such action may be cut down by legislation enacted subsequent to the contract or occurrence giving rise to the cause of action, provided only that after the effective date of such legislation reasonable time still remains for commencing the action.

9. Chattel mortgages ⇨194

Under statutes requiring chattel mortgages to be filed or recorded, the filing or recording is equivalent of taking possession by the mortgagee and the mortgage is valid as against all who become creditors of mortgagor after such filing or recording, unless mortgage can be declared invalid upon ground of fraud or for some reason other than that it was not filed or recorded. Civ. Code, § 2957.

10. Chattel mortgages ⇨196

Under statutes requiring the refiling or re-recording of chattel mortgages within a certain period, failure to refile or re-record a mortgage within such period has the same legal effect as if the mortgaged property were returned by mortgagee to possession of mortgagor and, as to creditors of the mortgagor, whether prior or subsequent, the property is freed from the mortgage lien and may be levied upon. Civ.Code, § 2957.

11. Chattel mortgages ⇨154, 196

The statutes of 1935 and 1937 providing, in effect, that chattel mortgages must be re-recorded within four years from the last recording or re-recording thereof or in default of such re-recording shall be void as against creditors of mortgagor and subsequent purchasers in good faith and for value were to be treated as going to the remedy only and not to the substantive right of a chattel mortgagee under a previously existing valid and recorded chattel mortgage. Civ.Code, § 2957.

12. Chattel mortgages ⇨133, 195 Constitutional law ⇨169

The statutes of 1935 and 1937 providing, in effect, that chattel mortgages must be re-recorded within four years from the last recording or re-recording thereof or in default of such re-recording shall be void as against creditors of mortgagor and subsequent purchasers in good faith and for value, did not, when applied to a chattel mortgage executed and recorded in 1932, violate the obligation of contracts clause of the federal constitution. Civ.Code, § 2957; U.S.C.A. Const. art. 1, § 10.

13. Constitutional law ⇨307

The statutes of 1935 and 1937 providing, in effect, that chattel mortgages must be re-recorded within four years from the last recording or re-recording thereof or in default of such re-recording shall be deemed as against creditors of mortgagor and subsequent purchasers in good faith and for value do not, when applied to a chattel mortgage executed and recorded in 1932, violate the due process clauses of the federal and state Constitutions. Civ.Code, § 2957; U.S.C.A.Const. Amend. 14, § 1; Const.Cal. art. 1, § 13.

14. Chattel mortgages ⇨133, 195

The statutes of 1935 and 1937 providing, in effect, that chattel mortgages must be re-recorded within four years from the last recording or re-recording thereof or in default of such re-recording be deemed void as against creditors of mortgagor and subsequent purchasers in good faith and for value, although not precisely "statutes of limitation" within ordinary use of quoted term, are strongly analogous to such statutes as regards validity thereof. Civ.Code, § 2957.

[Ed. Note.—For other definitions of "Statute of Limitation," see Words & Phrases.]

15. Chattel mortgages ⇨195

A chattel mortgage executed and recorded in 1932 was not exempt from the statutes of 1935 and 1937 providing, in effect, that chattel mortgages must be re-recorded within four years from the last recording or re-recording thereof or in default of such re-recording be deemed void as against creditors of mortgagor and subsequent purchasers in good faith and for value. Civ.Code, § 2957.

16. Lis pendens ⇨3(4)

Provisions of the statute providing for a notice of lis pendens in actions affecting the title or right of possession of real property were inapplicable in a chattel mortgage foreclosure suit. Code Civ.Proc. § 409.

17. Chattel mortgages ⇨197(2)

Where chattel mortgagee under mortgage recorded May 16, 1932, commenced foreclosure suit on April 24, 1936, which was within four years of original recording of mortgage, such mortgagee was relieved from complying with statutes concerning the re-recording of chattel mortgages, and hence, although mortgage was not re-recorded, mortgagee's lien on chattels covered by mortgage was superior to lien of mortgagor's execution creditor who levied execution in December, 1937, especially where creditor had actual notice that mortgagor had given mortgage on chattels in question and could have inquired of court having jurisdiction of foreclosure suit to ascertain whether such suit had been commenced. Code Civ.Proc. § 685; Civ.Code, §§ 19, 2957, 2969.

18. Chattel mortgages ⇨197(2)

Where execution creditor of a chattel mortgagor had actual notice that mortgagor was indebted to mortgagee and had given a mortgage on property on which creditor sought to levy an execution, the creditor was bound to assume that such indebtedness continued until the contrary appeared, notwithstanding that mortgagee had failed to comply with statutes concerning re-recording of chattel mortgages. Code Civ.Proc. § 685; Civ.Code, §§ 19, 2957, 2969.

two crop mortgages. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Liggett & Liggett, of San Diego, for appellant.

Whitelaw & Whitelaw, of El Centro, for respondent.

HAINES, Justice pro tem.

It appears that in the year 1921 defendant and appellant Severo Sartori obtained judgment on a promissory note in the principal sum of \$350 executed to him by the defendant Bob Beretta. Subsequently he brought action upon this judgment and on April 12, 1926, obtained another judgment in renewal of it aggregating \$566.45. Notwithstanding effort to realize on this judgment by execution and various supplementary proceedings the same remained unsatisfied and after five years had elapsed such proceedings were taken under section 685 of the Code of Civil Procedure that Sartori obtained an order permitting execution to issue, pursuant to which execution did issue upon said last-mentioned judgment for \$1,048.67 on November 27, 1937, and was on December 2, 1937, levied upon certain dairy stock in Imperial county belonging to defendant Bob Beretta and defendant Rufina Beretta, his wife, worth, according to the court's findings, \$2,000.

It appears that in the meantime Beretta, in order to acquire his dairy had obtained from respondent Security First National Bank of Los Angeles certain loans and advances, represented by two promissory notes executed by him on April 28, 1932, in favor of said bank in the respective principal sums of \$6,850 and \$650, which were secured by a chattel mortgage of even date therewith, wherein there was mortgaged to the bank the dairy stock or the dairy stock from which, by replacement and natural increase, there resulted the dairy stock levied upon by Sartori as above stated. This mortgage, among other things, provided for further advances to Beretta and that the repayment thereof, in addition to the sums represented by the notes, should be secured thereby. In addition to said chattel mortgage Beretta executed to the bank two crop mortgages, as further security for his indebtedness to it, but at the time of Sartori's execution levy these additional crop mortgages were of no value as security, and the bank held no other substantial security for its money

Appeal from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Suit by the Security First National Bank of Los Angeles against Severo Sartori and others to foreclose a chattel mortgage and

than Beretta's original chattel mortgage to it affecting the stock levied upon by Sartori. Beretta was insolvent and had no other resources than said dairy stock. It further appears that the said chattel mortgage to the bank was recorded on May 16, 1932, and that no rerecording of this chattel mortgage ever occurred pursuant to the provisions of section 2957 of the Civil Code as amended by the legislature in the respective years of 1935 and 1937. St.1935, p. 2225, and St.1937, p. 525.

Respondent bank on April 24, 1936, filed in Imperial county the present action against Beretta to foreclose the said chattel mortgage together with the two crop mortgages and after Sartori had levied his execution, filed in said action an amended and supplemental complaint adding as parties to the foreclosure action Beretta's wife, Rufina, and also Sartori and the sheriff of Imperial county. Sartori answered, claiming that his rights under his execution lien were paramount to those of the bank under its chattel mortgage in consequence of the bank's failure to rerecord the latter as provided by said amended statute.

At the time Sartori's execution was placed in the sheriff's hands it was accompanied by written instructions to levy on the dairy stock and also by an affidavit made by one Heinrich, an employee of Sartori's counsel, purporting to be made pursuant to section 2969 of the Civil Code, in which affidavit it was *inter alia* said "that on the 28th day of April, 1932, judgment debtors gave to the Security First National Bank of Los Angeles their note and mortgage on certain cattle, which mortgage was duly recorded in the official records of Imperial County, State of California, in Book 351, at page 21; that more than four years have now elapsed since the filing and recording of said mortgage. Therefore this affiant alleges the fact to be that the said mortgage is now of no legal effect as to this plaintiff * * *". This affidavit did not in terms state that the mortgage had not been rerecorded. It did go on to say that Sartori wished to levy on "sufficient personal property, as set forth in said mortgage" to satisfy his judgment, and that he filed with it his indemnity bond under the provisions of said code section. The record shows that this bond ran to the sheriff and respondent bank and that the amount of its penalty was \$2,000. It recited that the estimated value of the cattle to be levied on was

\$1,000, and that "the plaintiff herein requires of said sheriff that he shall retain said property under levy and sell the same to satisfy said judgment, together with interest and costs". Upon the filing of the amended complaint the court restrained the threatened sheriff's sale but appointed a receiver who took possession of the dairy stock. After trial of the cause the court rendered judgment in favor of the bank for \$3,826.78 principal, together with various further sums due by way of interest, costs and attorney's fees, foreclosing its mortgage and determining that the same was paramount to Sartori's execution lien. From that judgment Sartori now appeals.

[1-6] It is necessary at the threshold of the discussion to deal with the contention advanced in respondent's behalf that the appellant's levy was unauthorized and invalid for want of compliance with said section 2969 of the Civil Code. It is claimed that it adequately complies neither with the requirement of that section that the execution creditor shall present to the officer called upon to make the levy "a verified statement that the mortgage is void or invalid for reasons therein specified", nor yet with the requirement that he shall deliver to such officer "a good and sufficient undertaking in double the amount of the mortgage debt or double the value of the mortgaged property * * *". As respects the former of these requirements we have seen that the affidavit presented assigns as the reason why the mortgage was claimed to be void merely the circumstance that "more than four years have now elapsed since the filing and recordation of such mortgage". We think the language so used, though perhaps somewhat inartificial, was sufficient. It seems to us substantially equivalent to a statement that more than four years had elapsed since *any* filing and recordation of said mortgage. To be sure the recordation may, under the terms of section 2957, be either at large or in the form of a certificate referring to the former record and reciting that the instrument is thereby "re-recorded". Even this alternative method, however, is recognized by the section as a means of recordation, and we think that the statement in the affidavit would be properly referable to the last recordation made, if there were more than one. As respects the undertaking it is true that it is not either in "double" the amount of the mortgage or in "double" the value of the

dairy stock, as the court found such value to be. The statute, however, does not require the execution creditor to anticipate the court's findings on the subject of value. If the permitted alternative of using double the value of the mortgaged property rather than double the amount of the mortgage, as the criterion in fixing the amount of the undertaking, is valid, then the statutory provision is that such amount shall be "such as the officer may determine and require". While the undertaking is for the indemnification both of the sheriff and of the mortgagee, in the event of an unlawful levy, yet the officer is liable to the mortgagee for any misfeasance on his part under his official bond, and, as it was necessary to invest some one with the right in a preliminary way to determine the value of the mortgaged property in order to "determine" the amount of the undertaking required, the legislature has seen fit to invest the officer with that authority. If, in making his determination, he makes bona fide use of his judgment, that is all that the law demands. If, contrariwise, the officer is guilty of any misconduct in the matter his liability therefor on his official bond would presumably be sufficient protection for the mortgagee. We do not think that the fact that in the instant case the valuation placed on the cattle was only half that subsequently found correct by the court, in the absence of fraud on the part of the execution creditor, has any bearing on the validity of the levy.

We come, then, to the main questions in the case, which are thus stated in the opening brief for the appellant:

"First: Are chattel mortgages which were made and recorded prior to the year 1935, when the rerecording provision of Section 2957 of the Civil Code was first enacted, exempted or excused from compliance with the said provision?

"Second: Did the commencement of this foreclosure suit within four years of the original recording of the chattel mortgage relieve the mortgagee from a necessity of compliance with said provision of that section?"

Neither of these inquiries is squarely answered by any decision to which our attention has been called in this state. In *Bank of California v. McCoy*, Cal.App., 69 P.2d 1013, it was originally held by the District Court of Appeal for the Third District, in a case where a chattel mort-

gage recorded on June 1, 1930 had not been rerecorded, and on May 6, 1935, a judgment creditor of the mortgagor levied on the mortgaged property and on May 29, 1935, caused it to be sold by the sheriff, that the lien of the mortgage had expired on June 1, 1934, and that, therefore, the judgment creditor's levy and sale were good. In this decision, however, the circumstance that the amendment of section 2957 requiring the rerecording, as enacted in 1935, St.1935, p. 2225, did not become effective until July 20, 1935, and therefore could not in any event have been effective to cause an expiration of the mortgage lien on June 1, 1934, nor yet at the time of the execution creditor's levy and sale, was overlooked. Upon this being called to the court's attention it granted a rehearing and otherwise disposed of the case.

[7,8] It is claimed in respondent's behalf that the requirement that a chattel mortgage be rerecorded within some given time after its original recordation or, in default thereof, be void against creditors of a mortgagor, cannot be applied to mortgages in existence at the time the requirement was enacted, consistently with section 10 of article 1 of the Federal Constitution, U.S.C.A., forbidding any state to violate the obligations of contracts, section 1 of the 14th amendment to the Federal Constitution forbidding any state to deprive any person of life, liberty or property without due process of law, and section 13 of article 1 of the state Constitution making the same inhibition. In considering this contention certain well recognized distinctions must be observed. "The lender, who has taken a mortgage of personal property, and has had it executed and recorded as required by law, has acquired a right of property." *Hammels v. Sentous*, 151 Cal. 520, 523, 91 P. 327, 328, 12 Ann.Cas. 945. It necessarily follows that a statute purporting, for example, to make unconditionally void a previously valid and duly recorded chattel mortgage, would manifestly be invalid. So, likewise, would a statute enacted after the making and recordation of such chattel mortgage purporting unconditionally to subordinate a mortgage lien to some other lien, as, for example, that of a livery stable keeper upon mortgaged horses placed in his charge by the mortgagee, be invalid. *National Bank of Commerce v. Jones*, 18 Okl. 555, 91 P. 191, 12 L.R.A.,N.S., 310, 11 Ann.

Cas. 1041. Ordinarily, however, there is some statutory limitation upon the time following the maturity of the obligation secured by such mortgage within which action must be brought upon it or else be forever barred. Nevertheless it is settled law that the time following the maturity of a cause of action allowed for commencing such action may be cut down by legislation subsequent to the contract or occurrence giving rise to the cause of action, provided only that after the effective date of such legislation reasonable time still remains for commencing the action. *Doehla v. Phillips*, 151 Cal. 488, 91 P. 330; *Rossi v. Caire*, 186 Cal. 544, 199 P. 1042; *Davis & McMillan v. Industrial Accident Commission*, 198 Cal. 631, 636, 637, 246 P. 1046, 46 A.L.R. 1095; *Coleman v. Superior Court*, 135 Cal.App. 74, 78, 26 P.2d 673; *Reynolds v. Jensen*, 14 Cal.App.2d 558, 58 P.2d 687. A common expression of the rule is that no one has a vested right in any particular allowance of time unless it has already run in his favor. That is as much as to say that, though his substantive right has been already created, he may be required by a change of statute to take affirmative action to preserve and enforce it within a shorter time than would have been allowed him for so doing by the statute in force when his right came into being. By analogy, no reason would appear to exist why, since he may thus be required by legislation subsequent to the initiation of his right to actually bring action to enforce it within a shorter period, such subsequent legislation may not also, without being held to impair his right, require him to do something else, not unreasonably burdensome, to keep his right alive, such, for instance as the giving to the public of some reasonable notice of its continued existence.

[9,10] Statutes providing for the re-recording of mortgages or other methods of making some public record of their continued existence are very common. As was said in *Commercial Security Bank of Ogden v. Chimes Press (Zion's Savings Bank & Trust Co., Intervener)*, 88 Utah 148, 42 P.2d 990, 993:

"The purpose of the filing statute has been stated, and we think correctly, by this court in *Volker Lumber Co. v. Utah & Oregon Lumber Co.*, 45 Utah 603, 148 P. 365, 367, Ann.Cas.1917D, 1158, as follows: 'Now, it is universally held by the courts, and such clearly is the purpose of

the statute, that, under a statute like ours, filing, if it is required, or recording, where that is necessary, in law is the equivalent of taking possession by the mortgagee, and hence the statute is construed to mean that the mortgage is invalid as against the class of persons aforesaid only so long as it is not filed or recorded, unless it is withheld from record so long that fraud may be inferred from the delay. When it is filed or recorded, however, it is the same, in legal effect, as though possession were taken, and the mortgage is valid as against all who become creditors of the mortgagor after such filing or recording, unless it can be declared invalid upon the ground of fraud or for some reason other than that it was not filed or recorded.'

"It would follow that a refileing is required for a cognate purpose. If the filing of the mortgage is of the same legal effect as the taking of possession by the mortgagee, and is in lieu thereof, then it must be that failure to refile within the statutory time would have the same legal effect as if the property were returned by the mortgagee to the possession of the mortgagor. Failure to refile would give notice to the world that the mortgage is no longer a valid and subsisting lien on the property described therein, or, to use the statutory language, the mortgage is void as to creditors. We think that cannot mean anything other than as to creditors, whether prior or subsequent, the property is now freed from the mortgage lien. Credit may then be extended to the owner on the theory that the property is freed from the mortgage lien, or the property may be levied upon by any creditor, either prior or subsequent, on the theory that the property is no longer subject to the mortgage. Creditors, as used in the statute, would include creditors who become such during the period of original filing. 11 C.J. 545; *First Nat. Bank of Rock Springs v. Ludvigsen*, 8 Wyo. 230, 56 P. 994, 57 P. 934, 80 Am.St.Rep. 928; *First Nat. Bank of Yankton v. Magner*, 47 S.D. 80, 195 N.W. 1020. If the property had been taken into possession by a mortgagee and later, upon payment of the mortgaged debt, its possession had been returned, or, upon payment of the mortgaged debt after filing, any creditor armed with process would have a right to attach the property or to sell it under execution. The purpose of section 474 is to clear the record made by the filing of the mortgage pursuant to section 470 by raising the conclusive pre-

sumption of payment where there is no filing of a renewal affidavit as therein provided. *Hanson v. Blum*, 53 N.D. 526, 207 N.W. 144."

While, as we have just said, statutes requiring the rerecording of mortgages are numerous, the cases cited to us in which there has arisen the precise question of the applicability of such statutes to mortgages previously made, are relatively few. It was, however, held in *Stevenson Brewing Co. v. Eastern Brewing Co.*, 22 App. Div. 523, 48 N.Y.S. 89, 90, that the requirement of chapter 354 of the New York laws of 1895 that in order to keep a chattel mortgage in force from year to year a statement must be filed annually, showing, among other things, "the time when and the place where" the mortgage was filed, applied to all subsequent extensions, even though of mortgages originally filed prior to the act, and that the designation of time and place is an essential part of the statement. The court said, 22 App. Div. 523, 48 N.Y.S. at page 91:

"The application of that principle in the present case does not exclude from the effect of the amended statute that which is required to be done subsequently to continue the validity of the mortgage as against the creditors of the mortgagor. Such application is prospective."

In *Aultman & Taylor Machinery Co. v. Fish*, 120 Ill.App. 314, 315, 316, it was said:

"At the time the mortgage from Anderson to appellant was executed, the law provided for an extension of chattel mortgages for a period of not more than two years, but the legislature subsequently amended the act * * * providing that an extension could not be made for more than one year, and one of the questions raised by this record is, whether the amendment affected chattel mortgages already in force when it was adopted and went into effect.

"Counsel for appellant contended that the law which was in force at the time of the execution of the original mortgage enters into and forms a part of the contract existing between the parties, and that the amendment should not be held to affect it because that would be giving effect to a law that impaired the obligation of contracts. * * * The amendment referred to did not affect or impair the obligation of the contract between the parties. It only affected the remedy.

"At the time of the passage of the amendment and its taking effect, shortening

the period for which an extension might be made, the parties had made no contract that was affected by it. The two years for which the mortgage was good had not expired and did not expire until * * * after the amendment took effect. While the law in force at the time the mortgage was executed authorized an extension for two years, no extension had been made before the law was changed by the act of 1903, shortening the period of extension to one year. If the mortgage had matured and the extension had been made before the taking effect of the act of 1903, then it would not have applied to the extension, for that would have impaired the obligation of the contract."

In *Stone v. Bassett*, 4 Minn. 298, 4 Gil. 215, the statute of that state which prescribed the terms and conditions upon which a mortgagor might retain the possession of the property after foreclosure and during the time allowed for redemption, was held to affect only the remedy and to be valid and applicable to mortgages existing before its passage.

[11-13] In fine it seems to us that the trend of authority indicates that such legislation as that under discussion is generally treated as going to the remedy only and not to the substantive right and therefore to be such legislation as may, without violation of the constitutional provisions referred to, be made applicable to mortgages already existing. Of course, it is a somewhat different question whether in any given case the legislature, even assuming its constitutional right to do so, has intended legislation to apply to obligations already in existence. On that subject, however, it was said in *Aultman & Taylor Machinery Co. v. Fish*, supra, 120 Ill.App. at page 316:

"While the rule as repeatedly announced in this State is that statutes are prospective and will not be construed to have retroactive operation unless the language employed in the act is so clear it will admit of no other construction, this rule applies only to statutes which affect some vested right or interest existing under a prior law.

"It must be something more than mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of the property, or the present or future enforcement of a demand, or a legal exemption from a demand made by another.' *Suth. on Stat-*

utory Construction, sec. 164. Statutes relating merely to remedies and forms of procedure are held not to belong to that class, where they do not affect the substantial rights of the parties, and such statutes apply to past contracts as well as future."

[14,15] This, of course, is the view usually taken with respect to statutes of limitations, as illustrated by authorities already cited and while not precisely a statute of limitation within the ordinary use of that term the enactment under discussion is strongly analogous to one. On the whole, therefore, we think that the amendments of 1935 and 1937 to section 2957 of the Civil Code are applicable to respondent's mortgage and that it was incumbent upon respondent to cause the same to be rerecorded if the same was to have continued valid as against the claims of Beretta's creditors.

[16] It is finally claimed in respondent's behalf that the circumstance that it brought its foreclosure action within the life of the mortgage under discussion, that is, before the lapse of the four years after its original recordation, obviated the necessity for a rerecordation. The action, of course, was not one affecting real estate and therefore the provisions of section 409 of the Code of Civil Procedure providing for a notice of *lis pendens*, are inapplicable. In *Commercial Security Bank of Ogden v. Chimes Press*, supra, it was held that the rule laid down by a certain former decision in Utah holding that the recording of a notice of *lis pendens* in an action for foreclosure of a chattel mortgage "gave constructive notice that the mortgage remained unpaid and the mortgagee need not take possession of the property", was abrogated by the passage of the statute requiring recordation of notice of the extension, the court saying:

"It is nowhere provided in that statute that the mortgage shall be void unless suit is commenced or notice of *lis pendens* filed. It was merely stated that such mortgage shall be void * * * unless the affidavit there required be filed within a period of ninety days after maturity of the debt, the entire time not to exceed one year."

On the other hand, in *Breeze v. Bayne*, 202 N.Y. 206, 95 N.E. 727, there was involved a statute requiring that, in order to continue good against creditors of the mortgagor, a chattel mortgage, within 30 days preceding the expiration of one year

from its first filing, be rerecorded or refiled, accompanied by a certain statement. The mortgagor had executed three chattel mortgages to the same mortgagee which were originally filed on different dates. The statute requiring the rerecording of the mortgages and the filing of the statements was not complied with. Before one year had expired after the filing of the last of these mortgages but after the expiration of one year from the filing of each of the first two, a representative of the mortgagee commenced proceedings by advertisement to sell out the mortgaged property under power of sale contained in the mortgages and did sell the same out accordingly. Pending these foreclosure proceedings, however, an execution creditor of the mortgagor levied on the mortgaged property. The trial court found that when the mortgagee's representative commenced his foreclosure proceedings, that is, before the year following the filing of the last mortgage had expired, he undertook to take possession of the mortgaged property and succeeded in securing from the officer then in actual possession of the same under the judgment creditor's levy an agreement to keep it for the mortgagee. The court of appeals held that this amounted to taking constructive possession of the property within the year following the filing of the third mortgage and that under the New York cases (citing *Porter v. Parmley*, 52 N.Y. 185; *Steele v. Benham*, 84 N.Y. 634; and *Tremaine v. Mortimer*, 128 N.Y. 1, 27 N.E. 1060), where a mortgagee operating under power of sale takes possession, actual or constructive, of the mortgaged property within the year, the refileing statute ceases to apply. As to the property involved in the first two mortgages then, it was held that the purchaser got no title good as against the execution creditor, but as to that involved in the last mortgage it was held that he did.

In *Crutts v. Daly*, 84 Misc. 192, 145 N.Y. S. 850, it appeared that the mortgagee under a chattel mortgage authorizing him to take possession of the mortgaged property in the event of its becoming unsecured, before the maturity of the mortgage debt and before the expiration of a year from the original filing of the mortgage, commenced a replevin action against the sheriff who held the property under an attachment junior to the mortgage levied against the property of the mortgagor who had absconded. The mortgagee whose replevin action continued pending at the time the

year following the filing of his mortgage expired, omitted within such year to refile his mortgage. The court held that in the circumstances the pendency of his replevin action obviated the necessity for his doing so. The court said that had the mortgagee actually taken possession of the chattels the subsequent refiling of his mortgage would have been unnecessary (citing *Breeze v. Bayne*, supra) and that the commencement of the action was the equivalent of taking possession as against the sheriff who ought to have delivered the property to the mortgagee on demand, that the rights of the parties were fixed thereby and that the attaching creditor wrongfully withholding possession through his agent the sheriff, could not claim the protection of the refiling statute.

[17-18] The question being one of first impression in this state, we incline to the view that the commencement of the foreclosure action within the period during which the original recordation of the mortgage, *ex proprio vigore*, sufficed to create and keep alive as against the public generally the mortgage lien, ought to be held to have so fixed the rights of the parties as to render any subsequent rerecording of the mortgage needless. It is true that in so holding we must decline to follow the above-quoted language of the supreme court of Utah to the contrary. It is also true that the above-cited New York cases dealing with the subject are not precisely analogous to the case at bar. They proceed upon the theory that, in providing for rerecording of mortgages, the statute is, in effect, providing a substitute for the notice to the public of a mortgagee's rights that would result if he were in possession of the property; and that when, within the time that the original filing or recording was effectual, he actually or constructively takes possession of the property, the result, on the principle *cessante ratione cessat lex*, is necessarily to dispense with any need of rerecording. It may be pointed out, however, that in neither the situation involved in *Breeze v. Bayne*, nor yet that involved in *Crutts v. Daly* did the mortgagee actually take possession of the property; that at least in the last-mentioned case it is only by a stretch of logic that he could even be said to have been in constructive possession of it, and that in any event such constructive possession would afford no physical evidence to the public generally of what his

actual rights were or that he had any. In these circumstances the view that by commencing a replevin suit, unaccompanied by an actual change of possession of the property affected, the mortgagee placed himself in a position equivalent to that which would have been his had he rerecorded his mortgage, in practical effect differs very little from holding that a foreclosure action would produce the same result. It is the law of California that he who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact. Civ.Code, sec. 19. There can be no question in the instant case, as sufficiently appears from Heinrich's affidavit filed in his behalf, that appellant Sartori had actual notice that Beretta had been indebted to the bank and had given a mortgage on the property here involved to secure that indebtedness. From this notice Sartori would be required to assume that such indebtedness continued until the contrary appeared unless relieved from so doing by section 2957 of the Civil Code. If, during the period that the original recordation of the mortgage was fully effective, the bank exercised its right to commence a foreclosure action, it manifestly could have commenced one only in the court having jurisdiction thereof. It does not seem to us in these circumstances that it would cast any unreasonable burden upon one intending to levy upon the property of Beretta to require him, instead merely of searching the records in the recorder's office for a possible rerecording of the chattel mortgage, to also make inquiry in the court having jurisdiction to entertain a foreclosure suit thereon as to whether such suit had been commenced. It is very true that any rights Sartori already had could not be the subject of adjudication in such foreclosure action until or unless he was made a party to it, but the question now under discussion is not one of subjecting him to adjudication prior to his being made a party to the action, but simply whether the circumstances were such that he ought to have taken notice of the pendency of the action, and whether or not his obligation to do so should, so far as he was concerned, be held to dispense with any necessity for the rerecording generally required by said section 2957. While the New York cases above referred to would not, though we

were to follow them, absolutely compel the answer that we have made to these questions, they are, nevertheless, to our minds strongly persuasive of their correctness. It so happens that in the instant case the result reached accords with the equities.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIF-FIN, J.



37 Cal.App.2d Supp. 729

PEOPLE v. WILLERT.

Cr. A. 1628.

Appellate Department, Superior Court, Los Angeles County, California.

Sept. 8, 1939.

1. Automobiles Ⓒ63

A bus company operating motorbusses over a route between points within the city of Los Angeles and points outside of such city was encompassed by provisions of Public Utilities Act relating to authority of the Railroad Commission over passenger stage corporations. Gen.Laws 1937, Act 6386, §§ 2¼, 50¼.

2. Municipal corporations Ⓒ617, 619

The constitutional provision that persons or corporations may establish and operate certain works for supplying inhabitants of municipal corporations with services upon such conditions and under such regulations as the municipalities may prescribe under their organic law is not a grant of power to municipalities, except possibly with respect to rates. Const. art. 11, § 19.

3. Municipal corporations Ⓒ617

The constitutional provision that persons or corporations may establish and operate certain works for supplying inhabitants of municipalities with services upon such conditions and under such regulations as the municipalities may prescribe under their organic law merely approves of the establishment and operation of works by persons and corporations, and recognizes that a city's organic law may authorize it to prescribe conditions and regulations under which the enumerated works may be established and operated. Const. art. 11, § 19.

4. Municipal corporations Ⓒ79

A general state statute constituting all or a part of a city's organic law is subject to limitations, at hands of Legislature, expressed in other statutes.

5. Municipal corporations Ⓒ592(1)

When a local ordinance of a municipality conflicts with a state statute, the statute controls even though ordinance was valid when adopted and conflicting statute was enacted thereafter.

6. Municipal corporations Ⓒ79

A city's "organic law" is subject to and controlled by conflicting state legislative action unless the subject matter is a "municipal affair" within contemplation of constitutional provisions empowering cities to make and enforce laws and regulations in respect to municipal affairs. Const. art. 11, §§ 6, 8, 11, 19.

[Ed. Note.—For other definitions of "Municipal Affairs" and "Organic Law," see Words & Phrases.]

7. Automobiles Ⓒ59

The regulation of a passenger stage corporation, as defined in the Public Utilities Act, was not a "municipal affair" within contemplation of constitutional provisions empowering cities to make and enforce laws and regulations in respect to municipal affairs. Gen.Laws 1937, Act 6386, §§ 2¼, 50¼; Const. art. 11, §§ 6, 8, 11, 19; art. 12, § 23, as amended in 1914.

8. Automobiles Ⓒ62

An initiative ordinance of Los Angeles authorizing a city board to issue and revoke permits to operate busses over public streets, and providing that persons operating busses without permits were guilty of misdemeanors, was rendered unenforceable by subsequent conflicting provision of Public Utilities Act vesting authority in state railroad commission to regulate passenger stage corporations, and hence an order of municipal court of Los Angeles dismissing a complaint charging defendant with violating ordinance was proper. Gen.Laws 1937, Act 6386, §§ 2¼, 50¼; Const. art. 11, §§ 6, 8, 11, 19; art. 12, § 23, as amended in 1914.

9. Automobiles Ⓒ9

When the state sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipi-

pal or local regulation is concerned. Gen. Laws 1937, Act 6386, §§ 2¼, 50¼; Const. art. 11, §§ 6, 8, 11, 19; art. 12, § 23, as amended in 1914.

10. Municipal corporations ☞108

The authority of the city of Los Angeles to pass an initiative ordinance was the same as the power of the city council to legislate.

11. Municipal corporations ☞617

Under constitutional provisions that powers of State Railroad Commission respecting public utilities should not affect such powers of control over utilities as related to the making and enforcing of "local, police, sanitary and other regulations," other than the fixing of rates, vested in cities, the quoted words were not to be given a more restricted or different meaning from that given them in constitutional provision that any city may make all such local, police, sanitary, and other regulations as are not in conflict with general law. Const. art. 11 § 11; art. 12, § 23, as amended in 1914.

[Ed. Note.—For other definitions of "Police Regulations," see Words & Phrases.]

12. Automobiles ☞59

Under their police power, as expressed in constitutional provision that any city may make such local, police, sanitary, and other regulations as are not in conflict with general law, cities have power to regulate passenger busses operating as common carriers on their streets. Const. art. 11, § 11; art. 12, § 23, as amended in 1914.

13. Municipal corporations ☞611

Under constitutional provision that statutory powers conferred on State Railroad Commission respecting public utilities shall not affect such power of control over public utilities as relates to the making and enforcing of local, police, sanitary, and other regulations, other than the fixing of rates, "vested" in any city, only those powers are "vested" in a chartered city that relate to municipal affairs, and all other powers, being subject to legislative change, cannot be deemed "vested." Const. art. 12, § 23, as amended in 1914.

[Ed. Note.—For other definitions of "Vest," see Words & Phrases.]

14. Automobiles ☞62

An initiative ordinance authorizing a city board to issue and revoke permits to operate busses over public streets and pro-

viding that persons operating busses without permits were guilty of misdemeanors, was not protected against a subsequent conflicting statutory grant of power to Railroad Commission over passenger stage corporations by constitutional provision that Railroad Commission should not have such powers of control over utilities as relate to making and enforcing of local, police, sanitary, and other regulations "vested" in cities, since ordinance did not deal with "municipal affairs" within contemplation of Constitution. Gen. Laws 1937, Act 6386, §§ 2¼, 50¼; Const. art. 11, §§ 6, 8, 11, 19; art. 12, § 23, as amended in 1914.

15. Automobiles ☞62

An initiative ordinance authorizing a city board to issue and revoke permits to operate motorbusses over public streets, and providing that persons operating busses without permits were guilty of misdemeanors, was not kept enforceable, after a subsequent conflicting statutory grant of power to Railroad Commission over passenger stage corporations, by constitutional provision that statutory grants of power to Railroad Commission over utilities should not affect a city's right to grant utility franchises, since permit required by ordinance was not a "franchise" within meaning of Constitution or city's charter. Gen. Laws 1937, Act 2720; Act 6386, §§ 2¼, 50¼; Const. art. 11, §§ 6, 8, 11, 19; art. 12, § 23, as amended in 1914.

[Ed. Note.—For other definitions of "Franchise," see Words & Phrases.]

16. Franchises ☞1

"Franchises" are special privileges which are conferred by the government upon individuals and which do not belong to the citizens of the country generally, of common right.

Appeal from Municipal Court of Los Angeles; Lucius P. Green, Judge.

Proceeding by the People of the State of California against Everett R. Willert, wherein defendant was charged with having operated a passenger bus of the Bay Cities Transit Company in violation of an initiative ordinance of the City of Los Angeles. From an order of the municipal court of the City of Los Angeles dismissing the complaint, the People of the State of California appeal.

Affirmed.

Ray L. Chesebro, City Atty., W. Jos. McFarland and F. Von Schrader, Asst. City Attys., and John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

Hector P. Baida, of Santa Monica, for respondent.

BISHOP, Judge.

Before a trial began, the defendant obtained the dismissal of the complaint which charged that he had operated a passenger bus of the Bay Cities Transit Company in violation of Los Angeles City's initiative ordinance numbered 58198, adopted June 7, 1927. As we are of the opinion that the ordinance is now ineffective, because directly in conflict with the superior authority vested in the State Railroad Commission, the order of dismissal, from which the People have appealed, must be affirmed.

There is no doubt that the legislature has endeavored to give the Railroad Commission exclusive authority in the field in which the ordinance attempts to function. By the terms of the ordinance, it is stated that the City's Board of Public Utilities and Transportation may issue a permit to operate a motor bus (defined as being a motor-propelled vehicle for public use in the transportation of persons, for compensation, over any public street in the city, whether operated wholly or partly within the city) if the Board shall declare that the public convenience and necessity require its operation. The Board is also authorized, according to the terms of the ordinance, to revoke a permit which it has granted. A person who operates a motor bus after a permit has been revoked and before another has been granted (the charge made against the defendant) is declared to be guilty of a misdemeanor. By other provisions of the ordinance, further conditions respecting the operation of busses are either prescribed or authorized.

[1] By appropriate definitions added to the public utilities act (Act 6386, Deering's Gen'l Laws 1937) by the Stats. of 1927, p. 73, the "motor bus" of the City's ordinance becomes the "passenger stage" of the public utilities act, and a "passenger stage corporation" is declared to be "every corporation, or person * * * engaged as a common carrier, for compensation, in the * * * operation or management of any passenger stage over any public highway in this state between fixed termini or over a regular route; provided, however, that this term shall not include those whose

operations are exclusively within the limits of a single incorporated city". Section 2¼. These definitions plainly encompass the Bay Cities Transit Company, whose bus, according to the complaint, was being operated by the defendant over a route between points within the city and points outside, which route had been approved by the Railroad Commission in a certificate issued by it. The provisions of section 50¼, added to the public utilities act by the same statute that defined "passenger stage corporation" are pertinent, therefore, which, after providing that no passenger stage corporation shall operate without a permit from the Railroad Commission, continue: "The railroad commission, in the exercise of the jurisdiction conferred upon it by the constitution of this state and by this act, shall have power and authority to grant certificates of public convenience and necessity and make decisions and orders and to prescribe rules and regulations affecting passenger stage corporations, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county and in case of conflict between any such order, rule or regulation and any such ordinance or permit, the certificate, decision, order, rule or regulation of the railroad commission shall in each instance prevail."

The position of appellant is, that in spite of the explicit declaration of the legislature to the contrary, the city has the power to make and now enforce the ordinance in question. Recognizing that the constitution declares that the power of the legislature to confer authority on the Railroad Commission, respecting public utilities, is plenary, the appellant points out that there are other provisions of the constitution, which must also be given effect, and that these save to the city the power embodied in the ordinance whose terms the defendant violated.

The first provision on which the appellant relies is the third sentence of section 19, Art. XI, placed in the constitution in 1911. We quote the first two sentences also to furnish the context for the third: "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or cor-

porations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof."

[2-5] It can hardly be contended that the third sentence of section 19, Art. XI, is a grant of power to a city, except possibly with respect to rates, a subject matter that does not concern us in this case. What it is, and this suffices to give it meaning, is the approval of the establishment and operation of "works" by persons and corporations, and the recognition that a city's organic law may authorize it to prescribe the conditions and regulations under which the works may be established and operated. A city's "organic law" may be found in one or more of three places. A general state statute may constitute all or a part of a city's organic law. If it does, it is, of course, subject to limitations at the hands of the legislature expressed in other statutes. The constitution itself, in so far as it grants powers to cities, may be considered a part of their organic laws, as has been recognized with respect to the familiar and pertinent provisions of section 11, Art. XI. In *re Ackerman*, 1907, 6 Cal. App. 5, 9, 91 P. 429. But note the limitation explicit in this section 11: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." If the local ordinance conflicts with a state statute, the latter controls even though the ordinance was valid when adopted and the conflicting statute came after. In *re Desanta*, 1908, 8 Cal.App. 295, 96 P. 1027; In *re Hoffman*, 1909, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75. A third source of the organic laws of a city is its charter, if it has one. Here, for the first time, we find the possibility of a power to prescribe the conditions and regulations under which persons and corporations may establish and operate their works, that is not subject to legislative control. Section 8 of Art. XI determines the manner in which cities may obtain charters, and, since 1914, provides: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to mu-

nicipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." Section 6, Art. XI, contains a similar provision: "cities * * * may amend their charters * * * so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

[6-9] We need not tarry to wonder whether the defendant's employer established and operated "works," to bring it within section 19, Art. XI. Let us say that it did, and that the section recognizes the possibility that a city's organic law may authorize it to impose conditions and regulations on such a one as defendant's employer. It is nevertheless true that the organic law is subject to and controlled by conflicting state legislative action unless the subject matter is a "municipal affair" as those words are used in sections 6 and 8, Art. XI. But to the question: Is the regulation of the establishment and operation of a passenger stage corporation, as defined in the public utilities act, a municipal affair? the answer must be given that it is not. The latest expression on the subject that we have discovered is in the case of *Morel v. Railroad Commission*, 1938, 11 Cal.2d 488, at page 500, 81 P.2d 144, at page 150, where the supreme court made this statement:

"* * * it is contended that the matter of regulating the use of the streets of a city for commercial purposes is a municipal matter and is not subject to the control of the legislature.

"Upon this question after reviewing the cases of *Ex parte Daniels*, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172, and *In re Murphy*, 190 Cal. 286, 212 P. 30, this court held: 'The effect of these several decisions is to declare that, whenever the state of California sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned.' *Atlas Mixed Mortar Co. v. City of Burbank*, 202 Cal. 660, 262 P. 334, 336.

"It is true that these cases involve regulation of the *use* of city streets and the instant case relates to the regulation of a *business* transacted upon such streets, and it is contended for this reason that these cases are not authority in support of the right of the state to regulate business carried on on the streets of a city. But the transacting of business upon a street necessarily requires the use of the street for that purpose, and the use of the street for the purpose of transacting business thereon is as a rule a much more onerous and burdensome use than the mere traveling over said streets by an ordinary private conveyance. If the latter use is a matter of public concern, we think the former which imposes far greater burdens upon the streets is also a matter of public concern and therefore subject to regulation imposed by the state."

We see no useful purpose in any discussion of the question in view of the authorities answering it. In addition to those cited in the quotation see: *Helmer v. Superior Court*, 1920, 48 Cal.App. 140, 191 P. 1001; *City of San Bernardino v. Railroad Commission*, 1923, 190 Cal. 562, 566, 213 P. 980; *Whyte v. City of Sacramento*, 1924, 65 Cal.App. 534, 546, 224 P. 1008; *Key System Transit Co. v. City of Oakland*, 1932, 124 Cal.App. 733, 741, 13 P.2d 979.

Beyond all other declarations that a city's power of control over public utilities, respecting other than municipal affairs, is subject and not superior to the will of the state legislature, is the express statement concluding this quotation from section 23, Art. XII, of the state constitution:

"The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution.

"From and after the passage by the legislature of laws conferring powers upon the railroad commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, or

in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission."

[10] Were this all of the section we would consider our problem fully solved, for the city's authority to pass an initiative ordinance is the same as the power of the city council to legislate. Section 272, Los Angeles city charter, and see *Hurst v. City of Burlingame*, 1929, 207 Cal. 134, 140, 277 P. 308. As amended in 1911, however, section 23 contained a proviso, and since 1914 it contains two, which, the appellant claims, preserve inviolate the city's power to pass and enforce the ordinance under consideration. The 1911 draft of the first proviso, under consideration in some of the earlier cases, follows: "provided, however, that this section shall not affect such powers of control over any public utility vested in any city and county, or incorporated city or town as, at an election to be held pursuant to laws to be passed hereafter by the legislature, a majority of the qualified electors voting thereon of such city and county, or incorporated city or town, shall vote to retain, and until such election such powers shall continue unimpaired." In 1914 this proviso was amended and another added to read as we now find them: "provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired; * * * and provided, further, that this section shall not affect the right of any city and county or incorporated city or town, to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law."

[11,12] At this point, we find ourselves in agreement with the appellant in two of its positions. First, we agree that the power back of the initiative ordinance relates to the making and enforcing of "local, police, sanitary and other regulations," respecting a public utility. We see no reason to give these words a meaning in section 23, Art. XII, more restricted

than, or different from, that given them when they appear in identical sequence in section 11, Art. XI. Under their police power, which is what these words express, cities have the power to regulate passenger busses, operating as common carriers on their streets. If authority is necessary, we have it in *Ex parte Cardinal*, 1915, 170 Cal. 519, 150 P. 348, L.R.A.1915F, 850. Furthermore, we concede that, in 1911 and in 1914, there was not any general law conflicting with the full exercise of this power; at that time the power to make and enforce such an ordinance as the one now relied upon existed unimpaired in the city of Los Angeles. In the premises, the appellant claims, the power to regulate busses was *vested* in the city when the amendment was adopted in 1914, and as the power has never been surrendered by a vote of the city, the power to enforce the initiative ordinance still exists. With this conclusion, however, we do not agree.

The authorities make two approaches to the problem, both leading to the same answer. The earliest cases take the position that the power that cities had in 1914 to regulate public utilities was vested in them, but that, except when relating to a municipal affair, this power which was vested retained its characteristic frailty; it wilted in the face of adverse legislative action. In *Title Guaranty & Trust Co. v. Railroad Commission*, 1914, 168 Cal. 295, 142 P. 878, Ann.Cas.1916A, 738, it was held that the power of the city of the sixth class to regulate the rates, and to prescribe proper rules relating to the delivery of water, was vested in the city and was not divested by the purported grant of a like power to the Railroad Commission. A like conclusion was reached in *City of Los Angeles v. Central Trust Co.*, 1916, 173 Cal. 323, 159 P. 1169, respecting the endeavor of the city of Los Angeles to condemn a right of way across an existing railroad in the absence of the approval of the Railroad Commission. It was held that the power to open streets in the city was a power respecting a municipal affair; that if the grant of power over the matter to the Railroad Commission were regarded as the exercise of the legislature's general authority, it was subject to the city's charter respecting municipal affairs; that if it were regarded as the exercise of the special authority granted by section 23, Art. XII, it was subject to the proviso respecting vested powers.

In each of these cases the fact was pointed out that section 82 of the public utilities act then in force (Statutes, Extra Sessions, 1911, p. 62) reenacted the proviso of section 23, Article XII. But the public utility act no longer contains this legislative declaration that its provisions are not to be exclusive, are not to occupy the whole field, and this is a vital omission, as was stressed in *Civic Center Ass'n v. Railroad Commission*, 1917, 175 Cal. 441, 166 P. 351, 355. The action in the *Civic Center* case was one to compel the Railroad Commission to order the three railroads entering the city of Los Angeles to abolish grade crossings and establish a common depot. Among other positions taken in opposition to such an order was the contention that the city had complete authority respecting its streets. Of particular interest to our problem are these conclusions: "It will be observed that the reservation in the proviso of section 23 to all cities of the powers theretofore vested in them is general and embraces all powers of local police regulation over public utilities, except rate fixing, then vested in such cities, including those relating to matters of general concern, as well as those relating to municipal affairs. From this it would follow that the powers of this character then vested in Los Angeles, by its charter, to regulate and control the state railroads in their operations and street crossings within the city, would also be reserved to the city and would remain unimpaired. Such power appears to have been vested in the city in October, 1911, by section 34, of its charter, above mentioned, and by subdivisions 30 and 38 of section 2 of its charter as amended on March 25, 1911. Stats.1911, pp. 2063, 2065. (Section 15 of the act of February 9, 1911 * * * so far as it relates to crossings of 'public roads and highways,' was, in our opinion, intended to apply only to crossings outside of cities, and it did not operate to divest Los Angeles of such powers within that city.) But notwithstanding this comprehensive effect of the proviso, if taken alone and literally, we think that when considered in connection with the language of section 6 of article 11, defining the tenure upon which cities hold powers over matters not municipal in character, a clear distinction appears by virtue of which such powers may be divested by a general law. By the terms of section 6, art. 11, powers vested in a city by a freeholders' charter, to regulate affairs

not municipal in character, were not absolute, but were 'subject to and controlled by general laws.' Such powers, therefore, are granted upon the condition and subject to the qualification that they must yield to and be suspended by a general law inconsistent therewith, whenever such general law shall be enacted. The city holds its powers of this character subject to this condition. Such power would therefore be divested by the happening of the condition. So far as a power of this character is reserved to the city by the proviso of section 23, it is reserved with the conditions upon which it was granted inhering in it. The reservation was not intended to destroy or annul the terms of the grant by which such power became vested in the city, or remove the condition subsequent, but only to hold it as it was and leave the power, as before, subject to suspension upon the passage of a general law inconsistent therewith. * * * The Public Utilities Act of 1915 omits this reservation. Consequently, with respect to affairs not municipal, upon the rule just stated, it supersedes all grants of power by the city charter which are inconsistent with the act."

[13] The second, and present day, avenue of approach to the answer to the appellant's claim is that only those powers are "vested" in a chartered city, as that word is used in section 23, Art. XII, that relate to municipal affairs; all other powers, being subject to legislative change, can not be said to be vested. In *City of San Mateo v. Railroad Commission*, 1937, 9 Cal.2d 1, 68 P.2d 713, the matter is considered at some length and this statement made, 9 Cal.2d at page 7, 68 P.2d at page 716: "The term 'vested' found in the proviso as originally adopted in 1911 * * must be deemed to refer to 'such powers of control over' public utilities as were then lodged in municipalities and such as were beyond the power of the Legislature to withdraw without the cities' consent. Whatever vested power the municipalities of the state enjoy they derive from the State Constitution and to the extent there permitted. And the only municipalities in the state vested with immunity from control of the Legislature are freeholders' charter cities organized under section 8 of article 11 of the Constitution. The immunity from legislative control is limited to municipal affairs and to the extent specified by sections 6 and 11 of the same

article. With respect to other matters charter cities are subject to and controlled by general laws. Municipalities organized under the general Municipal Corporations Act possess no powers which are not subject to and controlled by general laws, and do not enjoy 'vested' powers within the meaning of the proviso of section 23, article 12, as originally adopted in 1911. The same conclusion must be drawn as to the effect of the amendment of the proviso in 1914." By way of a summary our supreme court continued, 9 Cal.2d at page 8, 68 P.2d at page 717: "From the history of the proviso in question and its relation to other provisions of the Constitution, it must be concluded that the term 'vested' as used in the proviso, referred to powers of control over public utilities (1) such as related to the making and enforcement of local, police, sanitary and other regulations in chartered cities (other than the fixing of rates); (2) such as related to municipal affairs; and (3) such as had been assumed by such cities by appropriate charter provision. This was the holding, and properly so, in *Mountain View v. Southern Pac. R. Co.*, 1934, 1 Cal.App.2d 317, 36 P.2d 650."

[14, 15] Because, as we have already discovered, the city's initiative ordinance deals with a question which is not a municipal affair, one concerning which its charter does not give it supreme control, the ordinance is not protected against a conflicting grant of power to the Railroad Commission by the first proviso of section 23, Art. XII. Does the second of the two provisos quoted, the one preserving the city's right "to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law," keep the ordinance enforceable? It is our conclusion that it does not.

The appellant's argument is based on the provisions found in paragraph (a), subsection (8), section 3, of the Los Angeles charter, reading: "The city may grant franchises for fixed terms, permits or privileges, for the construction and operation of plants or works necessary or convenient for furnishing the city and its inhabitants with transportation . . . and may prescribe by ordinance, approved by a vote of the people, the method of procedure for making such grants, subject to the limitations elsewhere contained in this charter." The terms "franchises" and "permits" are here used interchangeably, the argument

proceeds, and the "franchises" of the proviso of section 23, Art. XII, include "permits". Not expressly presented but implicit in the appellant's argument is the further proposition that the right to grant a franchise or permit, saved by the proviso, includes the right to deny one. Hence, the city of Los Angeles can punish the defendant for using its streets without the permit required by the initiative ordinance (No. 58198).

If appellant's argument is good, then this last proviso of section 23, Art. XII, affords a simple device to each city of the state, chartered or not, whereby it may recapture control over all public utilities operating within its confines. All a city need do is to adopt an ordinance forbidding a public utility to operate without a permit. Then, as the necessity for a permit is the necessity for a franchise, the city is in control. Such a conclusion is so startling as to create a grave doubt of its correctness.

[16] One fault with the processes by which the conclusion is reached is the assumption that the "permit" required by the ordinance belongs to the class of permits that are synonymous with franchises. Obviously, this is not so. "Franchises are special privileges conferred by the government upon individuals and which do not belong to the citizens of the country generally, of common right," a quotation from 26 C.J. 1008, found in *Roth Drugs v. Johnson*, 1936, 13 Cal.App.2d 720, 738, 57 P.2d 1022, 1030. If a franchise may be required, therefore, before one may operate a passenger bus line within a city (and that it may not be, is held in *Northeast Rapid Transit Co. v. City of Phoenix* (Ariz.1932) 15 P.2d 951), it is because one does not have

that right at common law without a "permit," not because some ordinance says one must have a permit.

That the "permit" of the initiative ordinance heretofore mentioned is not the "permit" which is a "franchise" within the meaning of section 3 (8) (a) of the charter, is further clearly seen when we note that the ordinance does not pretend to grant its permit "upon the terms and conditions and in the manner prescribed by law" for the grant of a franchise. As authorized by the pertinent charter section, section 3 (8) (a), the city has duly adopted two ordinances, the first, ordinance No. 27557 (N. S.), then, shortly after the adoption of the initiative ordinance (No. 59198), Ordinance No. 58200 to take the place of Ordinance No. 27557 (N.S.) In each of these ordinances (as in the Broughton Act, Stats. 1905, p. 777, Act 2720, Deering's Gen'l Laws 1937), provision is made that the franchise to be granted shall be sold to the highest bidder. The charter itself prescribes many terms which must be inserted in each franchise or permit granted, as, to take one example, that the city reserves the right to purchase the property of the utility. The permit of the initiative ordinance has no such term. For aught that appears in this criminal proceeding, the defendant's employer, Bay Cities Transit Company, may have a franchise to operate; if the city has a right to demand such a franchise, it has not exercised that right in the initiative ordinance on which this prosecution is based.

For the reasons given, we conclude that the order dismissing the complaint was proper; it is affirmed.

I concur: SHAW, P. J.

14 Cal.2d 293

**LILIENKAMP et al. v. SUPERIOR COURT
OF LOS ANGELES COUNTY.**

L. A. 16936.

Supreme Court of California.

Sept. 14, 1939.

1. Executors and administrators ⇨314(12)

An order setting aside a decree of partial distribution of assets of an estate was not an "appealable order."

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

2. Courts ⇨198

Jurisdiction of the probate court is a jurisdiction in rem, the res being the decedent's estate.

3. Executors and administrators ⇨1

The object of probate and administration proceedings is to secure distribution to persons entitled to share in estate.

4. Executors and administrators ⇨314(4)

Jurisdiction of the probate court to administer a decedent's estate is established when the appropriate petition has been filed and the notice required by statute has been given.

5. Executors and administrators ⇨314(4)

Where there is no statutory requirement of personal notice to persons interested in the distribution of assets of an estate, such personal notice is not essential to give probate court jurisdiction to distribute the estate.

6. Constitutional law ⇨309(1)

The absence of a requirement for personal notice in probate proceedings does not deprive an interested person of any of his constitutional rights.

7. Executors and administrators ⇨315(9)

Where heirs agreed to distribute decedent's property in accordance with a purported written request of decedent and an order of partial distribution based on agreement was entered, distributees who did not enter their appearance in proceeding, notice of which was given by posting, to distribute assets were not "other" or "adverse parties" under the statute requiring that personal notice of a motion to set aside a decree be given to "other" or "adverse" parties and were not entitled to personal notice of a motion to set aside decree of partial distribu-

tion on ground that alleged written request of decedent was a forgery. Code Civ.Proc. § 473; Probate Code, § 1200.

[Ed. Note.—For other definitions of "Adverse Party" and "Other Party," see Words & Phrases.]

8. Executors and administrators ⇨315(5)

A decree of distribution of assets of an estate is a muniment of title of the highest value.

9. Executors and administrators ⇨315(4)

The fact that a decree of distribution of assets of an estate is a muniment of title of highest value does not prevent the exercise of jurisdiction by appropriate court to set decree aside in a proper case upon giving of due notice as prescribed by law. Code Civ. Proc. § 473.

10. Executors and administrators ⇨315(4)

A proceeding to set aside a decree of distribution, after jurisdiction of probate court has terminated, is addressed to equity jurisdiction of court, and, proceeding being in personam, all distributees must be made parties and brought into action by service of appropriate notice. Code Civ.Proc. § 473.

11. Executors and administrators ⇨315(9)

Where heirs of a decedent agreed to distribute her property in accordance with a purported written request of decedent and an order of partial distribution was entered based on such agreement, after entry of an order setting aside decree of partial distribution on ground that the written request was a forgery, distributees under agreement were entitled to appeal from probate court's denial of application for approval of agreement and for distribution in accordance therewith. Probate Code, §§ 1200, 1233; Code Civ.Proc. §§ 473, 938.

12. Executors and administrators ⇨314(12)

Where a partial distribution was ordered by probate court, in accordance with agreement of heirs of decedent based on purported written request of decedent and subsequently probate court on motion of some of the heirs of decedent set aside decree of partial distribution, on appeal by distributees under agreement from a subsequent order denying distribution in accordance with agreement, the propriety of such order as well as the order setting aside order of partial distribution would be reviewable. Probate Code, §§ 1200, 1233; Code Civ.Proc. §§ 473, 938.

In Bank.

Certiorari proceedings by Ida Lilienkamp and the Immanuel Presbyterian Church of Los Angeles (a religious corporation) to review an order of the Superior Court of Los Angeles County vacating an order for partial distribution of assets of an estate.

Affirmed.

For prior opinion, see 85 P.2d 577.

Freston & Files, of Los Angeles, for petitioner Ida Lilienkamp.

Edgar C. Smith, of Los Angeles, for petitioner Immanuel Presbyterian Church of Los Angeles.

Cruickshank, Brooke & Dunlap, of Pasadena, for respondent.

SHENK, Justice.

This is a proceeding to review an order of the Superior Court in Los Angeles County, sitting in probate, vacating an order for partial distribution. The respondent made its return of the proceedings had before it relating to the order of partial distribution and the granting of the motion to vacate said order.

Louie E. Raymond died intestate on July 28, 1937, leaving a sister, Grace Raymond Peters, and two brothers, Howard D. Raymond and Gordon B. Raymond. The return shows the following facts subsequently occurring:

One of the brothers, Howard D. Raymond, accompanied the body of the decedent to Chicago for burial. Before his return, Grace Raymond Peters, in the presence of the decedent's housekeeper, Ida Lilienkamp, opened a tin box belonging to the decedent. She extracted therefrom a writing in the hand of the decedent and effected its destruction by burning it. She thereupon prepared and substituted therefor a typewritten unsigned memorandum which purported to be in form and substance a draft of a will naming the decedent as the testatrix. Upon the return of the brother from Chicago, Grace Raymond Peters, in the presence of both brothers, purported to open the tin box for the first time. She exhibited to them the typewritten memorandum reposing therein and represented to them that to her personal knowledge it expressed the last wishes of the decedent. Upon such representation the brothers consented to sign an agreement that the portions of the estate which would have constituted legacies had the writing been executed, should be distributed accord-

ingly. The papers filed with the return herein indicate that the destroyed writing (which it is stated has since been adjudicated not to constitute a will) purported to provide a legacy of \$10,000 each to the surviving brothers and sister, certain other legacies, including one of \$3,000 to Ida Lilienkamp, and the residue to nieces and nephews of the decedent.

The agreement executed by the sister and brothers quitclaimed their interest in certain of the decedent's property and requested distribution in accordance with said typewritten memorandum, as follows: To each of Hope Raymond Anderson and Morton Hull Raymond (children of Howard D. Raymond), Donald G. Raymond (son of Gordon B. Raymond) and Frederick R. Ahlborn (son of Grace Raymond Peters) the sum of \$1,000 and certain personal possessions of the decedent; to Immanuel Presbyterian Church of Los Angeles, the sum of \$1,000; to Ida Lilienkamp, the sum of \$15,000 and the decedent's Buick car; and to Grace Raymond Peters, in addition to her right as a direct heir, all household furniture, rugs, clothing and jewelry, not otherwise mentioned, located at the home occupied by decedent in her lifetime.

Subsequently Grace Raymond Peters, as administratrix of the estate of Louie E. Raymond, deceased, presented her petition for an order approving the agreement and for partial distribution in accordance therewith. In that petition she represented to the court that prior to her death the decedent "expressed a written request that a certain portion of her estate should be disbursed and given to certain persons, and a certain sum of money to the Immanuel Presbyterian Church of Los Angeles, and that pursuant to the express wish of the decedent that certain persons and the Immanuel Presbyterian Church be given certain personal property, as enumerated and set forth in the original Memorandum of agreement * * *" filed with the court, the heirs had so assigned and quitclaimed their interests in and to said property for distribution accordingly. The court, on May 5, 1938, made its order approving the agreement and for partial distribution in accordance therewith. Its order shows that notice of the hearing of said petition was given by posting, as required by section 1200 of the Probate Code, and that no one appeared to contest the granting of the order.

Thereafter, the two brothers discovered that their sister had practiced a deception

upon them. They gave written notice of rescission of the agreement to the special administrator of the estate succeeding Grace Raymond Peters. Within the six months' period prescribed by section 473 of the Code of Civil Procedure they noticed a motion for relief pursuant thereto and for an order vacating the order of partial distribution on the grounds stated in said section. That motion was addressed to and served upon said special administrator and Grace Raymond Peters, former administratrix, and her attorneys. Notice was not served on any of the distributees named in the order of partial distribution and none of them had entered an appearance in the probate proceeding. No objection was made to the granting of the motion and, on June 30, 1938, on the evidence before it, the court vacated the decree of May 5, 1938. Thereupon it also denied the petition for approval of the agreement and for partial distribution. The order vacating the order of partial distribution does not recite that notice was given to the petitioners herein. The contention on this review is that in the absence of any such notice and in the absence of any recital in the court's order precluding investigation therein on this proceeding, the order vacating the order of partial distribution is void.

The proceeding for the review herein was initiated by Ida Lilienkamp and the Immanuel Presbyterian Church of Los Angeles, two of the distributees named in the order of partial distribution.

[1] The order of June 30, 1938, setting aside the decree of partial distribution, was not an appealable order. *Estate of Calahan*, 60 Cal. 232; *Estate of Dean*, 62 Cal. 613; *In re Grussing's Estate*, 15 Cal.App. 2d 11, 59 P.2d 152; *Linstead v. Superior Court*, 17 Cal.App.2d 9, 61 P.2d 355.

It is the petitioners' view that the court did not regularly pursue its authority for the reason that notice of the motion to set aside the decree was not personally served upon them; that, being distributees named in the order of partial distribution, they were entitled to be served personally with notice in order to give the court jurisdiction to make the order pursuant to section 473 of the Code of Civil Procedure. On the other hand the respondent contends that any notice which may be prescribed by said section 473 is required to be served only upon persons interested who have appeared in the probate proceeding.

On the record before us we are of the opinion that the court did not act in excess of its jurisdiction in making the order setting aside the decree of partial distribution.

[2-6] Jurisdiction of the probate court is a jurisdiction in rem. The res is the decedent's estate, and the object of the probate and administration proceedings is to secure distribution to the persons entitled to share in the estate. *Edlund v. Superior Court*, 209 Cal. 690, 695, 289 P. 841. Jurisdiction is established when the appropriate petition has been filed and the notice required by the statute has been given. The usual method is by publication, or posting, as in the partial distribution proceeding here involved, or by both. By such method notice is deemed to have been given to all persons interested that the proceeding is pending. Where there is no statutory requirement therefor, personal notice to persons interested, although their interest appears, is not essential to give the probate court jurisdiction to distribute the estate to those entitled. Absence of a requirement for personal notice in probate proceedings does not deprive an interested person of any of his constitutional rights. *Security-First National Bank v. Superior Court*, 1 Cal.2d 749, 37 P.2d 69; *Estate of Davis*, 136 Cal. 590, 69 P. 412. In truth such a requirement in many cases would prevent or render well-nigh impossible the discharge of the duty and authority devolving upon the probate court to make distribution of the estate. The subject of the necessity of personal notice to confer jurisdiction in the probate court was considered in *Estate of McDougald*, 143 Cal. 476, 77 P. 443, 444. At that time the Code of Civil Procedure provided that notice of appeal must be served on adverse parties. Notice of appeal from an order settling an account of the administratrix was not served on non-appearing creditors. They moved to dismiss the appeal on the ground that they were persons interested in the estate and, therefore, adverse parties who should have been served with notice. In disposing of the question adversely to that contention, the court said:

"If these contentions prevail, it is obvious that difficulties will arise in many cases. If a nonappearing creditor is an adverse party, so also would be a nonappearing heir or legatee, and, if one must be served with notice of appeal, so [must] the other. * * * If all the parties

thus interested in the fund are to be deemed adverse parties, within the meaning of that term as used in section 940, Code Civ. Proc., requiring service of notice of appeal [on the adverse party], then, in every appeal from a probate proceeding, all such interested parties must be served with notice, in order to give this court jurisdiction. Creditors and heirs are not required to appear by attorney in the administration of an estate, and, indeed, they may never appear at all, either in person or by attorney. They may be out of the jurisdiction, or their names and residences may be unknown. The statute provides no method of constructive service of notice of appeal in case of nonresidents who have not appeared, or unknown parties. The time for taking the appeal from orders of this character is limited to 60 days. In such cases the right of appeal secured by the statute would [often] prove unavailing, in many cases, and it would be effectual only in those cases where the deceased left no heirs, legatees, or creditors residing out of the state, and none residing in the state whose names and residences were unknown. The construction contended for would defeat the purpose of the statute giving the right of appeal.

"The word 'party' should not be given so broad a meaning. That a person interested in an estate, although his name and his interest are disclosed on the face of the record, is not necessarily a party to the cause or proceeding, is manifest from a consideration of the different cases where persons interested may or may not appear, at their option. * * * The names of these persons generally appear upon the face of the account, or upon some of the documents referred to therein, but the giving of the notice and the statement of their rights or claims does not ipso facto make them parties to the proceeding. The only effect of such a notice, so far as this question is concerned, is to give them an opportunity to become parties, so that, if they desire, they may appear and make themselves parties in some appropriate manner."

The court in that case concluded that although the order provided for payment in favor of the moving creditors, nevertheless, they did not thereby become parties to the proceedings entitled to notice of the appeal in the absence of an appearance filed by them. It reviewed prior decisions of this court as being in harmony with its conclusion.

In *Estate of Kent*, 6 Cal.2d 154, 57 P.2d 901, 904, the jurisdictional question considered on the appeal was whether an order settling the final account of the removed executrix was void because the required stipulation consenting to the hearing by a judge pro tempore was signed only by those who appeared in the estate. The stipulation had not been signed by non-appearing heirs, devisees and creditors. Section 5, article VI, of the Constitution, as amended in 1928, permitted the hearing by a judge pro tempore "upon stipulation of the parties litigant or their attorneys of record". On that appeal this court said: "Who are parties in a probate proceeding? More than thirty years ago in the *Estate of McDougald*, 143 Cal. 476, 77 P. 443, 444, the Supreme Court of this state declared the law on the question, who are parties in a probate proceeding, in a well-reasoned opinion in which that question was the only question before the court, and the law so declared has been accepted and followed by the superior court of Los Angeles county and other counties from that day to this. That law has become a rule of property, followed alike by the title companies and all others interested in the vast amount of property which passes through the probate department of that court each year." The court then discussed and quoted extensively from the *McDougald* case, and continued:

"The court's position is supported by citations therein from numerous decisions, including *In re Ryer's Estate*, 110 Cal. 556, 558, 42 P. 1082; *In re Calkins' Estate*, 112 Cal. 296, 297, 44 P. 577; *In re Bullard's Estate*, 114 Cal. 462, 46 P. 297; and other cases. See, also, *In re Carpenter's Estate*, 146 Cal. 661, 80 P. 1072. This also is the rule throughout the nation. In all but a few of the probate cases when the question is raised it is held that the several persons having an interest in the subject-matter of the action, who do not appear, are not parties. See cases collected in 88 A.L.R. 442.

"This law was stated again in almost the same language in *McKenzie v. Hill*, 9 Cal. App. 78, 98 P. 55, 56, as follows: 'In a proceeding to probate a will any person interested, whether as devisee, legatee, or heir, may appear and contest the probate. The petition for probate must show the names of the heirs and devisees, and hence their interest must always appear in the record. Yet it would not be contended that

an heir, devisee, or legatee who fails to appear at the time of the hearing of the petition is in any sense a party to such proceeding. * * * Upon the settlement of an account, every creditor, heir, legatee, or devisee is a person interested, and as such has a right to enter an appearance and become a party. The names of these persons generally appear upon the face of the account or upon some of the documents referred to therein, but the giving of the notice and the statement of their rights or claims does not ipso facto make them parties to the proceeding.' * * *

"All of the above has been stated in support of our decision that nonappearing heirs and legatees and creditors are not parties to a probate proceeding."

The jurisdiction of the probate court in the present case was established by the giving of due notice on the filing of the petition for approval of the agreement and for distribution in accordance therewith. Its jurisdiction of the res thus conferred on it power to grant or deny the petition. That jurisdiction continued and when no appeal was taken from the order of partial distribution such jurisdiction extended to the hearing and determination of a motion pursuant to section 473 of the Code of Civil Procedure, after due notice, as required by that section. It must inevitably follow, however, that only such further notice in any such subsequent proceedings need be given as is expressly required by that section, which is limited to "notice to the adverse party".

[7] We may assume that personal notice to "other" or "adverse parties" is required in every proceeding under said section 473. *McDonald v. Severy*, 6 Cal.2d 629, 59 P.2d 98; *Gill v. Peppin*, 41 Cal.App. 487, 491, 182 P. 815. But when the motion is made in a probate proceeding, the question of who are such other or adverse parties must be held to have been answered by the reasoning of the foregoing cited cases. The same necessity for finality and certainty in the chain of title of decedents' estates applies with equal force when the procedure under section 473 is brought into question. Representatives of decedents' estates and attorneys for many years have acted in reliance upon the provisions of the code and the pronouncements in the decision of the court that personal notice in any such proceeding is required to be given only to those interested persons who have appeared in the probate proceeding,

and that only the persons so appearing are adverse parties or parties litigant within the meaning of any provision regarding personal notice on parties. It is said that the petitioners were not interested persons or that any interest they might have was not disclosed until the filing of the petition for partial distribution. But so is it upon the initial filing of any proceeding in probate whereupon and upon compliance with the statutory provisions for notice, jurisdiction to proceed attaches. In this proceeding, jurisdiction was acquired to hear and determine the application for approval of the agreement and for partial distribution in accordance therewith. At any time after the petition for partial distribution was filed and the notice given, pursuant to section 1200 of the Probate Code, the assignees named as the prospective distributees could have filed an appearance so as to entitle them to personal notice of any subsequent proceedings. No contention is made that they were not the recipients of the statutory notice given upon the initiation of the application for distribution. Even if they could be deemed to be adverse parties by being named in the proceedings for partial distribution, and in the decree, still personal notice was not required on any such parties who had not appeared in the probate proceeding. Section 1010 of the Code of Civil Procedure, prescribing the formal requisites of a notice, also provides: "No bill of exceptions, notice of appeal, or other notice or paper, other than amendments to the pleadings, or an amended pleading, need be served upon any party whose default has been duly entered or who has not appeared in the action or proceeding." Those provisions apply in probate proceedings. Sec. 1233, Probate Code.

The petitioners place special reliance on the recent cases of *Toby v. Superior Court*, 8 Cal.App.2d 32, 47 P.2d 338, and *Linstead v. Superior Court*, 17 Cal.App.2d 9, 61 P.2d 355. In the *Toby* case, as in the *Kent* case, supra, the court was concerned with the validity of a stipulation for a judge pro tempore to conduct the hearing. The matter for disposition by the probate court was a motion to vacate and set aside an order settling final account and a decree of distribution. The opinion shows that certain distributees had not signed the stipulation which was entered into only by the attorney for the administratrix and the attorney for the moving parties. The court in that case noted the constitutional section prescribing a stipulation "of the par-

ties litigant". It thereupon, without further consideration, held that "as the distributees were the real parties in interest, the appointment of such judge pro tempore was void because of their failure to consent to the appointment". [8 Cal.App.2d 32, 47 P.2d 339.] It is true that in the Kent case this court distinguished the Toby case because it involved the rights of distributees. However, if the law as it relates to probate proceedings is to be kept uniform, it becomes apparent that the true distinction which retains that case in harmony with the Kent case is that it does not appear from the facts stated by the District Court of Appeal in the Toby case that the distributees had not appeared in the probate proceeding. If they appeared they were parties litigant within the meaning of the constitutional section as defined in the Kent case.

In the case of Linstead v. Superior Court, supra, a writ of review issued to test the validity of an order setting aside a decree of distribution. The ground of the petition for annulment of the order was that personal notice of the motion had not been served on the distributees, and that was also one of the grounds upon which the court there decided that the order was invalid. But what should be specially noted from the opinion is that the distributees were then represented by an attorney of record. In that case, therefore, it may be said that it affirmatively appears that the distributees had appeared in the probate proceeding, in which case they would be entitled to notice.

There is nothing said in Estate of Mitchell, 126 Cal. 248, 58 P. 549, which is contrary to the views herein expressed and approved. The remarks of the court in that case were directed to the necessity of giving the notice required by section 1663 of the Code of Civil Procedure relating to proceedings for partial distribution, namely, by posting, before the application for partial distribution could be heard.

[8-10] A decree of distribution is undoubtedly a muniment of title of the highest value (Estate of Garraud, 36 Cal. 277; 24 Cor.Jur., p. 529), but its character in that respect does not prevent the exercise of jurisdiction by the appropriate court to set it aside in a proper case upon the giving of due notice as prescribed by law. Any such application or action brought after the jurisdiction of the probate court as such has terminated is properly ad-

dressed to the equity jurisdiction of the court, and the proceeding is then in personam. In such cases, the distributees must be made parties and be brought into the action or proceeding by service of appropriate notice. See Bacon v. Bacon, 150 Cal. 477, 89 P. 317; In re Gall, 182 N.Y. 270, 74 N.E. 875; In re Leavens, 65 Wis. 440, 27 N.W. 324. But in the administration of decedents' estates, where the probate court has acquired jurisdiction of the res, a distinction must necessarily be drawn in accordance with the reasoning of the McDougald and Kent cases, supra, when the question of service of personal notice on interested persons is raised. To hold that personal notice is required to be served on persons interested who have not appeared, when personal notice in such case is expressly not required by statute, is to modify the statutory provisions by judicial pronouncement. So to do would have the effect of creating an inconsistency in the law applicable in such cases, and an instability therein to the extent that certainty and repose in the chain of title to decedents' estates would be greatly diminished. And if such pronouncement were made, the question would naturally arise: Should the requirement for personal notice be confined to such nonappearing distributees as are resident in this state, or should it be extended to include all, irrespective of their whereabouts or the difficulties which might be encountered thereby? It is apparent that the reasons for not requiring personal service on persons whose interests are disclosed in the probate proceeding, unless they have entered an appearance, applies as cogently when the motion is addressed to the probate court to set aside an order of distribution pursuant to section 473 of the Code of Civil Procedure. Personal service in many cases would be impossible.

[11,12] It is not intimated that the probate court, if deemed necessary or desirable as a condition of granting the relief under section 473, may not require personal service to be made upon interested persons, including distributees, even when they have not appeared in the proceeding. The petitioners, as nonappearing distributees, are not deprived of the right to have a review of the merits of the order setting aside the decree of partial distribution. The return herein discloses that upon the same hearing, after the motion to set aside the decree had been granted, the court

denied the pending application for approval of the agreement and for distribution in accordance therewith. An appeal would lie from such an order when duly made and entered. See *Brownell v. Superior Court*, 157 Cal. 703, 109 P. 91; see, also, *Estate of Parsell*, 190 Cal. 454, 213 P. 40, 25 A.L.R. 1561. The petitioners herein, feeling aggrieved, could appear in the probate proceeding and notice an appeal from the final order made upon the application for approval of the agreement and for partial distribution. On such appeal the propriety of that order as well as of the order setting aside the order of partial distribution would be reviewable. Sec. 1233, Probate Code; Sec. 938, Code Civ.Proc.; *Estate of Mitchell*, 126 Cal. 248, 58 P. 549; *Postal Telegraph-Cable Co. v. Superior Court*, 22 Cal. App. 770, 136 P. 538; 4 Cal.Jur., p. 1053.

The order designated "Order setting aside order confirming written memorandum of agreement and ordering partial distribution" is affirmed.

We concur: CURTIS, J.; HOUSER, J.; EDMONDS, J.; YORK, Justice pro tem.



14 Cal.2d 305

LOEWENBERG v. SCHNEIDER et al.
L. A. 16425.

Supreme Court of California.

Sept. 18, 1939.

1. Appeal and error ⇨695(1), 696(1)

The reviewing court would not determine whether evidence was sufficient to support lower court's findings where bill of exceptions failed to set forth evidence in full and did not contain statement that all evidence pertaining to questions of fact on which findings were allegedly without support was set forth in bill of exceptions.

2. Appeal and error ⇨931(1)

On appeal to review findings of lower court allegedly unsupported by the evidence, all intendments favor correctness of findings.

3. Appeal and error ⇨731(5)

The reviewing court could not determine sufficiency of evidence to sustain find-

ings of lower court because of failure of bill of exceptions to specify the particulars in which evidence was alleged to be insufficient. Code Civ.Proc. § 648.

4. Appeal and error ⇨731(5)

The statutory provisions requiring that one seeking, on appeal, to attack findings of lower court on ground that they are unsupported by evidence, must specify particulars in which evidence is alleged to be insufficient, are mandatory. Code Civ.Proc. § 648.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Bertha Loewenberg against Edward J. Schneider and Ida M. Schneider to impress a trust on real property, to secure an accounting of rents, issues, and profits, and to recover damages for waste. The defendant, Edward J. Schneider, by cross-complaint sought a judgment for balance allegedly due under trust deed. From a judgment for defendant on his cross-complaint and against plaintiff in principal action, plaintiff appeals.

Affirmed.

Arthur C. Arnold, Elias Mansfield, Anthony C. Kolda, and Elon Gilbert Galusha, all of Los Angeles, for appellant.

Holbrook, Taylor, Tarr & Reed and Taylor, Kolliner, Bolton & Schwartz, all of Los Angeles, for respondents.

PER CURIAM.

In this cause respondents move to dismiss the appeal or affirm the judgment upon the ground that no substantial question is presented for decision. The point is well taken.

By her amended complaint plaintiff sought to impress a trust upon certain real property in Los Angeles, to secure an accounting of rents, issues, and profits, and to recover damages for waste. Defendants answered, and also filed a cross-complaint. Trial of the cause resulted in judgment for defendant in the sum of \$3,296.39. Plaintiff appealed.

It appears that plaintiff owned real property in Los Angeles which she had encumbered with a \$12,000 first mortgage to California Bank, and a \$6,000 deed of trust to defendants. She was in default upon payments due on both debts. Defend-

ant Edward J. Schneider acquired the first mortgage, and also caused his deed of trust to be foreclosed. He then purchased the property at the foreclosure sale for \$8,500. At the time there was due him from plaintiff the sum of \$10,350.59, or a balance of \$1,850.59 after allowing credit for the purchase price. On trial of the present cause plaintiff endeavored to show that said defendant had occupied a relation of trust toward her; that he had induced her not to refinance the property by promising her that if she would permit him to acquire the first mortgage without opposition, and to effect a friendly foreclosure of the trust deed, he would then hold the property in trust for her. Said defendant to the contrary alleged and asserted that he purchased the first mortgage for the amount due thereon in order to protect his second deed of trust; that he occupied no position of intimate friendship or confidence toward plaintiff, and that he made no promises, or false representations to her. By cross-complaint he sought judgment for the balance due him under the trust deed of \$1,850.59, with rentals, interest, etc., or a total of \$3,296.39. The trial court found on all issues in favor of defendant, and entered judgment awarding him the sum prayed by his cross-complaint. Among other things the court specifically found that it was not true that defendants were intimate friends of plaintiff, or that plaintiff reposed the utmost trust and confidence in defendant Edward J. Schneider, or that she made any agreement with him whereby he became obligated to protect her interest from foreclosure, or that there was any trust relationship between them.

On appeal it is contended that these findings are erroneous. In fact, the question of the sufficiency of the evidence is the only major contention urged in appellant's opening brief, and it is argued under various headings. The remaining questions listed relate to issues not raised by the pleadings, or other immaterial matters which do not merit discussion.

[1-4] As to the main contention of insufficiency of the evidence, an inspection of the record shows that consideration of the point is precluded by deficiencies in the form of the bill of exceptions. That document contains only five and one-half typewritten pages of excerpts from testimony given on the trial. It neither purports to set forth the evidence in full, nor

does it contain any statement that it sets forth all evidence pertaining to those questions of fact on which the findings are allegedly without support. With such a showing, it cannot be held that the evidence was insufficient. All intendments favor the correctness of the findings. *City of Los Angeles v. Moyer*, 108 Cal.App. 4, 6, 290 P. 1073. Moreover, the bill of exceptions also fails to specify the particulars in which the evidence is alleged to be insufficient. As stated in *Schultz v. City of Venice*, 200 Cal. 50, 54, 251 P. 913, 915: "Such specifications are expressly required by the provisions of section 648 of the Code of Civil Procedure relating to bills of exceptions, and it has been uniformly held that such provisions are mandatory and that in their absence the question of the sufficiency of the evidence to sustain the findings of the trial court cannot be considered by this court upon appeal from the judgment. *Beeson v. Schloss*, 183 Cal. 618, 192 P. 292; *Mills v. Brady*, 185 Cal. 317, 196 P. 776, and cases cited." See, also, *Newbury v. Linberger*, 45 Cal.App. 556, 188 P. 72; *Carter v. Canty*, 181 Cal. 749, 186 P. 346.

The judgment is affirmed.



**PEOPLES STATE BANK v. IMPERIAL
IRR. DIST. et al. ***
Civ. 2319.

District Court of Appeal, Fourth District,
California.

Sept. 11, 1939.

Rehearing Denied Oct. 6, 1939.

See 94 P.2d 370.

1. Waters and water courses ☞230

The rights of a holder of bonds of an irrigation district are determined by the bonds themselves and the law applicable thereto, and the court may not enlarge or diminish such rights. *Gen.Laws 1937, Act 3854, §§ 33, 39-39d, 52.*

2. Waters and water courses ☞230(6)

Refunding bonds and interest coupons issued by irrigation district are general obligations of the district and are payable from revenue derived from an annual as-

*For subsequent opinion see 101 P.2d 466.

assessment upon the land within the district. Gen.Laws 1937, Act 3854, §§ 33, 39-39d, 52.

3. Action ⇨6

It is only in case of actual controversy relating to the legal rights and duties of the respective parties that an action for declaratory relief can be maintained, and the court may refuse to exercise the power granted in any case where its declaration or determination is not necessary or proper at the time under all the circumstances. Code Civ.Proc. § 1061.

4. Judgment ⇨570(4)

The refusal of trial court to exercise its discretionary power of granting declaratory relief should not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment of dismissal in action for declaratory relief should preclude any party from obtaining additional relief based on the same facts. Code Civ. Proc. §§ 1061, 1062.

5. Action ⇨6

Holder of bonds of irrigation district was denied application for declaratory relief against district, where holder had not applied for any of the remedies provided by law, especially where existing forms of action were reasonably adequate. Code Civ. Proc. §§ 1061, 1062.

6. Action ⇨6

Appeal and error ⇨949

Under statute authorizing court to refuse to entertain action for declaratory relief where its determination is not necessary or proper, trial court is vested with discretionary power, and its refusal to entertain action is not reviewable except for abuse of discretion. Code Civ.Proc. § 1061.

7. Appeal and error ⇨948

Plaintiff appealing from adverse judgment in action for declaratory relief has duty to present record which shows that relief was improperly refused, and, in absence of a showing to the contrary, appellate court must assume that trial court properly exercised its discretion. Code Civ.Proc. § 1061.

8. Appeal and error ⇨1107

On appeals involving injunction decrees, law prevailing when appellate court renders its opinion is applicable.

9. Appeal and error ⇨843(2)

Where holder of bonds of irrigation district sought injunction to restrain district

from filing proceedings under Federal Bankruptcy Act, on ground that state statute purporting to give consent thereto was unconstitutional, and since rendition of judgment by trial court, but before judgment by appellate court, Legislature repealed statute in question and adopted a subsequent statute, which purported to validate proceedings under repealed statute, appellate court would not determine the constitutionality of repealed statute. St.Cal.1934, Ex.Sess. c. 4; St.1939, c. 72; Bankr.Act § 81 et seq., 11 U.S.C.A. § 401 et seq.

10. Appeal and error ⇨843(2)

Where bankruptcy proceeding had been instituted in federal court by irrigation district under state statute purporting to consent thereto at time holder of bonds of district sought temporary injunction to restrain district from such action, issue of constitutionality of state statute was academic, and would not be determined by appellate court. St.1939, c. 72; Bankr.Act § 81 et seq., 11 U.S.C.A. § 401 et seq.

11. Injunction ⇨22

Trial court properly refused to enjoin irrigation district from filing petition in bankruptcy under Federal Bankruptcy Act, where, at time of making application therefor, district had in fact filed proceeding in federal court under state statute purporting to consent thereto. St.Cal.1934, Ex.Sess., c. 4; St.1939, c. 72; Bankr.Act § 81 et seq., 11 U.S.C.A. § 401 et seq.

12. Appeal and error ⇨843(1)

An appellate court will not review questions which are moot and which are only of academic importance.

13. Bankruptcy ⇨38

California irrigation districts, where state has given its consent, may file a voluntary application or petition for confirmation of a plan for composition and readjustment of its debts under the Federal Bankruptcy Act. Bankr.Act § 81 et seq., 11 U.S.C.A. § 401 et seq.

Appeal from Superior Court, Imperial County; Frank J. Macomber, Judge.

Action by the Peoples State Bank against the Imperial Irrigation District and the Board of Directors of the Imperial Irrigation District for declaratory relief and for an injunction to enjoin the defendants from filing a petition in bankruptcy. From

a judgment dismissing the complaint, the plaintiff appeals.

Affirmed.

W. Coburn Cook, of Turlock, for appellant.

Harry W. Horton and George R. Kirk, both of El Centro, for respondents.

GRIFFIN, Justice.

On May 27, 1938, appellant instituted the present action for declaratory relief and sought an injunction against the Imperial Irrigation District and its board of directors, alleging that it was the owner of certain refunding bonds issued by the district; that all of the bonds fall due in 1983; that certain interest coupons were past due and had been presented for payment but that payment was refused and respondents had failed to levy the amount of the annual assessments required by law for the payment of bond obligations. The complaint further alleges: "That defendants have threatened, intend to, have undertaken preliminary steps and negotiations therefor, and are about to file a petition in bankruptcy and for composition and readjustment of debts of Imperial Irrigation District under the provisions of chapter X of the United States Bankruptcy Act [11 U.S.C.A. § 401 et seq.] and under the purported or alleged consent of chapter 4, California Statutes of 1934 (Extra Sessions). * * * That said chapter 4, California Statutes 1934 (Extra Sessions), is unconstitutional and void * * * That by undertaking a proceeding under said chapter 4, California Statutes 1934 (Extra Sessions), or under chapter X of the Bankruptcy Act, defendants would engage in unconstitutional acts and proceedings detrimental to and with irreparable injury to plaintiff." The complaint prayed for declaratory relief, for a temporary restraining order and injunction enjoining the respondents from filing a petition in bankruptcy under chapter X of the Bankruptcy Act, and that chapter 4, Statutes 1934 (Extra Sessions) be adjudged unconstitutional and void. The trial court sustained a demurrer to the complaint without leave to amend and rendered a judgment of dismissal. From this judgment dated July 28, 1938, appellant has appealed.

Appellant points out and argues that it is entitled (1) to a declaration of its rights as a holder of bond obligations of respondent district; (2) that a California irrigation district is a governmental agency of

the state of California and as such is not subject to bankruptcy; (3) that the state of California has not given its consent to bankruptcy proceedings by its irrigation districts; (4) that the purported consent of the state of California as contained in chapter 4, Statutes of 1934 (Extra Sessions) is in fact not such consent and is unconstitutional and void.

[1-7] Disposing of the first point, it is quite apparent that appellant's rights as a holder of the bond obligations are fixed and determined by the instruments themselves and the law applicable thereto. The court may not enlarge or diminish those rights. The bonds and interest coupons are general obligations of the district and are payable from revenue derived from an annual assessment upon the land within the district. Annual assessments must be levied for the payment of matured and maturing bond obligations. If not levied as the result of the neglect or refusal of the board of directors to cause such assessment and levies to be made, adequate provision is made for the protection of the bondholders' rights. California Irrigation District Act, Deering's Gen.Laws 1937, act 3854, §§ 33, 39, 39a, 39b, 39c, 39d and 52. See, also, *Provident Land Corp. v. Zumwalt*, 12 Cal.2d 365, 85 P.2d 116; *United States ex rel. Concord Sav. Bank v. Mayor etc. of Fort Scott*, 99 U.S. 152, 25 L.Ed. 348. It is only in case of actual controversy relating to the legal rights and duties of the respective parties that an action for declaratory relief can be maintained (*Blakeslee v. Wilson*, 190 Cal. 479, 213 P. 495), and the court may refuse to exercise the power granted in any case where its declaration or determination is not necessary or proper at the time under all the circumstances. Section 1061, Code Civ. Proc. This determination, however, should not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action and no judgment of dismissal under the instant case should preclude any party from obtaining additional relief based on the same facts. Section 1062, Code Civ.Proc. Until the remedies provided by law for the enforcement of the rights of appellant have been applied, we see no urgency for a declaration of those rights, especially, where existing forms of action are reasonably adequate. *San Joaquin & K. R. Canal & Irr. Co. v. County of Stanislaus*, 155 Cal. 21, 99 P. 365;

Newburger v. Lubell, 257 N.Y. 383, 178 N. E. 669. Under the provisions of section 1061, Code of Civil Procedure, the trial court is vested with discretionary power in entertaining an action for declaratory relief and its refusal so to do is not reviewable upon an appeal, except for abuse of discretion, and it is the duty of appellant to present a record which shows that relief was improperly refused. In the absence of a showing to the contrary, the appellate court will assume that the trial court properly exercised its discretion. *Cutting v. Bryan*, 206 Cal. 254, 274 P. 326; *Sunset Scavenger Corp. v. Oddou*, 11 Cal. App.2d 92, 53 P.2d 188.

In appellant's second cause of action an injunction is sought preventing respondents "from undertaking any proceedings whatever under the terms of chapter X of the United States Bankruptcy Act, or under or in reference to chapter 4, California Statutes, 1934, (Extra Sessions)" and "that said chapter 4, Statutes 1934, (Extra Sessions) of California be adjudged unconstitutional and void".

It now appears that since the rendition of judgment and before this opinion was filed the legislature in its 1939 session repealed chapter 4, Statutes of 1934 (Extra Sessions), the constitutionality of which is questioned by appellant, and has now adopted chapter 72 (Stats.1939), entitled "An act authorizing taxing agencies and instrumentalities to prosecute proceedings under sections 81, 82, 83 and 84 of the act of congress entitled 'An act to establish uniform system of bankruptcy throughout the United States,' approved July 1, 1898, as amended, consenting to the adoption of the sections by the congress, validating proceedings under or in contemplation of proceedings under the sections, and repealing chapter 4 of the Statutes of the Extra Session of 1934, and declaring the urgency hereof". Approved by the governor April 30, 1939, and filed with the secretary of state April 21, 1939. This act became effective immediately and purportedly gives consent to bankruptcy proceedings by California taxing agencies and further purports to validate proceedings theretofore commenced.

[8-11] It also appears from the record that respondents have in fact filed proceedings in the federal court under the Bankruptcy Act, subsequent to the effective date of chapter 72, 1939 Statutes above cited. It has been clearly determined in *Tulare*

Irr. District v. Lindsay-Strathmore District, 3 Cal.2d 489, 45 P.2d 972, that an injunction decree, by its very nature, acts on the rights of the parties in the future, and, whatever may be the law applicable to appeals generally, on appeals involving injunction decrees, the law in effect and applicable when the appellate court renders its opinion must be applied; and in an action, which involves an appeal from an injunction decree, although the judgment was entered and the appeal was perfected before the passage of the new enactment, the law in existence and applicable at the time of the decision of the case on appeal governs and not the law at the time of entry of the judgment. Although both appellant and respondents are insistent that this court should now construe the constitutionality of the new enactment (chapter 72, Stats.1939), we would only be deciding an academic question, not applicable to the instant case, for the proceedings have already been instituted in federal court under the present existing law and the writ could not and should not issue restraining respondent from doing that which has already been done. *Wright v. Board of Public Works*, 163 Cal. 328, 125 P. 353; *Bernard v. Weaver*, 23 Cal.App. 532, 138 P. 941; *Cohen v. Gray*, 70 Cal. 85, 11 P. 508. An injunction is a writ or order requiring a person to refrain from a particular act. Section 525 Code Civ.Proc. By express statutory mandate, a state court cannot enjoin the proceedings of a federal court. Civ.Code, § 3423, subd. 2; Code Civ. Proc. § 526, second subd. 2; *Phelan v. Smith*, 8 Cal. 520; *Morgan v. State*, 154 Ark. 273, 242 S.W. 384, 387; *Union National Bank v. Lehmann-Higginson Grocer Co.*, 10 Cir., 82 F.2d 969; *In re Forty-One Thirty-Six Wilcox Building Corporation*, 7 Cir., 86 F.2d 667.

[12] In the instant case, then, the question presented has become moot. An appellate court will not review questions which are moot and which are only of academic importance. It will not undertake to determine abstract questions of law at the request of a party who shows that no substantial rights could be affected, in the case pending, by a decision either way. *Adams v. Prather*, 176 Cal. 164, 167 P. 867; 2 Cal.Jur., sec. 472, p. 803; *Keefer v. Keefer*, 31 Cal.App.2d 335, 87 P.2d 856; *Illinois Trust & Sav. Bank v. Pacific Railway Co.*, 115 Cal. 285, 47 P. 60; 2 Cal.Jur., sec. 13, p. 125.

[13] The right under the Bankruptcy Act, of irrigation districts in California, where the state has given its consent, to file a voluntary application or petition for confirmation of a plan for composition and readjustment of its debts under the act, has been definitely set at rest by the United States Supreme Court in *United States v. Bekins*, 304 U.S. 27, 58 S.Ct. 811, 82 L.Ed. 1137, decided April 25, 1938; *In re Lindsay-Strathmore Irr. Dist.*, D.C., 21 F.Supp. 129. See, also, *In re Corcoran Irr. Dist.*, D.C., 27 F.Supp. 322; *In re Merced Irr. Dist.*, D.C., 25 F.Supp. 981; *In re Lindsay-Strathmore Irr. Dist.*, D.C., 25 F.Supp. 988.

For the reasons expressed, the judgment of dismissal is affirmed.

I concur: MARKS, Acting P. J.



34 Cal.App.2d 574

PEOPLE v. ROSS.

Cr. 1678.

District Court of Appeal, Third District,
California.

Sept. 18, 1939.

1. Criminal law ⇨1134(1)

Where only relief asked of District Court of Appeal was that judgment convicting defendant of murder in the second degree be modified by reducing the crime to that of manslaughter, the inquiry must be directed to the question as to whether evidence was sufficient to sustain a verdict of murder in the second degree. Pen.Code, § 1181(6).

2. Homicide ⇨22(2)

To be "murder of the first degree," under statute, the killing must be premeditated, except when done in the perpetration of certain felonies. Pen.Code, §§ 187-189.

[Ed. Note.—For other definitions of "Murder in First Degree," see Words & Phrases.]

3. Homicide ⇨23(1), 146

Where killing is proved to have been committed by defendant and nothing further is shown, the presumption of law is that killing was malicious and an act of

murder, but in such case the verdict should be murder of the second degree, and not murder of the first degree. Pen.Code, §§ 187-189.

4. Homicide ⇨23(2)

"Murder in the second degree," under statute, is an unlawful killing with malice, but without deliberation or premeditation, and the intent to take life is implied from the fact of an unlawful killing. Pen.Code, § 189.

[Ed. Note.—For other definitions of "Murder in Second Degree," see Words & Phrases.]

5. Homicide ⇨33

"Voluntary manslaughter" is the unlawful killing of a human being, without malice, upon a sudden quarrel or heat of passion, and the law requires the existence of but one of these conditions, as provocation to reduce a felonious homicide from murder to manslaughter. Pen.Code, § 192.

[Ed. Note.—For other definitions of "Voluntary Manslaughter," see Words & Phrases.]

6. Homicide ⇨254

In murder prosecution, evidence supporting conviction of murder in second degree.

7. Homicide ⇨354

In murder prosecution, testimony in regard to defendant's habit of drinking intoxicating liquor provided no basis for reducing conviction from second-degree murder to voluntary manslaughter, in view of statute providing that no act committed by a person while in state of voluntary intoxication is less criminal by reason of his having been in such condition. Pen.Code, § 22.

8. Homicide ⇨270

In murder prosecution, whether defendant knew what he was doing when he took life of his paramour was for jury.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Walter Arthur Ross was convicted of murder in the second degree, and he appeals.

Affirmed.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice TUTTLE delivered the opinion of the court.

Defendant was convicted, after a jury trial in the county of Butte, of the crime of murder in the second degree. The information charged him with having murdered one Charlotte Boyd, in the city of Chico, Butte county, California, on the 26th day of July, 1938.

Defendant moved the trial court to modify the judgment and enter a judgment against him of manslaughter. The trial court refused to so modify the judgment, and appellant now asks this court to modify the judgment to manslaughter, which may now be accomplished without a new trial, under section 1181(6) of the Penal Code.

Appellant's first point relates to the power of the appellate court to modify this judgment to that of manslaughter. Respondent concedes that this court has such power under the above section of the Penal Code as it now reads. We are therefore concerned only with appellant's second point, namely, whether the evidence is sufficient to sustain the verdict of murder, or whether the evidence will only sustain a judgment of manslaughter.

The defendant Walter Ross was twenty-four years old at the time of the murder. His paramour, Charlotte Boyd, the deceased, was thirty-one years of age, and had been married for ten years. She lived with her invalid husband in Chico, California. The murder took place on Oak street, between First and Second streets, in the city of Chico. Defendant spent his boyhood in the vicinity of Fresno following the trade of electrician's helper. He met Charlotte in a restaurant in Chico in July, 1937, just about one year before he took her life. After defendant and Charlotte became better acquainted, according to defendant's own testimony, they commenced having sexual intercourse. Although defendant knew Charlotte was married, these relations became more and more intimate, and while defendant does state that during the year of their intimacy, the question of Charlotte procuring a divorce and marrying him was touched upon, nothing was ever done about it, and indeed, the subject, if discussed at all, was of a very chimerical nature.

In November, 1937, defendant attempted to break off with Charlotte, and went to Fresno to live with his mother. He corresponded with Charlotte, however, and

in March, 1938, again succumbed to his amorous desires, and went back to Chico, there to continue his adulterous relations with the deceased. Defendant's mother came to Chico to live with him on July 14, 1938, twelve days before the murder. Defendant's own testimony is to the effect that he never drank hard liquor until he knew Charlotte, so that his drinking proclivities continued for less than one year; only eight months, when we omit the period from November, 1937, to March, 1938, when he was in Fresno with his mother.

Upon the day of the murder the defendant made an appointment with Charlotte, and drove to the above locale in his car, taking with him a high-powered hunting rifle that carried a load of 30-006 shells. He was seen at about 2:00 p. m. by Mrs. Anna McIntosh to stop his car and carry a gun toward the thicket of Chinese locust trees where the murder took place about five hours later. Defendant then got into Charlotte's blue sedan car with her and they drove off together. They returned later and the two cars were parked at the locale on opposite sides of the street, Charlotte's car being off the highway into the thicket. At about 7:00 p. m. eye-witnesses testified very clearly that they heard a cry and a shot and a groan coming from the car, and that they saw defendant standing just outside the car opposite the right front door; that they saw a figure slump behind the wheel, over to the right side of the seat; that defendant either opened one or two doors of the car, and placed something in the rear (which by fair inference can be said to be the gun), walked around behind the car to the left front door, opened it, got in and drove off. He then drove up the street, came by the Brattensbargs, and waved to them, and stopped at the home of Mr. Blecher, his boss, where he had a very rational talk with Mrs. Flo Blecher concerning the notification of his mother, and of putting his affairs in order. That he then drove off. That Mr. Brattensburg and his young son went over to the spot to investigate, and that defendant came back again, slowed down, and they thought he was going to stop, but he suddenly speeded up, Mr. Brattensburg having to grab his son to keep the latter from being struck by the car. That defendant then speeded up the street and was gone.

Defendant next appears at the Lomo Tavern, at about 8:30 p. m. This is about

thirty-one miles from Chico, over hilly country. The bloody corpse of Charlotte was still at defendant's side. Defendant went into the tavern and was observed by many witnesses. He then left and drove over to Butte Meadows, entering a roadhouse run by one Grace Taylor. He came in carrying his rifle, and had several drinks of whiskey. He confessed orally to the killing, and said what "he would do to the law if they came for him". Subsequently, he was thrown down, disarmed, and tied up to await the coming of the sheriff. Charlotte's corpse was still outside in the car.

[1] The only relief asked of this court is that the judgment be modified by reducing the crime to that of manslaughter, and the inquiry must be directed to the question as to whether or not the evidence was sufficient to sustain a verdict of murder in the second degree. If it is, the judgment must stand. Precisely, the contention of appellant is that: "There is no evidence in the entire case, either from the witnesses for the People or the defendant, showing or tending to show motive, malice or premeditation on the part of the defendant herein, and the crime proved is only one of manslaughter; therefore, the trial court, as a matter of law, should reduce the conviction of murder in the second degree to manslaughter."

[2, 3] "Murder is defined as the unlawful killing of a human being with malice aforethought. Section 187, Pen.Code. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature, and implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Section 188, Pen.Code. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder in the first degree; and all other kinds of murders are of the second degree. Section 189, Pen.Code. To be murder of the first degree, under our statute, the killing must be premeditated, except when done in the perpetration of certain felonies; that is to say, the unlawful killing must be accompanied with a deliberate and clear intent to take life.

If the act be preceded by, and be the result of, a concurrence of will, deliberation and intent, the crime of first-degree murder is proved. *People v. Bellon*, 180 Cal. 706, 182 P. 420. When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree. *People v. Knapp*, 71 Cal. 1, 6, 11 P. 793; *People v. Ford*, 85 Cal.App. 258, 263, 258 P. 1111." *People v. Howard*, 211 Cal. 322, 328, 329, 295 P. 333, 336, 71 A.L.R. 1385.

[4] "Murder" (in the second degree) "is an unlawful killing with malice, but without deliberation or premeditation. * * * In first degree murder the evidence must show that there was a deliberate intent to take life, while in that of the second degree, the intent to take life need not be proven, and may not in fact exist; it is implied from the fact of an unlawful killing." 13 Cal.Jur., p. 603, par. 18.

In *People v. Ford*, 85 Cal.App. 258, 262, 263, 258 P. 1111, 1113, it is said: "Another point mentioned, but not strongly urged, by appellant is that it was error for the trial court to instruct the jury that a verdict of murder in the second degree might be returned. There is no merit to this claim. The proof established a case where such an instruction was peculiarly apt—in fact, necessary. The evidence against the appellant was almost entirely circumstantial; there was no definite proof of motive, nor as to what conduct or conversation immediately preceded the killing. Although the jury believed that the appellant slew the deceased, there was no evidence of that deliberation preceding the act which is necessary to constitute murder of the first degree. On the other hand, there was also an absence of proof of provocation and sudden passion which would bring the offense within the definition of manslaughter, and without which the only lawful verdict must have been one finding the defendant guilty of murder. This is so since upon the commission of homicide by a defendant having been established, the crime is murder unless there is evidence produced either by the prosecution or the defense affirmatively showing circumstances of mitigation which would bring the murder within the definition of manslaughter. Therefore the jury legally

and logically returned a verdict of murder in the second degree, for the circumstances of the killing were certainly such as to show an abandoned and malignant heart."

[5] In 13 Cal.Jur., page 609, it is stated: "Voluntary manslaughter is the unlawful killing of a human being, without malice, upon a sudden quarrel or heat of passion. The law requires the existence of but one of these conditions, as provocation to reduce a felonious homicide from murder to manslaughter. When a mortal blow is struck upon a sudden quarrel or in the heat of passion, upon adequate provocation, the actual intent is disregarded. In such case, although the intent to kill may exist, it is not that malicious intent which is an essential element in the crime of murder."

[6] Applying the foregoing rules and definitions to the facts here, we are satisfied that there is ample evidence to sustain the verdict of murder in the second degree. Evidence of deliberation or premeditation is not necessary. The killing was clearly shown to have been committed by defendant. Assuming that nothing further was shown, "the presumption of law is that it was malicious and an act of murder". Howard case, *supra*. As to the offense of manslaughter, none of the elements prescribed in section 192 of the Penal Code appears in the evidence. There is a complete absence of proof of a sudden quarrel or heat of passion. On the contrary (using the words of appellant), "the record is clear that during the whole time that Ross knew and loved Charlotte they never had a single cross word".

Much faith is placed by appellant in the case of *People v. Kelley*, 208 Cal. 387, 281 P. 609, 611. There the verdict was murder in the first degree, without recommendation. The Supreme Court remanded the case to the trial court, with directions to find the defendant guilty of manslaughter. There is no discussion in the case as to whether or not the evidence would justify a verdict of murder in the *second* degree. The court finds that the elements necessary to constitute murder in the *first* degree were not proven, in that there was no evidence "that there was a willful, deliberate, and premeditated killing". As we have seen, the presence of those elements is not necessary to constitute murder in the *second* degree. In fact, section 189 of the Penal Code expressly so provides. Furthermore, in the *Kelley* case the court

states that there was prejudicial error in the record which would call for a reversal of the judgment, were it not for the fact that it had the power to modify the judgment. No errors of any character are urged by appellant here, except the refusal of the trial court to modify the judgment. The case sheds little light on the ultimate question to be decided here—Does the record sustain the verdict of second degree murder?

The case of *People v. Peter*, 125 Cal. App. 657, 14 P.2d 166, likewise relied upon by appellant, was one where the appellate court directed the trial court to modify a judgment of second degree murder by entering a judgment of manslaughter. The facts clearly indicate there that the shooting was done in the heat of passion, following a quarrel over a card game. The crime, therefore, was manslaughter, and not murder. In the instant case, as we have pointed out, such evidence is entirely lacking, and there appears to be no immediate provocation for the killing.

[7] Counsel for appellant emphasizes continually the habit of defendant in respect to the consumption of intoxicating liquor and the effect thereof. The answer to this argument is contained in section 22 of the Penal Code, which reads as follows: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

Dr. Catton, a medical expert, testified: "In other words, having taken myself through those whole five tests, I come out with the conviction that he (the defendant), satisfies all the tests of being conscious rather than unconscious during the episode, wherein he states that he was not conscious."

[8] There was ample evidence to justify the finding upon the part of the jury that defendant knew just what he was doing when he took the life of his paramour. All of these matters were questions of fact for the jury, and under the record here, the proper place for their presentation was in the argument at the trial.

In conclusion, we are of the opinion that the jury might well have found that defendant was guilty of murder in the first degree. There is evidence of preparation and premeditation, consisting of the taking of the rifle on the proposed ride with the deceased, and the further evidence that he was seen to take the gun from his car, at the scene of the crime, and walk toward the shrubbery which bordered the road. The jury may have decided to deal leniently with defendant on account of the conduct of the deceased. She was married, and some seven years older than he. The record would bear out the assertion of appellant's counsel to the effect that defendant was the victim of her unnatural and consuming lust,—not that he was an unwilling victim at the beginning, but toward the end of the episode he may have found himself degenerating physically and morally, and for this reason made up his mind that the only release from his predicament was to destroy her. That he intended to do so, there can be no doubt.

We have carefully examined the entire record, and are satisfied that the disposition of the case made by the jury was a proper one.

The judgment is affirmed.

I concur: THOMPSON, J.



34 Cal.App.2d 500

WEIAND v. SOUTHERN PAC. CO.
Civ. 6149.

District Court of Appeal, Third District,
California.

Sept. 11, 1939.

Hearing Denied Nov. 9, 1939.

1. Master and servant ⇨276(2)

In action against railroad company for death of defendant's employee, verdict resting on conjecture, surprise, or speculation cannot stand, but plaintiff must produce substantial affirmative proof that defendant's negligence caused fatal injury, and, where proven facts give equal support to each of two inconsistent inferences, judgment must go against party on whom rests necessity of

sustaining one of such inferences as against the other. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59.

2. Commerce ⇨8(6) Courts ⇨97(5)

In action under Federal Employers' Liability Act, plaintiff's rights and defendant's obligations depend on such act and applicable principles of common law as interpreted by federal courts, not state court decisions in conflict therewith. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59.

3. Negligence ⇨134(1)

To recover damages for wrongful death, there must be substantial proof of defendant's negligence.

4. Master and servant ⇨276(1)

In action under Federal Employers' Liability Act for death of defendant's employee, if plaintiff proves sufficient facts to justify verdict for him on one theory, existence of one or more other seemingly rational explanations of episode does not preclude recovery by or invalidate verdict for plaintiff. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59.

5. Master and servant ⇨278(18)

In action against railroad company for death of brakeman, evidence *held* sufficient to sustain jury's finding that defendant was negligent in leaving cabooses on track too near switch and another track to allow sufficient clearance between them and passing freight cars for body of employee descending from top of one of such cars by side ladder. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59.

6. Master and servant ⇨276(8)

In action against railroad company for death of brakeman, evidence *held* sufficient to justify jury's finding that defendant's negligence, in leaving cabooses on track too near switch and another track to allow sufficient clearance between them and passing freight cars for body of employee descending from top of one of such cars by side ladder, was proximate cause of fatal injury. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59.

7. Master and servant ⇨276(10)

In action against railroad company for death of brakeman, crushed between standing caboose and passing freight car while descending from top of such car by side ladder, evidence *held* sufficient to justify jury's

finding that decedent was acting within scope of his employment at time of accident. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59.

8. Master and servant ⇨235(5)

Under Federal Employers' Liability Act, employee owes no duty to exercise care to discover extraordinary dangers arising from employer's negligence, but may assume that employer or his agents have exercised proper care for employee's safety until notified to contrary, unless want of such care and resulting danger are so obvious that ordinarily careful person would observe and appreciate them under circumstances. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59.

9. Master and servant ⇨286(30)

In action for death of railroad brakeman crushed between standing caboose and passing freight car, whether lack of sufficient clearance between them was so obvious that ordinarily careful person would have observed and appreciated danger under circumstances was fact question for jury. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59.

10. Master and servant ⇨281(6)

In action against railroad company for death of brakeman, evidence *held* sufficient to justify jury's finding that defendant's negligence in leaving cabooses on track so near switch and another track as to leave insufficient clearance for body of employee descending from passing freight car by side ladder presented danger which was not obvious and could not have been anticipated by deceased in exercise of ordinary prudence. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59.

11. Master and servant ⇨235(4)

An employee owes no duty to exercise care to discover dangers not ordinarily incident to employment, but resulting from employers' negligence.

12. Death ⇨99(4)

An award of \$30,000 damages to widow for death of her 49-year-old husband, earning average of \$216 per month as railroad brakeman during six months before his death and about \$200 per month while employed in railroad work, was not excessive, though he received less compensation at times when not engaged in his regular work.

13. Death ⇨95(2)

In death action, deceased's ability to earn money, rather than amount actually

earned by him, may be considered by jury in determining amount of damages to be awarded his widow.

14. Negligence ⇨136(31)

In action for death of railroad brakeman, crushed between standing caboose and passing freight car, from top of which he was descending by side ladder, whether decedent was contributorily negligent, so as to require reduction of damages proportionately, *held* for jury under evidence. Federal Employers' Liability Act § 3, 45 U.S.C.A. § 53.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by Minnie Weiland, administratrix of the estate of Edward W. Weiland, deceased, against the Southern Pacific Company to recover damages for deceased's death. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied; CARTER, J., not participating.

W. D. Tillotson, of Redding, and George R. Freeman, of Willows, for appellant.

M. Mitchell Bourquin, of San Francisco, and Carter, Barrett, Finley & Carlton, of Redding (P. J. Murphy, of San Francisco, of counsel), for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This action is brought by the widow of Edward W. Weiland to recover damages for the death of the latter, and is based upon the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59. The jury awarded damages in the sum of \$30,000, and the appeal is from the judgment.

Edward W. Weiland, at the time of his death on the 20th day of January, 1937, was forty-nine years of age, and had been engaged in railroading for some twenty-five years, about fourteen years with the defendant. On the 20th of January, 1937, Weiland was the fifth brakeman on an extra freight train comprising approximately one hundred six cars running from Gerber, in Tehama county, to Roseville, in Placer county. As fifth man, Weiland was responsible for the second twenty-five or thirty cars behind the engine, the first twenty-five or thirty cars being under the charge of the head brakeman, Paul Fizer. The train arrived in the Roseville yard in daylight at approximately 7:30 o'clock in the morning. It was a very cold morning, and many of

the cars were covered with ice, snow and frost. The principal part of the defendant's yard at Roseville, California, lies west of the Lincoln street crossing. The railroad tracks run in a general westerly and easterly direction. The train in question came into the Roseville yard from the north on a track commonly known as the Oregon lead. Just before this track reaches the defendant's depot or station, which is a short distance east of Lincoln street, it turns in a general westerly direction and crosses Lincoln street at right angles. The Oregon lead retains its identity until it reaches switch No. 2, which is 320 feet west of the west line of Lincoln street. From this point, continuing west, the lead track is known as track No. 1. Track No. 2 branches off of the lead on the north at switch No. 2. The defendant's westbound main line is south of the lead. A yard crew working in the west end of the yard had "kicked" two cabooses down the lead and into track 1 some twenty minutes before the train entered. These cabooses stood then about fifty feet from the frog over which trains would pass turning into track 2. Except for the cabooses, track 1 was unoccupied at that end of the yard. As the train turned over the frog into track 2, Weiand was caught between the caboose and the side of the car of the train upon which he was riding. He was found lying on the ground between the caboose and the moving train upon which he had been employed, in an unconscious condition. He lay with his head to the west in the direction of the travel of the train. His clothing was split, exposing the skin up and down the back from waist to shoulder. His sixth, seventh, eighth, ninth, tenth, eleventh and twelfth ribs were broken off an inch from the spine and had pierced the lung and spleen. His chest was crushed, and the whole chest wall was badly discolored. There were a number of lacerations distributed over the body. The left side of the skull was also fractured. He died within a short time. There was no eyewitness to the occurrence. When last seen he was standing upon top of one of the moving cars of his train, just before his body was discovered, and while the train was entering the railroad yard at Roseville.

[1] The chief contention urged by appellant as a ground for reversal is that "there is no evidence that the negligence of the defendant, if any, was the proximate cause of the accident". It relies upon the

following familiar rule laid down in *Wheelock v. Freiwald*, 8 Cir., 66 F.2d 694-698: "A verdict cannot be permitted to stand, which rests upon conjecture, surmise, or speculation, but plaintiff must produce substantial affirmative proof that the negligence of the carrier caused the injury, and 'where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover.' *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 53 S.Ct. 391, 393, 77 L.Ed. 819."

Seeking to invoke the foregoing rule in the instant case, appellant states: "The most logical cause of the accident and the only theory which coincides with the undisputed and uncontradicted evidence is that Weiand came to his death by reason of his own voluntary act in attempting to walk upon the top of a car, made slippery by ice and frozen snow, while it was in motion, and that he slipped and went off of the car feet first."

[2-4] The law is settled that in an action brought under the provisions of the Federal Employers' Liability Act, the rights of the plaintiff and the obligations of the defendant depend upon the act and the applicable principles of common law as interpreted by the federal courts and not by the decisions of courts of the several states when in conflict therewith. We cannot see any material difference between the rule in the *Chamberlain* case, quoted above, and the rule prevailing in this state to the effect that there must be substantial proof of negligence in any case to authorize a recovery. The above rule is predicated upon the theory that *neither* of two inconsistent inferences has been established. Obviously, if plaintiff has failed to make out a case for the jury on either of two theories, no recovery can be had. If, however, plaintiff has proven sufficient facts to justify a verdict upon *one* theory, the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury.

[5] The first inquiry is: Was any negligence upon the part of defendant proven? It is contended by respondent that such negligence consisted in leaving

the two cabooses at a point where the converging tracks were so close that there was insufficient "clearance" between the cabooses and passing freight cars, and particularly between the body of an employee who was in the act of descending from the top of a freight car by means of a "ladder" affixed to the side of said car, or who was on such ladder in the discharge of any other of his duties. The evidence shows that the distance between the corner of the easterly caboose and the ladder of a car of the same type upon which deceased was riding, is 16½ inches. There is the further fact proven that the sway of the car incidental to passing over the switch might reduce this clearance some seven inches more. Sometimes, according to witness Wait, this swaying motion continues clear through the yard. The testimony of witness Keller shows that the cabooses stood on track No. 1, at a point about fifty feet west of the *frog* of the switch over which the train passed in moving on track No. 2. These two tracks merged at the switch. Witness Keller saw the body of Weiland immediately after the accident, and the relative positions of the passing cars in the train on which deceased was riding, and the two cabooses. Keller had been engaged for years in railroad work. He had worked in 1936 and 1937 for the defendant at Roseville as car inspector, and as general car foreman in Oakland during 1929. His duties were to inspect trains as they were coming in or leaving the terminal at Roseville, and he was so engaged on the day that Weiland was killed. He testified that there was not "clearance" between the east end of the caboose and the train on which Weiland was working. He testified that "clearance is known as a safe distance from one car to another where it is safe in case a man on the ladder of a moving car, that he is safe, that he will not be struck by the car next to him". If there was insufficient "clearance" between the passing train and the cabooses, or one of them, the jury was justified in finding that the act of the company in leaving the cabooses too near the switch and consequently too close to the other track, was negligence. This fact was one for the jury to determine, and we are satisfied that there is sufficient evidence to sustain such a finding.

[6] The question then arises, as to whether or not such negligence was the proximate cause of the injury. We believe that the facts and circumstances shown by

the record were sufficient to justify a finding in favor of respondent upon that issue, and to remove the verdict from the implication that it was the result of speculation and conjecture and without any factual foundation whatever. The testimony relating to the injuries received by Weiland (detailed *supra*), would support the inference that they were not the result of a "fall", but the result of a crushing received between the caboose and the moving car. At a point almost directly over the spot where the body was found, there were marks upon the side of the caboose which ran more parallel to the roof than in a vertical direction. The paint on the caboose was scuffed up and scratched westward. There were no marks whatever upon the roof of the caboose, though it is several inches lower than that portion of the roof of the car which was nearest to the caboose. The clothing of deceased was split open the entire distance up and down the back, just left of the spine. There was paint upon the shoes of deceased of the same color as that of the caboose. These and other facts disclosed by the record are ample to support a finding that while deceased was upon the side ladder of the car upon which he was riding, he was brushed off and crushed by the easterly caboose which had, through the negligence of defendant, been allowed to stand at a point on the track where there was insufficient "clearance", as that term is defined by the witness Keller. The opinion of Judge Rudkin, in the case of *Hobbs, Wall & Co. v. Petterson*, 9 Cir., 2 F.2d 594, answers the contention of appellant on this phase of the case:

"But the court was not compelled to accept any of the theories advanced by the plaintiff in error. The mere suggestion of such theories did not necessarily throw the case into the realm of speculation and compel a finding in its favor. As said by the court in *Wabash Screen Door Co. v. Black*, 126 F. 721, 725, 61 C.C.A. 639, 643: 'While the evidence was circumstantial, it was ample in our opinion, to warrant the submission of the question to the jury under the instructions given. * * * Doubtless a jury ought not to be permitted to speculate, in the sense of guess, between causes, when no reasonable explanation of the injury can be found in the testimony. * * *

But, in the absence of direct testimony, the simple suggestion of theories by the defense does not reduce the jury to mere

speculation, and disqualify it from determining the cause of the injury complained of. The theories suggested may be forced and fanciful, finding no reasonable foundation in the facts proved. They may be explanations which do not explain; which the common sense of the jury, when applied to the testimony, would instantly reject.” (Italics ours.)

The same holding is found in the case of *Kulp v. Chicago, St. Paul, Minn. & Omaha Ry. Co.*, 8 Cir., 88 F.2d 466, where numerous authorities are cited in support thereof.

[7] It is next urged that “there is no evidence that at the time of the accident said Edward W. Weiland was acting within the scope of his employment with the defendant.” It is not contended that deceased was at a place where he *at no time* was not within the scope of his employment. The record is undisputed that a brakeman is called upon at *certain* times and in *certain* contingencies to ascend and descend the side ladder of a freight car. In this respect the case differs from many of the cases relied upon by appellant. The question is not whether deceased was doing an act which was *altogether* outside the scope of his employment, but whether or not, upon this *particular occasion*, he was called upon to use the ladder. That it was the custom of a brakeman to act in the same manner of decedent in the discharge of his duties, was established by the evidence of witness Keller, who testified: “It was a common thing, as the train came in, to see a brakeman on top of the train and somewhere near Lincoln street, why, to see them climb out and drop off of the train.” Witnesses of both appellant and respondent testified that brakemen were required to descend and get off as the train entered the receiving track, and from the ground to inspect the running gear of their train. It is the contention of appellant, however, that this duty arose when the train came to a stop just before entering the railroad yards at Roseville. The evidence shows that the train did stop, but only momentarily—“for a few seconds”, according to the engineer. It is during such an interval that appellant insists the duty arises, in respect to a brakeman, to inspect the running gear. Weiland was injured after the train had again started up, and after it had switched to the receiving track. There is testimony that the duties of the deceased would require him to descend

from the car at a point after the train had entered the receiving track. The following is a question put to, and answer of witness Mauzy: “What is the custom and practice, Mr. Mauzy, of brakemen riding on trains entering yards?” “Well, they are supposed to be out until they start in on the receiving track, or *down part way on the receiving track*, and I get off and watch my portion of the train.” Witness Wait testified that men are expected to get out on the side of a train coming into the yards. In our opinion the evidence would support a finding to the effect that Weiland, in attempting to descend from the car where he did, was following a custom which prevailed in defendant’s yard at Roseville, in respect to his duties, and that the case comes directly within the rule laid down in *Texas & P. R. Co. v. Harvey*, 228 U.S. 319, 33 S.Ct. 518, 521, 57 L.Ed. 852-857, where it is said: “The other errors assigned concern the requests of the defendant below for a peremptory instruction in its favor because Harvey had placed himself in the window where none of his duties required him to be; but the record discloses that it was customary for a hostler’s helper to get upon an engine and to look out of the cab window for the reasons we have stated, and for one helper to lend aid to another. We do not think that the testimony shows that Harvey was not in the line of his duties when he got upon the engine * * *.”

Furthermore, the record shows without contradiction that there were a number of instances and contingencies which required a brakeman, in the line of his duties, to descend the ladder on the side of a car. It was a matter for the jury to decide, whether or not, upon the occasion here involved, Weiland acted within the scope of his employment. We are satisfied that the record justifies such a finding. We cannot accept the narrow and limited view taken by appellant, and believe that to do so would stultify a just and reasonable application of the rules of the law governing the relationship between employer and employee.

[8] It is urged as another ground for reversal that the deceased assumed the risk of any injury under the circumstances. The rule applicable to such a defense is thus stated in *Chicago, R. I. & Pac. v. Ward*, 252 U.S. 18, 40 S.Ct. 275, 276, 64 L.Ed. 430: “As to the nature of the risk assumed by an employé in actions

brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & O. R. Co. v. De Atley*, 241 U.S. 310, at page 315, 36 S.Ct. 564, 566 (60 L.Ed. 1016 [1020]): 'According to our decisions, the settled rule is, not that it is the duty of an employé to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employé may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' * * * (Italics ours.)

[9-11] The question here is whether or not the lack of sufficient clearance between the caboose and the train was "so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them". This was a question of fact for the jury. Several witnesses testified that it would be difficult or impossible for a man looking at the caboose from the east (and, by inference, from a position on the train similar to that occupied by the deceased when he was approaching the caboose), to tell whether or not there was sufficient "clearance", as we have described that term. The evidence is sufficient to justify a finding that the negligence of the defendant, in leaving the cabooses where they stood, presented a danger which was not obvious, and which, with the exercise of ordinary prudence, could not have been anticipated. Deceased was under no duty to exercise care to discover dangers not ordinarily incident to the employment, but which resulted from the employer's negligence. 39 C.J. 692, par. 896; 16 Cal.Jur. 1068, par. 47.

[12,13] It is contended that the damages are excessive, in that they appear to have been given under the influence of passion and prejudice. We find nothing in the record to warrant this assertion. The decedent left a surviving wife. During the past six months before his death his earning averaged \$216 per month. He was forty-nine years of age, and his expectancy was 21.81 years. During the times that he was employed in railroad work his earnings were about \$200 per month. It is true that at times he was not engaged in his regular work, and during such times

he may have received less compensation. His ability to earn, rather than the amount actually earned, may be considered by the jury in arriving at amount of damages to be awarded his widow. *Hosman v. Southern Pacific Co.*, 28 Cal.App.2d 621-634, 83 P.2d 88. The record is not vulnerable to this attack.

[14] Finally, and in connection with the claim of excessive damages, it is urged that decedent was guilty of contributory negligence, and that the verdict should be reduced proportionately, under the provisions of the act mentioned above. U. S.Code, title Railroads, § 53, 45 U.S.C.A. § 53. After reviewing the evidence, we cannot say, as a matter of law, that decedent was guilty of contributory negligence. The determination of this question of fact was a function committed solely by law to the jury. There is no merit in this point.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



34 Cal.App.2d 554

WETZSTEIN v. THOMASSON et al.

Civ. 12234.

District Court of Appeal, Second District,
Division 2, California.

Sept. 13, 1939.

Rehearing Denied Oct. 2, 1939.

Hearing Denied Nov. 9, 1939.

1. Pleading ⚡291(2)

While genuineness and due execution of releases pleaded by defendant in *hæc verba* were admitted by failure of plaintiff to file affidavit denying same, failure to file affidavit did not preclude plaintiff from controverting the releases by evidence of mistake, undue influence, fraud, or any other defense that would be open if such releases were the basis of an action. Code Civ.Proc. § 448.

2. Release ⚡50

In personal injury action, where defendant pleaded releases executed by plaintiff in *hæc verba*, evidence directed to the issues of mistake, undue influence, and fraud was

admissible, although plaintiff failed to file affidavits denying genuineness and due execution of releases. Code Civ.Proc. § 448.

3. Contracts ⇨92

A person who is able to read and understand instrument is bound by provisions of instrument when he signs it, in absence of fraud or imposition, but a party to a contract will not be bound by it unless he assents to it, and, if he does not in reality assent, such want of assent may be shown in order to avoid the effect of his signature.

4. Release ⇨17(2)

Transactions whereby insurance adjuster, without explaining purpose or effect, seeks to obtain release from injured person, are subject to closest scrutiny.

5. Release ⇨57(1, 2)

In action for personal injuries arising out of automobile accident, where defendant relied on release, evidence that release was secured by insurance adjuster at time plaintiff was not in physical or mental condition to consider settlement, that adjuster read settlement to plaintiff but did not explain it to her, and that release did not follow terms of verbal agreement entered into by adjuster and plaintiff, was sufficient to support finding of trial court that release was void.

6. Release ⇨24(2)

Where release was void because plaintiff was tricked into signing it under belief that it involved only medical bills to date, expenses for repair of her automobile, and wages for a substitute to work in her place of business, and that any claim she might have for pain and suffering or for further medical bills were to be taken care of later, offer to restore sum paid under release was not necessary, where plaintiff did not seek to recover for items which she believed to have been covered by release.

7. Husband and wife ⇨209(2)

Under statute, wife is given right to maintain in her own name an action to recover damages for her personal injuries, and damages for personal injuries to wife are not recoverable unless she is made a party plaintiff. Code Civ.Proc. § 370.

8. Husband and wife ⇨209(2)

In tort action by wife to recover damages, the husband may be joined as a party plaintiff but need not be so joined. Code Civ.Proc. § 370.

9. Husband and wife ⇨25(1)

A release executed by plaintiff's husband was not a bar to an action for personal injuries, since husband alone had no right to sue for and recover damages for personal injuries to his wife, and hence he could not alone release or relinquish such right. Civ.Code, § 172; Code Civ.Proc. § 370.

10. Release ⇨53

In action for personal injuries arising out of automobile accident, where defendant relied on release, admission of testimony to effect that plaintiff's mind was not clear at time of executing the release was not error, where pleadings presented issue as to the validity of the release.

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by Minnie M. Wetzstein against C. E. Thomasson and another for injuries which plaintiff suffered in an automobile accident. From judgment for the plaintiff, the defendants appeal.

Affirmed.

Hearing denied; CARTER, J., not participating.

Lasher B. Gallagher, of Los Angeles, for appellants.

Hitchcock, Cook & Obegi and Wiley J. Shannon, all of Van Nuys, for respondent.

WOOD, Acting Presiding Justice.

Plaintiff commenced this action to recover damages for injuries which she suffered when an automobile in which she was riding collided with an automobile negligently driven by defendant. The accident occurred on December 4, 1936, on Glendale boulevard in the city of Los Angeles near its intersection with Montgomery street. Defendant appeals from a judgment entered in favor of plaintiff in the sum of \$5,000.

Except for several hours spent in a doctor's office and in her place of business plaintiff remained at home and in bed for a number of days immediately after the accident. On December 4th and 5th and again on December 7th, an insurance adjuster called on plaintiff and on each occasion remained several hours discussing a possible settlement. On the last-mentioned date the adjuster secured plaintiff's signature to a document purporting to be a release of all claims for damages and left a release to be signed by plaintiff's husband. This release, which was for consequential damages suffered by the husband by reason of the injuries to plaintiff, was

signed by the husband at plaintiff's request although the husband had never seen nor talked with the adjuster. Plaintiff received the sum of \$175 and her husband the sum of \$54.15 as consideration for executing the releases. Plaintiff's automobile, which was covered by collision insurance, was repaired by her insurance carrier and thereafter the claim for property damage was completely settled between her insurance carrier and defendant's insurance carrier.

In this action plaintiff sought and recovered a judgment for both general and special damages for personal injuries, exclusive of the items for which she received the sum of \$175 from the adjuster. She neither tendered nor offered to restore to defendant the consideration which she and her husband had received for executing the release. Defendant pleaded the releases and the settlement with plaintiff's collision insurance carrier in bar of the action. After trial by the court without a jury judgment was entered for plaintiff awarding her \$4,000 as general damages and \$1,000 for medical expenses.

[1,2] In his answer defendant pleaded the releases in *haec verba* and plaintiff failed to file an affidavit denying their genuineness and due execution. Defendant now contends that since under section 448 of the Code of Civil Procedure the genuineness and due execution of a written instrument which is pleaded in *haec verba* are deemed admitted unless plaintiff files an affidavit of denial, evidence on the validity of the releases was improperly admitted over his objection. Although it is true that under the circumstances of the instant case no issue as to the genuineness or due execution of the releases was presented, the failure to file the required affidavit did not preclude plaintiff from controverting the releases by evidence of mistake, undue influence, fraud and any other defense that would be open if such releases were the basis of an action. *Walsh v. Jacobson*, 3 Cal.App.2d 477, 39 P.2d 455; *Moore v. Copp*, 119 Cal. 429, 432, 51 P. 630; *Garcia v. California Truck Co.*, 183 Cal. 767, 192 P. 708. The evidence in the instant case relating to the releases was directed to the issues of mistake, undue influence or fraud and was therefore properly admitted.

Defendant contends that the finding of the trial court to the effect that the releases were void and were not a bar to the action is not supported by the evidence. It appears from the evidence that at the time of the

accident plaintiff was about 48 years of age and was engaged in business as a florist. As a result of the accident she was thrown forward in the automobile and the steering wheel was broken when her abdomen came in contact with it. Both knees and ankles were cut and her elbow injured. She was unconscious for a short while after the accident. At the time of the trial, October 21, 1938, plaintiff had not entirely recovered. Her weight had been reduced from 168 to 96 pounds.

Immediately after the accident plaintiff was taken to a doctor's office where her injuries were treated and an examination made for internal injuries. The accident occurred at about 7:40 a. m. on December 4, 1936, and at about noon on that day plaintiff left the doctor's office and went to her place of business because she was the only one who could open the shop and there were some orders for flowers which had to be filled. Plaintiff went home at about 4 p. m. and went to bed. Shortly after noon on the day of the accident the adjuster for defendant's insurance carrier called at plaintiff's place of business and remained there for several hours discussing a possible settlement of her claims. At that time plaintiff stated that she did not wish to discuss a settlement. The next day the adjuster called plaintiff on the telephone at 8 a. m. and then came to her home at about 9 a. m. Plaintiff was in bed and was in great pain, yet the adjuster remained for several hours talking constantly about a settlement, berating her physician, upon whom he had called, and stating that if she did not settle it would work a great hardship on defendant. The adjuster left at about 4 p. m. on that day. On Sunday, December 6, the adjuster called her on the phone and stated he would not be out that day but would be out on Monday. In reply plaintiff stated, "It is too soon, I do not know what it is going to turn into."

On Monday, December 7, the adjuster came to plaintiff's home at about 9 a. m. and remained there until 4 or 5 p. m. He made repeated efforts to get plaintiff to sign the release and spoke of the sum of \$300, stating in substance that they would pay for the lady who would take plaintiff's place in the flower shop for a period of thirty days and that they would pay the doctor bills. When the adjuster found out the amount of the doctor's bill and offered to pay it plaintiff said: "Well how do I know, what will I do about the rest of

the doctor bill, that is just to date. You have asked him for the bill simply what has already accumulated." The adjuster assured her that they would take care of the bill. Plaintiff was told that the \$175 which she received was to cover doctor bills to date and to pay the lady who was taking her place in the florist shop. Nothing was said about physical suffering, nor did the adjuster discuss the reason for the sum of \$54.15 which was paid to her husband for his release. She was assured that future developments in her physical condition would be taken care of. Before the release was signed the adjuster read it to plaintiff but did not explain its legal effect. The signed release was taken by the adjuster when he left. During the four days that these negotiations were being carried on plaintiff was in great pain, was suffering from nervous shock and for at least part of the time was under the influence of opiates administered by her physician. Plaintiff testified that when she signed the release she understood that it covered only expenses incurred to date. The trial court found that the "adjuster remained constantly at her bedside pressing and importuning her for a settlement"; that the adjuster knew that plaintiff was a married woman living with her husband; that plaintiff refused to enter into a compromise with the adjuster in her then condition but that on December 7, 1936, entered into a "verbal agreement" with the adjuster by the terms of which she agreed to accept from the insurance company the amount of her doctor's bill to date, expenses for the repair of her car and for the employment of a substitute to work in her place of business. The court further found that by the terms of the "verbal agreement" any claim that plaintiff might have for pain and suffering or for further doctor's bills or for "unknown claims for damages" were to be taken care of later. The release actually signed by plaintiff manifestly did not follow the terms of the "verbal agreement". The court further found that plaintiff signed the release in the belief that the instrument covered only a release "of the items heretofore agreed upon"; that plaintiff was misinformed by the adjuster as to the contents of the instrument and as to its legal effect; that the plaintiff was at the time of signing the release suffering intense pain and anguish and was "under the influence of opiates to ease the pain and induce rest and her mind was not clear".

[3-5] The circumstances of the instant case indicate clearly that the release was executed by plaintiff as a result of the "high-pressure" methods adopted by the adjuster. Plaintiff made no attempt to negotiate a settlement but the adjuster for defendant's insurance carrier voluntarily sought the interview with plaintiff within a few hours after the accident, at a time when plaintiff was in no condition physically or mentally to consider a settlement, and continued his lengthy importunities for a settlement for several days. Such conduct has been severely condemned in numerous decisions of reviewing courts. *Winstanley v. Ackerman*, 110 Cal.App. 641, 294 P. 449; *Tyner v. Axt*, 113 Cal.App. 408, 298 P. 537. Although it is true that when a person with the ability to read and understand an instrument signs it, he is bound by the provisions of such instrument, in the absence of fraud or imposition, it is likewise true that a party to a contract will not be bound by it unless he assents to it and, if he did not in reality assent, such want of assent may be shown in order to avoid the effect of his signature. *Smith v. Occidental Steamship Co.*, 99 Cal. 462, 34 P. 84. In the instant case it is evident that plaintiff because of her condition was unable to give to the transaction the same careful consideration which she might ordinarily give to a business transaction. Although the release was read to her, the adjuster did not inform her as to its full legal effect and did not leave it in her possession in order that she might secure competent advice. Transactions of this nature should be subjected to the closest scrutiny. *Tyner v. Axt*, supra. Under the findings of the court plaintiff did not in reality assent to the provisions of the release which purported to waive all of her claims for damages present and future. There is ample evidence to support the finding of the court that the release was void.

A case bearing striking similarity to the case under review is the case of *Meyer v. Haas*, 126 Cal. 560, 58 P. 1042, 1043. In that case the plaintiff received serious injuries but the physician in the employ of defendant paid him the sum of \$25 and received a receipt which purported to release defendant from all claims by reason of the injuries. At a jury trial the release was pleaded by the defendant but the jury brought in a general verdict for the plaintiff and in answer to special interrogatories found that the physician had made misrepres-

sentations to plaintiff as to the contents and legal effect of the instrument and had prevented the plaintiff from becoming acquainted with the character, contents and legal effect of the instrument. The jury specifically found: "He did not convey full information as to its contents, and said it was all right, and led him (the plaintiff) to believe that the twenty-five dollars only covered his loss of time while he was sick. * * * He withheld full explanation of the instrument, and led plaintiff to believe it was all right. He neglected to inform him that the acceptance of the twenty-five dollars barred any further action for damages of any nature whatever." In affirming the judgment the Supreme Court held: "That portion of the contract, therefore, purporting to release and satisfy the claim upon which the action is based is, on the findings of the jury, absolutely void, for the reason that the mind of plaintiff never consented to any such a release, and the plaintiff should be bound only to the release and satisfaction of his claim for loss of time."

[6] The objection has also been raised by defendant that in order for plaintiff to maintain this action she should have offered to restore to defendant the sum paid at the time of signing the releases. No offer to restore the consideration received is necessary where a party is tricked or deceived into signing a contract different in its terms and objects from the contract which she has made and which she understands that she is executing. No offer to return the money was necessary because plaintiff is not seeking to avoid a contract made by her but is merely showing that she did not make the contract which was apparently made by her. *Meyer v. Haas*, supra; *Tyner v. Axt*, supra. Plaintiff understood that the release covered only doctor bills incurred to date and the cost of obtaining a helper in the flower shop for thirty days. The judgment covered only such items of damage as have accrued since the date of the settlement. The rule is well stated in *Garcia v. California Truck Co.*, supra [183 Cal. 767, 192 P. 710]: "In other words, if the situation is such that reforming the release to make it read as it would have read except for the fraud upon the plaintiff, the release would still purport to be a bar to the plaintiff's cause of action, then in order to maintain his action he must rescind and

avoid the release, and for rescission an offer of restoration is necessary."

[7-9] Defendant advances the argument that since the cause of action for injuries to plaintiff is community personal property and by virtue of section 172 of the Civil Code the husband has the complete management and control of such property, the release executed by plaintiff's husband is a complete bar to the present action.

Although plaintiff's husband was not a party to the instant action, the trial court found that the release executed by him, was void, apparently on the theory that the two releases were in reality executed as part of one transaction. Section 370 of the Code of Civil Procedure gives to the wife the right to maintain in her own name an action to recover damages for her personal injuries, and it is settled that damages for personal injuries to the wife are not recoverable *unless* she is made a party plaintiff. *Redwing v. Moncravie*, 131 Cal.App. 569, 21 P.2d 986. In a tort action by the wife to recover damages the husband *may* be joined as a party plaintiff but need not be so joined. See *Gomez v. Scanlan*, 155 Cal. 528, 102 P. 12, 13, where the court states that this form of action is an "exception to the rule that the husband has control of the community property". Since the husband alone has no right to sue for and recover damages for personal injuries to his wife, it cannot be successfully contended that he alone can release or relinquish that right which is vested in the wife. To uphold such contention would create an anomalous situation without support either in reason or in law.

[10] Defendant also contends that by admitting certain testimony over his objection to the effect that plaintiff's mind was not clear the court committed prejudicial error. This argument is based upon the earlier contention that no issue as to the validity of the release was presented by the pleadings. This contention has been answered in the discussion above set forth. Defendant did not suffer prejudice because of other rulings on the admission of evidence which are subjected to criticism.

The judgment is affirmed.

I concur: McCOMB, J.

PEOPLE v. McALLISTER. *

Cr. 2057.

District Court of Appeal, First District,
Division 2, California.

Sept. 12, 1939.

Hearing Granted Oct. 9, 1939.

1. Criminal law ☞996(2)

Where defendant in criminal prosecution, after having been duly tried, was arraigned for sentence at morning session of trial court and court inadvertently omitted alternative provision for imprisonment if fine was not paid, trial court had jurisdiction to amend the sentence by adding the alternative provision in an afternoon session of court held on the same day, at which defendant and counsel were present, when at time of amendment original sentence had not been reduced to writing, either by formal order or by minute entry, and no steps had been taken for execution of sentence.

2. Criminal law ☞996(2)

Where trial court had acted within its jurisdiction in amending sentence in criminal prosecution, denying defendant's motion to correct the sentence to show that he had been sentenced to pay a fine at morning session of court and that an alternative provision for imprisonment in event that fine was not paid was added at afternoon session was proper, since clerk's minute entry showing that defendant had been sentenced to pay a fine and in default of payment thereof to confinement in county jail was a correct entry of judgment as pronounced.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Proceeding by the People of the State of California against H. L. McAllister. From an order denying his motion to correct the record in a criminal prosecution, defendant appeals.

Affirmed.

Klein & Clarke, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and F. Walter French and William F. Cleary, Deputy Attys. Gen., for the People.

NOURSE, Presiding Justice.

Defendant appeals from an order denying his motion to correct the record.

93 P.2d—65½

*For subsequent opinion see 102 P.2d 1072.

Upon a prior application for writ of prohibition, appellant raised the same issues that he now raises. See McAllister v. Superior Court, 28 Cal.App.2d 160, 82 P.2d 462, 463. At that time we stated, concerning the record of the trial court and the facts presented by appellant:

"The minutes of said court show that petitioner was convicted of the crime of conspiracy to violate section 17 of an act known as the General Cemetery Act, St. 1931, p. 2443, and that after he was duly arraigned for sentence on March 2, 1936, the trial court ordered that petitioner 'pay a fine of \$900.00, said fine to be paid at not less than \$25.00 per month beginning on June 1st, 1936, and each and every month thereafter until said fine be satisfied; and in default of payment of said fine he be confined in the County Jail of the County of Alameda at the rate of one day's imprisonment for each \$5.00 of said fine unsatisfied, imprisonment however not to exceed six (6) months'. No appeal was taken from said judgment.

"* * * It appears that on the day set for sentence, petitioner and two codefendants were before the court. Motion for new trial was denied and motions for reference to the probation officer were made by the other defendants and granted. During these proceedings, petitioner was arraigned for sentence and the reporter's transcript shows that the respondent court ordered that defendant be fined \$900, payable in monthly instalments of not less than \$25 per month commencing on June 1. It further appears that petitioner left the courtroom and that later on the same day, but before any judgment was entered, petitioner and his counsel returned to the courtroom, where the trial court stated that the alternative provision had been inadvertently omitted. It was then ordered that in the event of default, petitioner be confined in the county jail at the rate of one day for each \$5 of said fine remaining unpaid, not exceeding a total period of six months."

It was held, in denying the peremptory writ of prohibition, that since the alleged invalidity of the judgment did not appear upon the face of the judgment roll, the issue could not be raised by a proceeding in prohibition, such proceeding being a collateral attack. McAllister v. Superior Court, supra, 28 Cal.App.2d page 162, 82 P.2d page 464. Appellant thereupon sought by motion in the trial court to correct the record

in order that it might show that he was sentenced to pay a fine at the morning session of the court and that the alternative provision for imprisonment in the event the fine was not paid was pronounced at the afternoon session of the court. It is his contention that, if the record be so corrected, it is at once apparent that the alternative provision for imprisonment is void, since the trial court, by pronouncing a valid sentence at the morning session of the court, had exhausted its jurisdiction, and was without authority to pronounce the alternative provision for imprisonment at the afternoon session of the court. In *re Sullivan*, 3 Cal.App. 193, 84 P. 781; In *re Bouchard*, 38 Cal.App. 441, 176 P. 692; In *re Gottschalk*, 47 Cal.App. 260, 190 P. 649; In *re Humphrey*, 64 Cal.App. 572, 222 P. 366; In *re Garrity*, 97 Cal.App. 372, 275 P. 480; *Barry v. Superior Court*, 91 Cal. 486, 27 P. 763; In *re Claudette*, 21 Cal.App.2d 688, 69 P.2d 1021.

In the leading case of *In re Sullivan*, supra, the trial court had on December 22, 1905, rendered judgment that the petitioner pay a fine and directed that if the fine was not paid, he be imprisoned in the state prison until the fine was satisfied at the rate of \$2 per day. A commitment in the usual form was issued, and the petitioner committed to the custody of the proper officer. Five days later, and before he had been committed to the state prison, he was returned to court and, on motion of the district attorney, the judgment was vacated and a new judgment was entered identical with the first, except that the county jail was specified as the place of imprisonment. The court held that the latter judgment was invalid and ordered the prisoner discharged. In so holding, the court stated (3 Cal.App. page 195, 84 P. page 782): "The prevailing doctrine announced in other states is to the effect that a court has power to revise, correct, or vacate a sentence imposed upon a defendant during the term of the court, and before the original sentence has gone into operation, or any action is had under it. *Commonwealth v. Weymouth* [2 Allen, Mass., 144] 79 Am.Dec. 776, and cases cited in the notes. Granting the soundness of this rule, and conceding the power of the court to vacate, change, or revise a judgment within a reasonable time, and before it has been executed in whole or in part, we are still unable to uphold the judgment under which the petitioner is imprisoned." The court then held that (3 Cal.App. page

197, 84 P. page 782): "The moment legal restraint was imposed as a means of enforcing the payment of the fine, that moment the execution of the judgment was commenced, and the power of the court was exhausted, and its jurisdiction to recall, annul, or change its judgment was at an end."

It will be noted that in the *Sullivan* case, supra, the court, basing its concession upon the plenary power of a court over its judgment during a term of court, concedes that the court may vacate, change, or revise a judgment "within a reasonable time, and before it has been executed". In *Ex parte Monckros von Vetsera*, 7 Cal.App. 136, 138, 93 P. 1036, the court said, basing its conclusion upon the same plenary power of the court, "Until the judgment had been entered in the minutes of the court, or had been in some authentic manner reduced to writing, as by the judge signing a written order, it must be held that the judgment lay in the breast of the judge, and that the court had plenary power thereover." In that case, the court had on October 15, 1907, announced, after hearing in a habeas corpus proceeding, that the petitioner was illegally detained and "ordered that he be discharged from the custody of said warden". No written order was signed and no minute entry made. Subsequently on October 17, 1907, the trial court signed a written order vacating and setting aside its order of October 15th. It was contended that the order of October 15th was a final judgment and that the court had, by making it, exhausted its jurisdiction to make any different order. This contention was held without merit upon the basis of the rule which we have quoted above. In *People v. Thompson*, 4 Cal. 238, the trial court had sentenced the defendant to be hanged on May 5th. Thereafter the defendant was again brought into court and the sentence was amended by shortening the time. The court held such amendment valid, saying (4 Cal. page 242): "As to the second [sentence], it was perfectly competent for the Court, at any time before final judgment signed, to amend its judgment, so that either sentence was good."

[1] While there is an apparent conflict between the rules announced in these three cases, i. e., two holding that the judgment may be altered, amended, or vacated at any time before the judgment is reduced to writing, either by minute entry or by formal order signed by the judge, and the other holding that this power may be ex-

exercised within a reasonable time and before the sentence has been executed, whichever view is taken, the trial court acted within its jurisdiction when it amended the sentence of appellant at the afternoon session of the court. For at the time the amendment was pronounced the original sentence had not been reduced to writing, either by a formal order or by minute entry, and no steps had been taken for the execution of the sentence. The record shows that the court acted promptly, and it cannot be said that the short interval of time intervening constituted an unreasonable delay.

We find nothing to the contrary in the other cases relied upon by appellant. As pointed out above in the Sullivan case, supra, the court attempted to modify the sentence after its execution had been commenced. In the Bouchard case, supra, the first sentence was void, and the second sentence was imposed nearly seven months after the petitioner had been received at San Quentin. It was held that the trial court had no jurisdiction to pronounce the second sentence, because the petitioner had served part of his term. In the Gottschalk case, supra, a modification of judgment was held void where the modification was made after the petitioner had been taken into custody under the original judgment. The petitioner in the Humphrey case, supra, was sentenced to pay a fine and to imprisonment in the state prison. It was held that the sentence of imprisonment was void and that the court was without jurisdiction to impose a valid sentence of imprisonment in the county jail. While it is not expressly so stated, it is apparent that petitioner was in custody under the void judgment. In *Re Garrity*, supra, the attempted modification occurred over a month after the original judgment had been rendered. While in that case the petitioner stipulated that the original sentence be set aside and the matter of sentences be reopened, it was properly held that the jurisdiction of the court having been exhausted by the first sentence, jurisdiction could not be conferred upon the court by stipulation. In the Barry case, supra, it appears that the petitioner had served the full sentence imposed by the first judgment, before any modification was attempted. The same factual situation is presented in the Claudette case, supra.

[2] We conclude that the trial court had jurisdiction to amend its judgment at the time it undertook to do so. Therefore the clerk's minute entry is a correct entry of

the judgment as pronounced, and the trial court properly denied the motion to correct the record.

Appellant argues, upon the basis of *In re Bateman*, 94 Cal.App. 639, 271 P. 757, that the court exhausted its jurisdiction at the time it orally pronounced judgment. An examination of that case discloses that it stands only for the principle that the judgment must be orally pronounced, and not for the principle that it is immediately effective upon oral pronouncement.

For the reasons above stated the order appealed from is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



**KATENKAMP et al. v. UNION REALTY
CO. et al. (two cases). ***
Civ. 11781, 11783.

District Court of Appeal, Second District,
Division 1, California.

Sept. 14, 1939.

Rehearing Granted Oct. 13, 1939.

1. Navigable waters $\S$ 41(1)

Under the common enemy doctrine, landowner is authorized to use every precaution not unreasonable in dealing with extraordinary water conditions to avert damage to his land.

2. Navigable waters $\S$ 41(1)

Whether landowner's action in attempting to avert damages to his land from extraordinary water conditions is reasonable so as to be authorized by common enemy doctrine must be determined by existing conditions, and not by consequences which follow.

3. Navigable waters $\S$ 41(1)

In action for damages, for transfer of sand from ocean beach in front of plaintiffs' land to defendant's adjoining land by maintenance of two groins, consolidated with mandatory action demanding removal of groins, conflicting evidence supported finding that groins were maintained by defendant for improvement of its property, and not for protection from inroads of sea.

*For subsequent opinion see 98 P.2d 239.

4. Appeal and error ⇨996

Where facts are proved with legal sufficiency, a finding of fact based upon reasonable inferences drawn therefrom cannot be disturbed on appeal.

5. Appeal and error ⇨1011(1)

The findings of the trial court will not be disturbed on appeal, where there is a substantial conflict in the evidence.

6. Navigable waters ⇨41(1)

In action for damages for transfer of sand from ocean beach in front of plaintiffs' land to defendant's adjoining land by maintenance of two groins, although damages sustained by plaintiffs were contributed to in part by the construction of a breakwater by city, defendant was liable for such proportion of total damage as was caused by the groins.

7. Navigable waters ⇨41(1)

In action for damages for transfer of sand from ocean beach in front of plaintiffs' land to defendant's adjoining land by maintenance of two groins, where damages sustained by plaintiffs were contributed to in part by the construction of a breakwater by city, trial court was entitled to estimate as best it could from the evidence before it how much of total damage was occasioned by defendant's groins.

8. Navigable waters ⇨41(1)

In action for damages for transfer of sand from ocean beach in front of plaintiffs' land to defendant's adjoining land by maintenance of two groins, where damages sustained by plaintiffs were contributed to in part by the construction of a breakwater by city, trial court did not err in allowing damages approximating 25 per cent. of amount testified to as having been sustained by plaintiffs, where there was positive evidence that the groins caused 75 per cent. of plaintiffs' damages, and some evidence to the effect that groins were sufficient to cause all the damages.

9. Negligence ⇨61(1)

Where separate and independent acts of negligence of two parties are direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, although his act alone might not have caused the entire injury, and although, without fault on his part, the same damage would have resulted from the act of the other.

10. Appeal and error ⇨1195(3)

Where District Court of Appeal on a prior appeal, in reversing and remanding case, ruled that plaintiffs' claim for damages for transfer of sand from ocean beach in front of plaintiffs' land to defendant's adjoining land by maintenance of two groins was not barred by statute of limitations, such holding became the "law of the case" upon the coming down of the remittitur. Code Civ.Proc. § 338, subd. 2.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

11. Appeal and error ⇨925(1)

In action for mandatory injunction to remove two groins which transferred sand from ocean beach in front of plaintiffs' land to defendant's adjoining land, it would be assumed, on appeal, that trial court gave due consideration to contention that it would be inequitable to grant injunction because benefits which plaintiffs might expect from removal of groins would be slight and far offset by damages which would result to defendant's property, in view of conflict in evidence on such point.

12. Appeal and error ⇨1122(2)

The purpose of constitutional provision giving appellate courts power to make findings of fact contrary to or in addition to those made by trial court is not to develop appellate courts generally into trial courts, and it is contemplated that appellate courts will exercise the power sparingly and, generally, will exercise it only when purpose of the new findings is to constitute a basis for an affirmance of the judgment or a basis for a reversal of the judgment with directions to trial court to enter a judgment for appellant. Const. art. 6, § 4¾.

13. Appeal and error ⇨891

Appellant's application to District Court of Appeal to submit additional evidence, pursuant to constitutional provision giving appellate courts power to make findings of fact contrary to or in addition to those made by trial court, was denied, where evidence, if admitted, would not have compelled reversal of judgment with direction to enter judgment for appellant. Const. art. 6, § 4¾.

DORAN, J., dissenting.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by J. F. Katenkamp and others against the Union Realty Company for damages for transfer of sand from ocean beach in front of plaintiffs' property to adjoining land of defendant as result of defendant's maintenance of two groins, consolidated with action by the same plaintiffs against the same defendant for mandatory injunction demanding removal of groins. From judgments for plaintiffs in both actions, defendant appeals.

Judgments affirmed.

Heaney, Price, Postel & Parma, of Santa Barbara, for appellant.

Leland Crawford and Alfred W. Robertson, both of Santa Barbara, for respondents.

WHITE, Justice.

The two actions forming the basis of this appeal involve the construction by defendant of two groins into the water fronting its properties upon the westerly arm of Miramar bay in Santa Barbara county. Defendant's real property is situated just east of the city of Santa Barbara, consisting of approximately 1200 feet fronting the Pacific ocean. Plaintiffs' properties also border on the Pacific ocean and are situated east of defendant's property. Two groins are here involved, one known as the easterly groin, which is 300 feet long, and one known as the westerly groin having a length of 190 feet. The easterly groin is closest to the plaintiffs' properties, while the westerly groin is distant 200 feet west of said easterly groin. The easterly groin was built and completed in the early summer of the year 1925, while the westerly groin was constructed early in the summer of 1929, at which last-named time the easterly groin was capped, raised slightly in height, and connected to the shore. In the interim between the erection of the easterly and westerly groins, viz., August, 1927, the city of Santa Barbara commenced construction of a breakwater for the purpose of providing a yacht harbor. This breakwater was approximately three and one-half miles west of the properties of the respective parties to this litigation. Construction of the breakwater continued into the year 1928 and until the fall of 1929, when it was completed.

By their amended complaint plaintiffs allege that following the erection of the second groin and the capping of the original groin in 1929, natural currents of the

sea were changed, causing sands in suspension to be deposited along and to the west of defendant's groins and the currents to carry away and erode plaintiffs' properties. Plaintiffs claimed that when their property commenced to erode the sands were carried away, leaving exposed the underlying rocks and clay; all of such conditions, it was charged, resulted from the groins constructed by defendant.

The two actions here in question were filed September 29, 1932, and October 5, 1932, one being an action for a mandatory injunction demanding removal of the groins, and the other being for damages allegedly resultant from the erection and maintenance of said groins. Following the sustaining of demurrers to the amended complaint and the entry of judgments thereon in favor of defendants, both such judgments were reversed by the appellate courts, and the causes remanded for trial. 6 Cal.2d 765, 59 P.2d 473, and 11 Cal.App. 2d 63, 53 P.2d 387. Upon the coming down of the remittitur in each action, defendant filed its answers, and the matters came on for trial, following which judgment was entered June 20, 1937, in favor of plaintiffs, decreeing that a mandatory injunction issue commanding defendant forthwith to permanently remove the two groins in question from in front of plaintiffs' property, while in the second action plaintiffs were respectively awarded damages in various sums totaling \$4,200. By stipulation both actions were tried together, but separate findings and judgments were entered. While separate appeals were taken by the defendant, it has been agreed that the cases may be considered together upon a consolidated set of briefs.

In addition to its denial of the allegations contained in plaintiffs' amended complaint, defendant set up the following affirmative defenses; summarized in appellant's brief as follows:

"(a) That the groins are maintained for the purpose of protecting the property of appellant, its said property being exposed to the inroads of the sea and thus to erosion.

"(b) As to the action in damages—that the action is barred by paragraph 2 of section 338 of the Code of Civil Procedure of the State of California.

"(c) As to the injunction suit—that it would be inequitable to order the removal of the groins or any part thereof because any benefits resulting to respondents would

be slight and the damage to appellant's property, great; that the damages to appellant's property would far offset any possible benefits respondents might receive, and that the remedy of injunction would therefore be harsh, inequitable and unjust."

The general grounds of appeal, therefore, are epitomized by appellant in its brief as follows:

"1. Was appellant within its rights in maintaining said groins, even if respondents' properties were thereby damaged, or in other words, do the facts in this case warrant the application of the common enemy rule?

"2. Does the evidence show any recoverable damage to have been caused by the groins?

"3. Does the evidence show what portion of recoverable damages, if any, was caused by appellant's groins?

"4. Is the action in damages barred by the provisions of paragraph 2 of section 338 of the Code of Civil Procedure of the State of California?

"5. Would it be inequitable, under the circumstances, to order the removal of said groins or a portion thereof?"

In support of its first ground of appeal, appellant asserts that because its land borders on the seashore and is exposed to the inroads of the sea, it has a right to use and did use only reasonable means for its protection; that by reason of what is commonly characterized as the "common enemy doctrine" it is not accountable to an adjacent littoral owner for injuries occasioned thereby. The doctrine referred to found its first pronouncement in England about the year 1828, in the case of *Rex v. Commissioners of Sewers for the Levels of Pagham*, [1828], 8 B. & C. 355. In the cited case it appears that the commissioners, in order to protect certain lands which it was their duty to protect, erected certain groins, some of which, it was charged, caused the sea to flow with greater violence against the lands of one Cosens, thereby making a greater inroad upon such land than the sea would otherwise have done. The opinion of the court, delivered by Lord Tenterden, C. J., and Bayley, J., denying the mandamus prayed for against the commissioners, proceeds in part as follows: "* * * It may be conceived that such is the effect of the groyne" (causing the sea to make a greater inroad upon the land than possibly it might otherwise

have done); "but the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several land-owners, are, as to this question, in a different situation from any individual proprietor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea, may not endeavor to protect himself by erecting a groyne or other reasonable defence, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. If we were in this instance to say that the commissioners for the level in question were bound to erect a groyne for Mr. Cosens, it might, and probably would, cause injury to the land lying to the eastward in the same manner as that erected for the protection of the level has caused injury to Mr. Cosens; and the owner of the land lying eastward of Mr. Cosens would have a right to call upon the commissioners to protect him also. In like manner each successive proprietor of land lying to the eastward would be entitled to claim protection, and the commissioners might be compelled to erect defences against the sea along the whole line of coast from the level of Pagham to the North Foreland; for so far, I believe, the sea is making inroads upon the land. The extent to which the principle must be carried, if once admitted, satisfies me that it cannot be sustained in reason or in law. I am, therefore, of opinion that the only safe rule to lay down is this, that each land-owner for himself, or the commissioners acting for several land-owners, may erect such defences for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy. For these reasons, the rule for a mandamus must be discharged."

To the foregoing Bayley, J., added by the way of concurrence: "* * * But if they" (the commissioners) "act bona fide, doing no more than they honestly think necessary for the protection of the level, their acts are justifiable, and those who sustain damage therefrom must protect themselves. It has been argued that Mr. Cosens, having sustained damage from the groyne erected by the commissioners, is entitled to compensation. I do not agree to that as an abstract

proposition. If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title those two things must concur, damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient. Now here Mr. Cosens may have sustained damage, but the commissioners have done no wrong. The dictum of Mr. Justice Wilmut was cited to show that where there is a right this court ought to find a remedy. But the right that Mr. Cosens and each land-owner has, is to protect himself; not to be protected by his neighbors. To that right no injury has been done, nor can any wrongful act be charged against the commissioners; the court, therefore, have no grounds for granting the mandamus applied for."

The doctrine just enunciated was followed in the early California case of *Lamb v. Reclamation District No. 108*, 73 Cal. 125, 14 P. 625, 2 Am.St.Rep. 775, where it was sought to abate and remove as a public nuisance a levee erected along the west bank of the Sacramento river and to recover damages for the overflowing of plaintiff's land on the other side of the river, about two miles below, allegedly caused by said levee. In this case our Supreme Court quotes extensively and approvingly from the decision in the case of *Rex v. Commissioners*, supra, in which latter case the waters of the sea were characterized as a common enemy against which every man has a right to defend himself. See, also, *Sanguinetti v. Pock*, 136 Cal. 466, 473, 69 P. 98, 89 Am.St.Rep. 169; *McDaniel v. Cummings*, 83 Cal. 515, 520, 23 P. 795, 8 L.R.A. 575; *Jones v. California Development Co.*, 173 Cal. 565, 574, 160 P. 823, L.R.A.1917C, 1021; *LeBrun v. Richards*, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336.

[1,2] The principle underlying the foregoing decisions which deal with extraordinary water conditions is that under such stress the landowner may use every precaution not unreasonable to avert damage to his land. Whether such owner's conduct is reasonable must be determined by existing conditions and not by consequences which follow. Respondents seek to distinguish the above-cited cases and assert their inapplicability upon the ground that the California cases cited refer only to storm waters, and that the tide waters of the Pacific Ocean are not storm waters in any sense. Be that as it may, the cases cited confirm the holding in the early English case

of *Rex v. Commissioners*, supra, that the sea is a common enemy and whenever it attacks littoral property the owner thereof may protect his property from its ravages and use every reasonable means so to do without liability.

With this principle in mind, we now turn to the record to ascertain whether, under the circumstances shown to exist here, the actions of the defendant were, as contended for by plaintiffs, unreasonable and therefore subject to abatement and responsibility for damages inflicted upon the property of plaintiffs. In determining the reasonableness of appellant's conduct, we are brought to a consideration of whether the erection and maintenance of the groins were and are a necessary protection from the inroads of the sea.

That defendant erected and maintains the two groins mentioned in plaintiffs' amended complaint is conceded. The record contains evidence that prior to June, 1929, plaintiffs' property was covered with a sandy beach to a depth of approximately six feet of sand; that since June, 1929, the sands have disappeared from plaintiffs' property, leaving exposed the underlying rocks, and in places exposing beds of clay beneath the sands and rocks. Also, that the ordinary high tide line of the waters of Miramar Bay has encroached upon plaintiffs' properties to a varying distance of from 30 to 60 feet. Indicative of the relative condition of the area included in the respective properties of plaintiffs and defendant prior to the erection of the groins, we find the following testimony given by Thomas Dinsmore, supervisor of the First District of Santa Barbara county, whose familiarity with the shore in question extends back sixty years:

"Q. Calling your attention to Plaintiffs' Exhibit Number 9, are you familiar with the point shown here as 'Fernald Point'? A. I am.

"Q. Have you frequently observed that point? A. Yes.

"Q. And prior to the erection of any groins? A. Yes.

"Q. Please state to the court the condition of the shore there prior to the erection of groins. A. That point was always rocky around that Fernald Point.

"Q. Calling your attention to the portion of the property marked on this exhibit as 'Union Realty Company property', are you familiar with that property? A. I am.

"Q. And were you familiar with it prior to the erection of any groins on there? A. I was.

"Q. Will you state to the court, as you recall the condition of that property prior to the erection of the groins? A. The same condition. There was a rocky point that runs out there.

"Q. Calling your attention to the portion of the property shown on this map, commencing at Eucalyptus Lane and Miramar Pier. (Plaintiffs' property.) The area in there. Do you know what that area was called? A. What do you mean, 'area'?

"Q. That area shown on this map between the Union Realty Company property, Eucalyptus Lane, and Miramar Pier. A. That was known as Miramar Beach there.

"Q. Will you state to the court the condition of the property prior to the erection of any groins upon the Union Realty Company property? A. There was always a wide beach there prior to that."

As to what change occurred in plaintiffs' properties after the erection of the second groin and the capping of the first in June, 1929, John Frederick Katenkamp testified as follows:

"Q. Just explain what you observed physically. A. I observed the sand under Mrs. Katenkamp's cottage also being washed away, and that our beach was being denuded of sand.

"Q. Will you explain more fully what, if anything, you observed as to the other properties? A. In proportion this happened to the properties situated toward the east.

"Mr. Rogers: I move to strike out the answer as stating the opinion and conclusion of the witness.

"The Court: Denied.

"Q. When did you first observe this condition, Mr. Katenkamp? A. It became very apparent in July of 1929.

"Q. Continuing on during the year 1929, what did you observe? * * *

"Q. Just explain, then, what you observed. A. I observed the sand beach disappearing and noticed rocks appearing instead.

"Q. With reference to Plaintiffs' Exhibit No. 10, will you please go to the map and with a K6 indicate the point you first observed rocks appearing and approximately when? Approximately what period in 1929 did you make that observation? A. From

the month of July on—about the middle of July.

"Q. When did you first observe the rocks appearing, Mr. Katenkamp? A. At that time.

"Q. Did rocks appear right away as soon as the groin was completed?

* * *

"The Court: It is leading. Sustained.

"Q. During the year 1930, you were on the beach, were you, during that year? A. Except for two months in the spring.

"Q. And what months were they? A. About the fifteenth of April to the fifteenth of June.

"Q. During the year 1930, with the exception of those two months, how frequently were you on the beach at Miramar Bay? A. At least two or three times a day.

"Q. Will you state to the court what you observed during the year 1930 upon Miramar Bay, at the properties at the foot of Eucalyptus Lane shown on Plaintiffs' Exhibit No. 10, extending easterly along the shore? A. I observed our beach was disappearing more and more.

"Q. Did that occur all the way through 1930? A. Occasionally we would have a reversal of weather conditions, but as a rule the beach continued to disappear.

"Q. During the year 1931?

* * *

"Q. I will ask the witness what he observed, if anything, during the year 1931 upon the shore immediately east of the easterly Edgecliff groin? A. I observed a rather marked increase in the erosion directly east of the Edgecliff groin and a continuous disappearance of our beach further east.

"Mr. Rogers: I move to strike out the statement as to the erosion as stating the conclusion of the witness.

"The court: You mean the disappearance of sand? A. No, now the bluff was being attacked.

"The court: Did the beach itself disappear?

"A. The rock beach remained, but the sand disappeared.

"The court: Objection overruled.

* * *

"Q. During the year 1932, what was the condition of this area you have just described? A. Just about the same, with the damage increasing except for one period.

"The court: You can't testify as to damage.

"A. The erosion increased every year except for a short period about August, 1932, when a considerable quantity of sand collected itself on the eastern end of Miramar Bay between the easterly groin and the pier.

"Q. During 1933 what was the condition, Mr. Katenkamp? A. The same.

"Q. Has that continued up to the present time? A. Yes, sir.

* * *

Further, Dr. U. S. Grant, assistant professor of geology at the University of California, testified that he had made a special study of shore line processes and shore line phenomena; that he is acquainted with and had made a personal examination of the areas here in question; that in his opinion, if the breakwater had not been built "there would have been possibly, surely, a larger amount of sand drift eastward along these beaches, but nevertheless I think the groins would act like most groins under similar conditions and would tend to deflect seaward the longshore drift." This witness further testified:

"By the court: Q. I would like to ask a question or two. As I understand you, doctor, you stated in your opinion that this breakwater has some effect in depriving this land here of sand? A. Yes, your honor. I believe that the breakwater has had an effect on this whole general region over to as far and including Summerland.

"Q. Part of the beach here apparently had no sand; how about that? A. Where it had no sand, then the effect is not noticeable. The effect is to reduce the amount of sand available in this region here, but not to cut off the entire supply.

"Q. What makes you think this land was deprived of sand by reason of the breakwater? How did you reason it out? A. It is apparent that since the breakwater has been built, there has been an increase in the width of the beaches in this general region, and it seems to me that there has been a very decided effect. * * *

With reference to the relative responsibility of the groins and the breakwater, the court propounded to Dr. Grant the following interrogatory: "* * * I want to know what in your opinion is the proportion of the damage done by the groins with reference to the proportion done by the breakwater."

To which the witness responded: "For the region immediately east of the groin I believe that groin is responsible for the larger effect, say 75 per cent. I would rather not state figures, but I believe it is true in general where we have a groin of this nature, especially where it projects out from the coast in the manner that it does, that we are apt to have a rather serious lack of sand on the lee side, and that is true here."

In opposition to the foregoing, and in support of its claim that the groins were necessary in order to protect its property from the encroachments of the sea, defendant introduced testimony of which the following resume is typical:

Charles F. Leeds, a consulting engineer of unquestioned and unchallenged education, training and experience, testified that he became familiar with the defendant's property in 1923; that along this property the shore was usually covered with cobbles; that there was some sand there, but he could not say how much; that in 1924 they constructed some experimental groins at Edgecliff; that the president of defendant, Union Realty Company, stated that he wanted the property protected, so plans were prepared for two groins and permits for their construction were obtained. This witness testified that the purpose of the groins was to demonstrate whether they could protect the property. He testified he saw the property frequently after that, and in 1925 a further study was made, when a design was worked out and a permit obtained for what is in the instant case known as the easterly groin. The old groins were allowed to disintegrate. The groin constructed in 1925 was a concrete box which was filled with boulders, and extended 262 feet. The witness further testified that the sand began to collect almost as soon as the construction was undertaken, and it was filled up to the top in a matter of three or four days; that sand was going over the top of the groin even at that time; that after the groin filled up sand actually went over the top of the groin. In 1929 it was decided to increase the protection, and a groin was constructed to the west. The easterly groin was given a concrete cap on the shoreward portion. This cap was constructed for a distance of approximately 170 feet from the shoreward end. Mr. Leeds further testified that the groins at Edgecliff do not deflect the sands seaward;

that as a matter of fact there is a tendency, very slight, to deflect the sands shoreward.

With reference to the breakwater at Santa Barbara and its effect upon the beach, Mr. Leeds testified that after the breakwater was constructed there was a good sandy beach over the area from Santa Barbara Point to Carpinteria. With reference to the cause of the erosion complained of by plaintiffs, this witness testified that the cause of the erosion on all of these easterly beaches is the damming of the littoral drift by the breakwater. In this connection his testimony, as epitomized by appellant, was in part substantially as follows: "It is the breakwater which is the cause of the erosion. This is shown by the amount of sand impounded within the breakwater area and the fact that the accretion west of the breakwater was practically simultaneously with the erosion of the easterly beaches. As the accretion at the breakwater increased in size there was progressively a deterioration of the easterly beaches—not a regular progression, but continuous throughout the time since the breakwater was started. * * * Since the groins have become full originally they have had no effect on the property easterly. * * * These high tide lines further show that the groins have had no effect, because if the groins had affected it there would have been a particular point of greater divergence. * * * In his opinion the groins have not caused any erosion to the property east since the capping of the easterly groin, because he has seen sand passing over the groin and, knowing the height to which it was built, sand would pass over in sufficient quantities to maintain the beach if the supply from the west had not been cut off. * * * After the capping of the easterly groin he recalls no noticeable deterioration of the beaches until about a year after. * * * The closing in of the breakwater resulted in the shutting off of the supply of sand and the starvation of the beaches. * * * Assuming that all other conditions remained the same, if the two groins were removed the supply of sand which is now impounded to the west of those groins would then be dispersed eastward and would pass across the beaches east of these groins and would improve those beaches for the short time that it took for the sand to pass across. Thereafter the beaches would return to their present condition. The improvement would be just a matter of a few days. If the littoral drift west of the groins were re-

stored to that which existed prior to the construction of the breakwater and the groins were left in, the beaches easterly of the groins would be restored to their former condition."

Monough P. O'Brien, as a witness for defendant, testified that he is a professor of mechanical engineering at the University of California, with years of experience in the study of beach erosion; that in his opinion the cause of the erosion is the fact that the breakwater has intercepted the normal littoral drift in the region east of the breakwater. If the littoral drift were reestablished to the west of the groins and they were left in, this littoral drift would reach Eucalyptus Lane, the beaches would build back to average conditions which existed previously to the construction of the breakwater. If the groins were removed, and the breakwater were left in, the sand now impounded by the groins would move easterly and pass the beaches along Miramar Bay, continue eastward and the beaches on Miramar Bay would not show an increase in the amount of sand. On the assumption of facts stated they include erosion on the Miramar Beach with no erosion to the west immediately following the increase in the height of the groins by three or four feet. If the evidence showed that there was a continuation in the erosion, one cannot attribute that erosion to these groins. Assuming the capping of the groin in 1929, the erosion commencing in July of 1929 and continuing continuously since then, he could not attribute the erosion starting in 1929 to the increase of the easterly groin and the westerly groin, for the reason that it was not sufficient to make any difference in the beach.

[3-5] We are impressed that the foregoing epitome of the testimony does no more than raise a substantial conflict in the evidence as to whether there existed a reasonable need for the construction of the groins in order to protect defendant's property from the ravages of the sea, and also as to whether defendant did in fact erect the groins for the purpose of protecting its property from encroachment by the sea and to prevent erosion or for the purpose of transforming into an artificial sandy beach to be utilized in connection with bathhouses, boardwalk and other improvements incidental to a beach club, what had formerly been a rocky shore in front of its property. There is in the record evidence of sufficient substantiality to warrant the

court in basing thereon a reasonable inference contrary to the contentions of defendant. Where facts are proved with legal sufficiency, a finding of fact based upon reasonable inferences drawn therefrom cannot be disturbed on appeal any more than any other finding supported by sufficient legal evidence. *Ryder v. Bamberger*, 172 Cal. 791, 799, 158 P. 753. No rule of law is more familiar nor more firmly established than the one which declares that when a substantial conflict is disclosed in the evidence the findings of the trial court will not be disturbed on appeal. *McKean v. Alliance Land Co.*, 200 Cal. 396, 253 P. 134; *Deacon v. Bryans*, 88 Cal.App. 322, 263 P. 371.

[6-9] It is next contended by appellant that the evidence fails to show any recoverable damage to have been caused by the groins. Appellant's contention in this regard is to the effect that the evidence clearly and overwhelmingly shows that the breakwater constitutes one of the causes of the erosion of the easterly beaches, including the beach of Miramar. This, however, is answered by what we have heretofore said concerning the conflict in the evidence upon that issue. Nevertheless, appellant urges that even though it be conceded that the evidence does support respondents' contention that the groins erected by appellant contributed to the erosion of respondents' lands, this might under certain circumstances entitle respondents to an injunction, but would not support the finding in their favor for damages. Appellant bases this claim upon the contention that the record is barren of evidence upon which appellant's proportionate liability might fairly be determined. It must be conceded that the evidence, taken as a whole, clearly indicates that the Santa Barbara breakwater contributed in part to the damages sustained by respondents. It is equally true that appellant is liable for such proportion of the total damage resulting from the contributing factors as was caused by the groins it erected. *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 P. 550, 22 Am.St.Rep. 254. But in determining the amount of the damages that should be assessed against appellant herein, the trial court was entitled to estimate as best it could from the evidence before it how much of the total damage occasioned by the city's breakwater and appellant's groins was caused by the latter. *Learned v. Castle*, 78 Cal. 454, 18 P. 872, 21 P. 11. Undoubtedly in cases like this entire accuracy is impossible, and great diffi-

culty is encountered in accurately apportioning or assessing the damage done by appellant's construction; but it must not be forgotten that such difficulty would have been avoided had appellant but taken care that no occasion should arise requiring such apportioning and assessing of the whole damages. *Ogden v. Lucas*, 48 Ill. 492; *Carroll v. Central Counties Gas Co.*, 74 Cal.App. 303, 240 P. 53. In the case at bar there is positive evidence, as hereinbefore pointed out, that the groins erected by appellant caused 75 per cent of respondents' damage, and there is some evidence to the effect that the groins were sufficient to cause all the damage. In allowing damages approximating 25 per cent of the amount testified to as having been sustained by respondents, we cannot say that the court erred, because, as is said in 26 R.C.L. 764, "The weight of authority is to the effect that where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this although his act alone might not have caused the entire injury, and although, without fault on his part, the same damage would have resulted from the act of the other."

[10] Appellant's next claim, that the action for damages is barred by the provisions of subdivision 2 of section 338 of the Code of Civil Procedure, is answered by the holding of the appellate court on the prior appeal in this case (*Katenkamp v. Union Realty Co.*, 11 Cal.App.2d 63, 53 P. 2d 387, 389, hearing denied by Supreme Court) that the injury complained of herein was a "taking and damaging of the real property * * * as distinguished from a mere trespass * * * on (an) interest in land". An action for damages therefor is not barred until the passing of five years thereafter; that being the time necessary to elapse before title may be claimed by adverse possession. With the coming down of the remittitur in the appeal last referred to, the holding therein contained as to the inapplicability of the statute of limitations became the law of the case.

[11] In support of its next ground of appeal, appellant, while admitting a conflict in the evidence upon the issue, nevertheless asserts that the mandatory injunction requiring the removal of the groins affords to respondents inequitable relief. The

basis for this argument is the claimed fact that all of the beaches east of the Santa Barbara breakwater were denuded of sands and had similarly suffered erosion, for which reason it is argued that the expert opinions given by two witnesses to the effect that if appellant's groins were removed improvement would result in the condition of the beach on respondents' property is incredible, in face of the opinions expressed by other experts to the effect that these beaches would receive no benefit except a very slight improvement for a period of a few days following the removal of the groins. We are asked to conclude from all the evidence on this subject that the benefits which the respondents might expect from the removal of the groins would be extremely slight and merely temporary, and would be far offset by the damage which would result to appellant's property. *Hulbert v. California, etc., Cement Co.*, 161 Cal. 239, 118 P. 928, 38 L.R.A.,N.S., 436. In view of the conceded conflict in the evidence upon this point, coupled with the fact that all of the matters argued by appellant as grounds for its contention were brought to the attention of the trial court, it must be assumed that the court gave them due consideration in arriving at its conclusion that the situation here presented is not one for the application of the doctrine of balancing hardships; and we are not authorized to disturb the finding of the trial court in that connection, based as it is upon a substantial conflict in the testimony with reference thereto.

Finally, appellant contends that the findings of fact and conclusions of law are conflicting, contradictory, not supported by the evidence, and fail to support the judgments. It would unduly prolong this already lengthy opinion to here narrate in detail the claims made by appellant in this regard. Suffice it to say that we have given careful consideration to the findings, conclusions of law and the judgments predicated thereon, as well as the evidence and exhibits in the case, from all of which we are unable to conclude that appellant's rights have been in any manner prejudicially affected thereby. The findings in the main follow the theory adopted by the trial court that appellant purchased its property here involved in its natural and normal condition of an ocean front property with a rocky beach in front of it, while respondents' properties fronted upon a sandy beach; that in erecting the groins appellant was actuated not by fear of the rav-

ages of the sea or the desire to protect its property from the water's encroachment, but erected the groins for the purpose of improving its property at the expense of respondents' rights to the full enjoyment of their respective properties.

[12] The appellant, pursuant to the provisions of section 4¾ of article VI of the Constitution and legislative enactment in accordance therewith, has filed an application to submit additional evidence. The scope, purpose and intent of the cited constitutional provision and legislative enactment were discussed at length and painstakingly analyzed in *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970, 975, where it was said: "We are convinced that it was not the intention of the new law that the reviewing courts should develop generally into trial courts; that it was contemplated that the courts of appellate jurisdiction would exercise the new power sparingly and, as a general rule, would exercise it only when the purpose of the new findings was to constitute a basis for an affirmance of the judgment or a basis for a reversal of the judgment with directions to the trial court to enter a judgment for the appellant."

[13] We have given careful attention to the proposed evidence, and from a consideration thereof in connection with the entire record, we conclude that if admitted such evidence would not compel a reversal of the judgment with directions to the trial court. It is true that such evidence would indicate that since the making and entry of the judgments in these cases the Santa Barbara harbor was dredged and the shoal formed within the harbor by the trapping and deposit of sand by the breakwater was removed; that this deposit, in the process of such removal, was transferred by means of pipes and pumps to the beaches east of the breakwater along a shore front of approximately one mile, and at a distance from the breakwater which would permit wave action to resume its function of moving sand easterly along the beaches, and thus reestablish the littoral drift; that the quantity of sand thus removed from the area of the breakwater and placed upon the easterly beaches was in excess of 500,000 cubic yards. That part of the proposed evidence consisting of photographs might tend to show the restoration of sandy beaches and the arrest of erosion, and it is contended by appellant that such evidence would demonstrate that the groins

built and maintained along the beaches do not deflect the sand seaward and do not deprive the leeward beaches of sands, and were not the cause of the erosion and damage of which respondents complain; but when considered in the light of all the other evidence contained in the record, including the physical fact that the erosion and damage to respondents' property commenced practically contemporaneously with the erection and maintenance of the second groin and the capping of the first groin, as well as the testimony of engineers, based upon experience with groins along the Pacific coast, that the sand immediately to the east side is affected by the groins, it is at once apparent that the evidence submitted by appellant in its application is not decisive of the issue, by reason of which fact this court could not, following reception of the proffered evidence, direct the court below to enter a judgment upon a reversal of the existent one.

For the foregoing reasons, the application for an order directing that further evidence be taken is denied, and the judgments from which the respective appeals herein were taken are, and each of them is, affirmed.

I concur: YORK, P. J.

DORAN, Justice (dissenting).

I dissent. The prevailing opinion is based upon the familiar rule that an appellate court, when called upon to determine whether there is evidence to support the judgment, will disregard the fact, if it is a fact, that the evidence is conflicting. That substantial evidence is sufficient to support a judgment even though other evidence, equally substantial or less substantial, is in conflict therewith, there can be no question. The conflict, however, in order to justify the application of the rule, must be real and not merely apparent.

In my judgment, appellant's contention is sound. The evidence of the physical facts, which are beyond dispute, together with the inferences that, by reason of the laws of nature, are inescapable, demonstrate to my satisfaction that the alleged damage is the result of the construction of the breakwater and not the groins. The logical and inevitable inference to be drawn from such evidence is secure as against any attempt to create an apparent conflict by means of opinions that at most are but speculative or wistful. An appellate tribunal is not bound to affirm a judgment

that thus offends the rules of reason. The judgment of the trial court appears to me to result from the failure to distinguish between an inference and an opinion. The former has the qualities of certainty and definiteness, whereas the latter not only lacks such qualities, but may be and frequently is the product of speculation mingled with desire or even expediency.



34 Cal.App.2d 573

PEOPLE v. SAMUEL

Cr. 390.

District Court of Appeal, Fourth District,
California.

Sept. 15, 1939.

Criminal law ¶1182

Where transcripts of trial court's clerk and reporter were filed with the clerk of the District Court of Appeal on August 18, 1939, the case was placed on the calendar of September 12, 1939, and no brief was filed on behalf of appellant and no appearance was made for him when case was called for argument, motion to affirm judgment under the provisions of the Penal Code was granted. Pen.Code, § 1253.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Proceeding by the People of the State of California against Louston Samuel. From an adverse judgment, the defendant appeals. On motion to affirm the judgment under the provisions of the Penal Code.

Judgment and order denying motion for new trial affirmed.

P. E. Bingman, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

MARKS, Acting Presiding Justice.

This is a motion to affirm the judgment under the provisions of section 1253 of the Penal Code.

The clerk's and reporter's transcripts were filed with the clerk of this court on August 18, 1939. The case was placed on the calendar of September 12, 1939. No brief has been filed on behalf of appellant and no appearance was made for him when the case was called for argument.

The judgment and order denying the motion for new trial are affirmed.

I concur: GRIFFIN, J.



34 Cal.App.2d 514

MONTGOMERY et al. (KENNEDY, Intervener) v. BOARD OF ADMINISTRATION OF CITY EMPLOYEES' RETIREMENT SYSTEM OF SAN DIEGO et al.

Civ. 2330.

District Court of Appeal, Fourth District, California.

Sept. 11, 1939.

Rehearing Denied Oct. 7, 1939.

See 94 P.2d 610.

1. Municipal corporations Ⓒ220(9)

Under San Diego charter authorizing establishment of retirement system and providing that no employee shall be retired "before 10 years of continuous service," quoted words mean 10 consecutive years of service without breaks, cessation, or intervening period of time, save and except such breaks or interruptions that may be caused by legally authorized cessations or leaves of absence within the power of the city to grant. St. 1931, pp. 2914-2916, §§ 141, 144, 146.

2. Evidence Ⓒ91, 94

The burden of producing a preponderance of evidence is upon the party who has the affirmative of the issue and remains upon him throughout the trial.

3. Mandamus Ⓒ168(2)

In suit to compel officers of the city of San Diego to pay retirement pension to pensioners, burden was on pensioners to prove that they were entitled to pensions, including proof of 10 years' continuous service, or lawful excuse for intermissions in that service, to comply with charter provisions authorizing establishment of retirement system. St. 1931, pp. 2914-2916, §§ 141, 144, 146.

4. Municipal corporations Ⓒ220(9)

Recitals in certificate of service and retirement issued by city of San Diego did not overcome positive evidence that pensioners had not rendered continuous service for 10 years as required by charter. St. 1931, pp. 2914-2916, §§ 141, 144, 146.

5. Municipal corporations Ⓒ46

A municipal charter can be amended only in the manner provided for the framing, modification, or adoption of city charters by the Constitution, and any attempt to do so in any other manner is void. Const. art. 11, § 8.

6. Municipal corporations Ⓒ46

An ordinance of the city of San Diego, if construed as giving authority to city council to add to, or subtract from charter provisions, or make regulations for the administration of retirement system, inconsistent with charter provisions, was void as attempting to permit the amendment of the charter in an unauthorized manner. Const. art. 11, § 8.

7. Municipal corporations Ⓒ46, 220(9)

Under San Diego charter permitting establishment of retirement system, and providing that no employee shall be retired "before ten years of continuous service," ordinance permitting substitution of intermittent service for continuous service as a basis for retirement was void as contrary to the charter and as attempt to amend charter in an unauthorized manner. St. 1931, pp. 2914-2916, §§ 141, 144, 146; Const. art. 11, § 8.

8. Constitutional law Ⓒ48

Where legislative enactment is susceptible of two constructions, one consistent and the other inconsistent, with the provisions of the Constitution, such enactment should be so construed as to make it harmonious with the Constitution and comport with the legitimate powers of the legislature.

9. Municipal corporations Ⓒ220(9)

Under San Diego charter granting city council power to pass ordinances to carry into effect the provisions authorizing city retirement system, council does not have power to pass ordinances conflicting with the charter, or that may have the effect of amending it, but an ordinance that puts into effect charter provisions is to have same force as though part of and included in the charter, and as so construed charter is constitu-

tional. St.1931, pp. 2914-2916, §§ 141, 144, 146.

10. Statutes ⇨235

The liberal construction of a statute does not include an amendment to, or enlargement of, its clear provisions by judicial decision.

11. Statutes ⇨219

A practical construction of a statute can only be resorted to in order to clear up uncertainties and ambiguities.

12. Statutes ⇨219

The construction of a statute by an administrative board cannot change its clear language or alter its plain meaning.

13. Municipal corporations ⇨220(9)

That administrative officers of retirement system of city of San Diego for a period of years recognized intermittent service as a basis for retirement would not warrant interpretation of charter provision authorizing establishment of retirement system and providing that no employee should be retired "before ten years of continuous service," so as to permit retirement before 10 years of continuous service. St.1931, pp. 2914-2916, §§ 141, 144, 146.

14. Municipal corporations ⇨220(9)

Under San Diego charter authorizing establishment of retirement system and providing that no employee should be retired "before ten years of continuous service," 10 years of continuous service need not immediately precede the retirement. St.1931, pp. 2914-2916, §§ 141, 144, 146.

15. Municipal corporations ⇨220(9)

An employee of the city of San Diego who, after being continuously employed by city for more than 10 years, worked intermittently for the city until retirement, was eligible for retirement and his successor in interest was entitled to his retirement pay. St.1931, pp. 2914-2916, §§ 141, 144, 146.

16. Municipal corporations ⇨220(9)

Under San Diego charter authorizing establishment of retirement system and providing that no employee shall be retired "before ten years of continuous service," but providing that retirement shall be compulsory at the age of 72, compulsory retirement at the age of 72 is not a waiver of prior positive provision denying the city council power to provide for retirement of an employee not having served city continu-

ously for ten years. St.1931, pp. 2914-2916, §§ 141, 144, 146.

17. Municipal corporations ⇨220(9)

An employee of the city of San Diego, who was retired at the age of 72 years but before having completed "ten years of continuous service" for the city, was not entitled to retirement pension. St.1931, pp. 2914-2916, §§ 141, 144, 146.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by W. F. Montgomery and others against the Board of Administration of the City Employees' Retirement System of San Diego and others, to compel defendants to pay certain pension or retirement benefits claimed to have accrued under the provisions of the charter and ordinance of the City of San Diego, wherein Anna Maude Kennedy intervened. From a judgment for the defendants, plaintiffs and intervener appeal.

Affirmed in part and reversed in part.

Ray D. Johnson, of El Centro, and John H. Langston, of Taft, for appellants.

Dayton L. Ault, City Atty., and James J. Breckenridge, Deputy City Atty., both of San Diego, for respondents.

MARKS, Justice.

This is an action to compel respondents to pay appellants certain employees pension or retirement benefits claimed to have accrued under the provisions of the charter and ordinances of the city of San Diego. The trial court held that none of the appellants were entitled to receive the pensions and this appeal followed.

A. R. Kennedy was retired on November 1, 1935, and received his pension up to the date of his death. His widow, Anna Maude Kennedy, succeeded to his pension rights. Except where clarity requires, we will make no distinction between deceased and his widow, the intervener.

The first charter of the city of San Diego (Stats.1889, p. 643, amended Stats. 1925, p. 1351) provided for a retirement plan for certain employees of the city. These provisions were reenacted in the present charter (Stats.1931, p. 2838) without any substantial change affecting the rights of the parties before us. We will, therefore, not concern ourselves with the

older charter provisions and all references will be to the present charter.

Article nine of the present charter contains the following provisions:

"Section 141. City Employees' Retirement System. The Council of The City of San Diego, State of California, is hereby authorized and empowered by ordinance to establish a retirement system and to provide for death benefits for public employees other than policemen and firemen (who are now members of a pension system) and elective officers, and members of Commissions who serve without pay; provided, however, that in no retirement system so established shall an employee be retired—except in case of disability, incapacitating the employee for the performance of his duties—before he reaches the age of sixty-two and before ten years of continuous service; * * * Retirement shall be compulsory at the age of seventy-two."

"Section 144. Board of Administration. The system shall be managed by a Board of Administration which is hereby created, * * *

"The Board of Administration may establish such rules and regulations as it may deem proper; * * *

"The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system; and shall have exclusive control of the administration and investment of such fund or funds as may be established, * * * Provided, however, that the Auditor and Comptroller shall refuse to allow any warrant drawn for payment of a retirement allowance if, in the opinion of the Auditor and Comptroller such retirement allowance has been granted in contravention of this Article or any ordinance passed under the authority granted herein."

"Section 146. Additional Provisions. The council is hereby fully empowered by a majority vote of the members to enact any and all ordinances necessary, in addition to the ordinance authorized in Section 141 of this Article, to carry into effect the provisions of this Article; and any and all ordinances so enacted shall have equal force and effect with this Article and shall be construed to be a part hereof as fully as if drawn herein."

In 1927, the city council of San Diego adopted ordinances setting up its retirement system. These ordinances attempted to provide for credits to employees for employment that had been intermittent and not continuous. It provided for the issuance of certificates to employees for the total of such intermittent periods of employment which should be credited on the total of ten years' continuous employment required in the charter as a prerequisite to retirement.

For a number of years the retirement system was administered under the terms of the ordinances. Those employees who had ten years' service, even though part of it was intermittent, were retired and received their pensions. In 1938, this procedure was questioned and the Board of Administration of the City Employees' Retirement System suspended payments to those pensioners who did not have ten years' continuous service to their credit.

An action in declaratory relief was brought by a pensioner, presumably on behalf of all other pensioners, setting forth the controversy that had arisen and asking the superior court of San Diego county to determine and declare the rights of the pensioners under the charter and the ordinances. The superior court declared those provisions of the ordinances void that attempted to give employees credit for intermittent service and held that only those who had ten years' continuous service to their credit could receive pensions. No appeal was taken from this judgment. Appellants have set forth portions of this judgment in their brief. It contains the following: "That the words 'continuous service' in the Charter of the City of San Diego, in its relation to the retirement of members of the City Employees' Retirement System of the City of San Diego, means ten consecutive years of service without break, cessation or intervening period of time, save and except such breaks or interruptions as may be caused by legally authorized vacations or leaves of absence within the power of the City to grant."

[1] Appellants in their reply brief state that the quoted portion of the judgment in the declaratory relief action defining continuous service is a reasonable definition of the term. We agree with that admission. Appellants admit that their records of service to San Diego do not show ten years' continuous service as defined by the

judgment in the declaratory relief case, except in one instance. To escape the natural result of this admission, they urge: that each one of them holds a certificate of service and retirement issued by respondents; that the burden of proof rests on respondents to prove lack of ten years' continuous service on the part of each appellant; that respondents failed to prove that the many breaks in the service of each appellant were not caused by legally authorized vacations or other lawful causes that would not break the continuity of the service.

[2] This is an ingenious if not a convincing argument. It overlooks the elementary rule "that the burden of producing a preponderance of evidence is upon the party who has the affirmative of the issue, and remains upon him throughout the trial". 10 Cal.Jur., p. 785, sec. 91, and cases cited.

[3] The appellants are the plaintiffs in the action. They have been removed from the retirement system and their pensions have been stopped. They are seeking to avoid the effect of the order of respondents depriving them of their pensions. They have alleged and must prove, before they can prevail, that they are entitled to their pensions. This includes proof of ten years' continuous service or lawful excuse for intermissions in that service. This they failed to do, except in one instance. Our study of the record fails to disclose any evidence of ten years' continuous service on the part of any appellant except A. R. Kennedy.

[4] We have been cited to and have found no provision in the city charter or ordinances giving any particular significance to the certificates of service and retirement issued to appellants. As there is undisputed evidence in the record that none of appellants, except Kennedy, had rendered continuous service for ten years, the mistaken recitals in the certificates cannot be held to have overcome the positive evidence that no appellant, except Kennedy, had rendered continuous service for ten years.

Appellants urge that under the broad provisions of section 146 of the charter which we have quoted, the city council had power to pass and adopt ordinances setting up the retirement system and to establish requirements of and qualifications for retirements and pensions; that under the section such provisions of the ordi-

nances had the same force and effect as the provisions of the charter and became portions of the charter; that such ordinances, when adopted, must be given the same force and effect as though their provisions had been incorporated in the charter. From this they argue that since the retirement ordinances provided that the total time of intermittent and interrupted service be computed and considered as continuous service and as each appellant, except Brand, had more than ten years' intermittent and interrupted service, each of them was entitled to retirement and a pension. It is true that the provisions of section 146 of the charter, if legal and if liberally construed, might be held to support the foregoing contentions.

[5] Section 8 of article 11 of the Constitution provides for the framing, ratification and adoption of city charters. An amendment to a charter can only be proposed by the legislative body of the city or by fifteen per cent of its electors or by both. Such amendment must be submitted to and approved by a majority of the electors and must also be submitted to and approved by the legislature at its next regular session following the election. There is no other way in which a city charter may be amended and any attempt to do so in any other manner is void. *Blanchard v. Hartwell*, 131 Cal. 263, 63 P. 349; *Garver v. Council of the City of Oakland*, 96 Cal.App. 560, 274 P. 375; *Garver v. Williams*, 96 Cal.App. 118, 273 P. 604.

[6] If section 146 of the charter must be construed as giving authority to the city council of San Diego by ordinance to add to or subtract from the charter provisions or make regulations for the administration of the retirement system inconsistent with the clear provisions of that document, it must be held to be unconstitutional as attempting to permit the amendment of the charter in an unauthorized manner.

[7] It is clear that certain provisions of the retirement ordinances, as construed and applied prior to 1938, conflict with the provisions of the charter. Certainly, intermittent service is not continuous service and in so far as the ordinances attempt to substitute intermittent service for continuous service as a basis for retirement, their provisions are void as contrary to the charter and as an attempt to amend the charter in an unauthorized manner.

It does not follow that section 146 of the charter is unconstitutional.

[8] "It is a well-recognized canon of interpretation that, where a legislative enactment is susceptible of two constructions, one consistent and the other inconsistent with the provisions of the constitution, such enactment should be so construed as to make it harmonious with the constitution and comport with the legitimate powers of the legislature." 5 Cal.Jur., p. 615, sec. 46.

[9] It is our duty to so construe the provisions of section 146 of the charter so that they may be held constitutional if that can be done without doing violence to the language of the section and the well-established rules of statutory construction. The section grants to the city council power to pass ordinances proper "to carry into effect the provisions of this Article". Art. IX Charter. This quoted portion of the section gives the city council power to pass ordinances to administer and carry out the terms of the charter. It gives no authority to pass any enactment that conflicts with the charter provisions. In view of that provision of the section, we must hold that it is only an ordinance that puts into effect charter provisions that is to have the same force and effect as though a part of and included in the charter; that the section does not empower the city council to pass any ordinance conflicting with the charter or that may have the effect of amending it. With such a construction placed upon it, we believe section 146 of the charter to be constitutional.

It is urged that we are required to put a liberal interpretation on the charter and that the interpretation put upon it by practical construction for a period of years by the administrative officers of the retirement system is persuasive and requires us to include within the term "continuous service" as used in the charter, the intermittent service that was recognized and credited for retirement for several years.

[10] The liberal construction of a statute does not include an amendment to or enlargement of its clear provisions by judicial decision. In *re Jessup*, 81 Cal. 408, 21 P. 976, 22 P. 742, 1028, 6 L.R.A. 594; *Mulville v. City of San Diego*, 183 Cal. 734, 192 P. 702. The word "continuous" is in common use and has a clear and unambiguous meaning. Continuous service, as used in the charter, means consecutive service and does not include intermittent

and interrupted service, as appellants would have us conclude.

[11-13] Practical construction of a statute can only be resorted to in order to clear up uncertainties and ambiguities. *Hodge v. McCall*, 185 Cal. 330, 197 P. 86; *People v. Sinicrope*, 109 Cal.App.Supp. 757, 288 P. 61. The construction of a statute by an administrative board cannot change its clear language or alter its plain meaning. *Hodge v. McCall*, *supra*; *People ex rel. State Board v. Kerber*, 152 Cal. 731, 93 P. 878, 125 Am.St.Rep. 93; *People v. Sinicrope*, *supra*, 109 Cal.App.Supp. at page 767, 288 P. 61. The provisions of the charter in question not being uncertain, there is no opportunity for practical construction here.

Respondents introduced in evidence the records of service of appellants. That of A. R. Kennedy shows that he worked intermittently during 1919 and until June 30, 1920; that he was transferred to the operating department on July 1, 1920, and worked continuously until June 30, 1931, for more than ten years; that after one year's leave of absence his employment was terminated; that he worked intermittently during 1934 and 1935; that he was retired on November 1, 1935.

[14, 15] We can find nothing in the city charter nor in the retirement ordinances that require the ten years of continuous service to immediately precede the retirement. As, on the record before us, it appears that Kennedy was eligible for retirement and that intervener as his successor in interest is entitled to his retirement pay, the judgment against intervener must be reversed.

The service record of B. D. Brand shows that he worked eighteen days in July, 1923; that he was reemployed by the city on July 1, 1925, and served continuously until August 31, 1932, on which day he was retired at the age of 72 years.

[16, 17] Brand argues that as his retirement was involuntary because of age, he is entitled to his pension. This contention is based on the last sentence of section 141 of the charter which provides that "Retirement shall be compulsory at the age of seventy-two". This sentence does not contain any waiver of the prior positive provision in the earlier part of the section denying to the city council the power to provide by ordinance for the retirement and pension of any employee not having

served the city continuously for ten years. In view of the positive provisions of that portion of the charter, an employee lacking ten years' continuous service could not be retired and pensioned except in case of disability. There is no showing that Brand was disabled at the time of his retirement. Therefore he did not possess the necessary qualifications for retirement and a pension.

The judgment against plaintiffs is affirmed. The judgment against intervener is reversed.

I concur: BARNARD, P. J.

GRIFFIN, J., being disqualified, does not participate herein.



34 Cal.App.2d 510

PEOPLE v. SCOTT et al.

Cr. 1690.

District Court of Appeal, Third District,
California.

Sept. 11, 1939.

Criminal law ¶1182

Where no brief was filed in behalf of appellants, and no appearance was made for appellants when case was called for hearing after being regularly placed on the calendar for oral argument, judgments would be affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Lassen County; Ben V. Curler, Judge.

Charles R. Scott and H. C. Murray were convicted of second degree burglary, and they appeal.

Affirmed.

Grover C. Julian, of Susanville, for appellants.

Earl Warren, Atty. Gen., and J. O. Brown, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellants were convicted in the superior court of Lassen county of the crime of burglary in the second degree, a felony.

The transcript on appeal was filed in this court June 29, 1939. No brief has been filed in behalf of appellants. The cause was regularly placed on the calendar for oral argument on September 11, 1939. No appearance was made for appellants at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgments are affirmed.



34 Cal.App.2d 566

GAY et al. v. CADWALLADER-GIBSON
CO., Inc., et al.

Civ. 12239.

District Court of Appeal, Second District,
Division 2, California.

Sept. 13, 1939.

Rehearing Denied Oct. 5, 1939.

Hearing Denied Nov. 9, 1939.

1. Automobiles ¶244(3)

In action against lumber company and driver of its motor vehicle for death of cement company's employee struck by motor vehicle while crossing well-defined pathway on property in control of lumber company, but which was in close proximity to property of cement company, evidence supported finding that driver knew that deceased might reasonably be expected to be where he was at time of accident, and sustained judgment for plaintiffs.

2. Negligence ¶32(1)

A possessor of land is subject to liability to others who are privileged to enter it for a public or private purpose, irrespective of his consent, for bodily harm there caused to them by his failure, after he knows, or from facts within his knowledge should know, of their presence on the land, to conduct his activities thereon with reasonable care for their safety.

3. Negligence ¶28

Test for determining liability to person injured while using premises in control of defendant is whether defendant engaged in commission of negligent act knew of, or had reason to expect, presence of person injured within range of his negligent activities.

4. Automobiles ⚡247

In action against lumber company and driver of its motor vehicle for death of cement company's employee struck by motor vehicle while crossing well-defined pathway on property in control of lumber company, but which was in close proximity to property of cement company, it was not necessary for trial court to make specific finding that deceased was licensee at time of accident to justify recovery, where defendant driver had reason to expect that employees of cement company would be using pathway and was charged with duty of refraining from negligently injuring them.

5. Automobiles ⚡245(70)

In action against lumber company and driver of its motor vehicle for death of cement company's employee struck by motor vehicle while crossing well-defined pathway on property in control of lumber company, but which was in close proximity to property of cement company, deceased was not contributorily negligent as matter of law in slowly moving wheelbarrow in front of oncoming motor vehicle, where great noise from cement plant made it difficult to hear approaching motor vehicles.

6. Death ⚡58(1)

The presumption, in death action, that deceased took ordinary care for his own safety, is dispelled when a fact wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on presumption or of such party's own witnesses, when such testimony was not the product of mistake or inadvertence.

7. Death ⚡58(1)

In action against lumber company and driver of its motor vehicle for death of cement company's employee struck by motor vehicle while crossing well-defined pathway on property in control of lumber company, but which was in close proximity to property of cement company, evidence failed to dispel presumption that deceased was in exercise of ordinary care for his own safety at time of accident.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Susie E. Gay and others against the Cadwallader-Gibson Company, Incorporated, and Valentine Lye for the death of Charles C. Gay, who was struck

by a motor vehicle driven by defendant Lye, who was operating the vehicle in the course of his employment by the Cadwallader-Gibson Company, Incorporated, wherein the Pacific Employers' Insurance Company appeared as a lien claimant. From a judgment for plaintiffs, the defendants appeal.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Randall J. Hood, of Los Angeles, for respondents.

F. Britton McConnell and Claude F. Weingand, both of Los Angeles, for lien claimant.

WOOD, Acting Presiding Justice.

Charles C. Gay was killed May 20, 1937, in an accident in which he was struck by a motor vehicle driven by defendant Lye, who was operating the vehicle in the course of his employment by Cadwallader-Gibson Co., Inc., hereinafter referred to as the lumber company. The action was commenced by the heirs at law of decedent to recover damages suffered because of his death. Defendants appeal from a judgment in favor of plaintiffs.

Decedent was at the time of his death and had been for a period of approximately twelve years in the employ of Pacific Portland Cement Company, hereinafter referred to as the cement company, and of its predecessor, Standard Gypsum Company. The cement company and the lumber company were lessees of adjoining parcels of real property from Craig Shipbuilding Company. The cement company's lease was dated April 11, 1925, and contained the provision that the lessors reserve the right, "To maintain and use the switch track now crossing the southwesterly portion of said demised premises, the approximate location of which is shown on said annexed map in red and black, such use, if said Lessee so desires, to be a joint use, each interfering with the use of the other as little as reasonably practicable." The switch track and the pathway hereinafter referred to were on a small parcel of land, a trifle less than one acre immediately adjoining the premises on which was erected a plant operated by the cement company. In 1927 the lumber company executed a lease with the Craig company and commenced to use the parcel of land just referred to jointly with the cement company. In 1934 an oral agreement was made by and between the lum-

ber company and the Craig company by which the lumber company agreed to pay taxes on the parcel of land and would have the control of it. This oral agreement was not communicated to the cement company.

There is no discussion in the briefs concerning the rule of law that the purchaser or lessee of land is bound to take notice of all easements and servitudes which are apparent on inspection of the property. We will therefore take up the contention of plaintiffs that the findings are supported by the evidence and that they in turn support the judgment. The trial court found that it was necessary for decedent to use and he was making use of and traversing a well-defined pathway which ran relatively parallel with and in close proximity to the property and buildings in the possession and under the control of his employer; that the pathway was located on property in the possession and control of the lumber company; that the pathway in question had been in constant and continuous use by the cement company and its predecessor and their employees for a long time preceding the accident; that defendant Lye negligently operated a vehicle, known as a lumber carrier, resulting in the death of decedent. The court further found: "That said defendant, Valentine Lye, at the time of and for a long time prior to the date of said accident, had knowledge of and knew of the existence of and the location of said pathway, and knew and had knowledge of the use being made thereof by the employees of said Pacific Portland Cement Company, and by said deceased, Charles Calloway Gay, and at all times had knowledge of and knew that said employees of said Pacific Portland Cement Company were constantly and continuously making use of and were traversing said well-defined pathway, and at all times knew that the various employees of said Pacific Portland Cement Company, including said deceased, Charles Calloway Gay, might be making use of and might be traversing said well-defined pathway at any time, and that various of said employees, including said deceased, Charles Calloway Gay, might reasonably be expected to be where said deceased was at the time of said accident; that said defendant, Valentine Lye, negligently failed to see and discover the presence of said deceased, Charles Calloway Gay, at the place where said accident occurred prior to the happening of said accident."

It appears from the evidence that the pathway referred to in the findings ran im-

mediately beside the spur track referred to in the lease; that it was in daily use by the employees of the cement company in passing from one doorway to another in the cement company's plant; that for many years and up to the time of the accident both the lumber company and the cement company had used the parcel of land in question without objection from either of them. Cars of the cement company were stopped on the right of way for unloading crude gypsum and for the purpose of making repairs. Employees of the cement company daily walked up and down the pathway, which was their only means of getting to their crusher house. Defendant Lye testified: "I have observed, on many occasions, that there is a doorway going into this rock crushing house, and I have seen that people went in and out through that doorway by means of walking along this right-of-way." In a conversation with the witness Bell, defendant Lye, after stating that it was customary for him to drive back and forth, stated that it was a privilege both companies enjoyed.

A photograph of the lumber carrier appears in the record. It is a high vehicle which does not afford its operator such a clear vision as is ordinarily afforded by drivers of automobiles. On the day of the accident defendant Lye loaded the carrier with lumber, backed it away from the lumber yard and started forward down the spur track, at which time he was traveling at the rate of 10 or 12 miles per hour. Decedent had just previously emerged from the plant of the cement company with his loaded wheelbarrow and had turned down the pathway when the lumber carrier overtook him from the rear, striking the wheelbarrow and causing injuries which resulted in his death.

[1-4] The contention of defendants that the findings do not support the judgment cannot be sustained. The trial court expressly found that the driver of the lumber carrier knew that decedent "might reasonably be expected to be where said deceased was at the time of the said accident". This finding is supported by the evidence. In 2 A.L.I. Restatement of the Law of Torts, section 346, it is stated: "A possessor of land is subject to liability to others who are privileged to enter it for a public or private purpose, irrespective of his consent, for bodily harm there caused to them by his failure, after he knows or from facts within his knowledge should know of their pres-

ence on the land, to conduct his activities thereon with reasonable care for their safety". This statement was referred to with approval in *Hamakawa v. Crescent Wharf, etc., Co.*, 4 Cal.2d 499, at page 503, 50 P.2d 803, at page 805, where this observation is made: "In the final analysis, as recognized by those same authorities, the test is whether the defendant engaged in the commission of the negligent act knew of or had reason to expect the presence of the person injured within the range of his negligent activities." In *Lucas v. Walker*, 22 Cal.App. 296, 300, 134 P. 374, 376, 379, cited in the *Hamakawa* case, the court said: "But if it be conceded that plaintiff was a mere licensee of defendant when he was hurt, it is still true that he was upon the premises and doing the work in question with the knowledge and consent of defendant. This is admitted by the pleadings. A licensee under such circumstances is entitled to recover for any injury to himself, in the absence of contributory negligence upon his part, resulting from the active negligence of the licensor, and such licensor is responsible in damages for any overt act of negligence, though the same be neither willful nor wanton." The trial court made no specific finding as to whether decedent was a licensee at the time of the accident, but it matters not whether he be called a licensee, invitee, or one exercising the right of his employer in accordance with the terms of the employer's lease. Defendant Lye had reason to expect that employees of the cement company would be using the pathway at the time he was operating the lumber carrier and he was charged with the duty of refraining from negligently injuring them. *Pomponio v. New York, N. H. & H. R. Co.*, 66 Conn. 528, 34 A. 491, 494, 32 L.R.A. 530, 50 Am. St.Rep. 124.

[5-7] There is no merit in the contention of defendants that decedent was guilty of contributory negligence as a matter of law. In this connection it should be noted, in addition to the facts above set forth, that a great noise called by defendant Lye a "roar" and a "rumble" was coming from the cement plant as decedent was slowly moving his wheelbarrow in front of the oncoming lumber carrier. Moreover, plaintiffs were entitled to the benefit of the presumption that decedent took ordinary care for his own safety. We are not unmindful of the rule that this presumption is dispelled when a fact wholly irreconcilable with it is proved by the uncontradicted testimony

of the party relying on it or of such party's own witnesses, when such testimony was not the product of mistake or inadvertence. *Engstrom v. Auburn Automobile Sales Corp.*, 11 Cal.2d 64, 77 P.2d 1059; *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529. It cannot be successfully contended that evidence was presented either by plaintiffs or defendants which is irreconcilable with the contention that decedent exercised due care.

The judgment is affirmed.

I concur: McCOMB, J.



34 Cal.App.2d 544

PEOPLE v. GLOVER.

Cr. 3243.

District Court of Appeal, Second District,
Division 1, California.

Sept. 12, 1939.

Embezzlement §44(1)

Evidence justified conviction of attorney for grand theft of amount which client furnished attorney for payment of interest on incumbrance on property involved in partition suit in which attorney represented client.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

George A. Glover was convicted of grand theft, and he appeals.

Affirmed.

Edward J. Queen, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant appeals from a judgment of conviction by the court of the offense of grand theft. A jury having been duly waived, the issue was submitted by stipulation upon the evidence produced for the magistrate's consideration at the preliminary hearing.

Briefly, as revealed by the record, the circumstances surrounding the commission of the offense are as follows: Frank and Alice Sesma, man and wife, were the owners of an undivided one-half interest in thirty-three acres, consisting mainly of citrus trees, in Los Angeles county. Mr. and Mrs. D. C. Peterson were the owners of the other undivided one-half interest. Sesma brought an action in partition in connection with which defendant Glover became the attorney for Peterson. Defendant negotiated on behalf of Peterson for the purchase of Sesma's undivided one-half interest, and during the course of such negotiations opened an escrow with the Title Guarantee & Trust Company, apparently or ostensibly to conclude the transaction. Peterson's relation to the escrow amounted, in effect, to an offer to buy, in connection with which about \$6,000 was deposited by him and \$6,800 by another, incidental to the transaction. No agreement to buy and sell was ever executed by the parties, nor did Sesma ever become a party to the above-mentioned escrow. The transaction was never consummated, if indeed it ever went beyond preliminary discussions, and the moneys deposited in the escrow were returned.

Defendant, as Peterson's attorney in the above-mentioned partition action, undertook by cross-complaint to set up an action in specific performance based on the above briefly described negotiations. At the time defendant was employed by Peterson, a fee of \$1,200 was agreed upon. Defendant required Peterson to execute a trust deed for \$1,500 which trust deed was to be held by defendant to secure the payment of the fee. Instead, and without Peterson's knowledge, defendant sold the trust deed. In addition, Peterson paid defendant over \$2,200 in fees.

During the negotiations between Sesma and Peterson above referred to, Peterson gave defendant \$350 which defendant asserted was necessary to pay interest on a certain incumbrance on the property. This \$350 was appropriated by defendant and constituted the subject-matter of the grand theft charge of which defendant was found guilty.

The sole contention on appeal is based upon the claim that the evidence fails to support the judgment.

The defendant was the only witness appearing for the defense. Without going into further detail, it is sufficient to note

that, although a conflict in the evidence was created by defendant's testimony, nevertheless, the evidence offered in support of the prosecution was corroborated and substantial, and is abundantly sufficient to support the judgment as a matter of law.

There being no errors in the record, the judgment should be, and it is affirmed.

We concur: YORK, P. J.; WHITE, J.



SOUTHERN PACIFIC CO. v. SUPERIOR
COURT IN AND FOR LOS ANGELES
COUNTY.

Clv. 12397.

District Court of Appeal, Second District,
Division 1, California.

Sept. 12, 1939.

Hearing Granted Oct. 19, 1939.

Witnesses ⇐16

The statutory requirement that an affidavit, showing that rights of all parties have been protected, be filed as a prerequisite to issuance of a subpoena duces tecum, necessarily presupposes that a judicial determination of sufficiency of affidavit to warrant issuance of subpoena will be made.

On petition for rehearing.

Denied.

Prior opinion, 93 P.2d 276.

W. I. Gilbert, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, for respondent.

PER CURIAM.

The petition for rehearing herein is denied.

The requirement of the statute that an affidavit be filed as a prerequisite to the issuance of a subpoena duces tecum necessarily presupposes that a judicial determination as to the sufficiency of the affidavit to warrant the issuance of a subpoena duces tecum

will be made before its issuance. In fact, the affidavit required to be filed must actually be sufficient to show that the rights of all parties have been protected, and this determination, of course, cannot be made by a ministerial officer.



34 Cal.App.2d 562

PEOPLE v. INGRUM.

Cr. 3226.

District Court of Appeal, Second District,
Division 2, California.

Sept. 13, 1939.

Rehearing Denied Sept. 26, 1939.

Hearing Denied Oct. 13, 1939.

1. Homicide ☞116(5)

In murder prosecution, in order to justify the killing of deceased on ground of self-defense, it was not sufficient for defendant to establish that she believed her life was in danger, but defendant was bound to show that she had reasonable cause to believe that she was in imminent danger of losing her life or suffering great bodily injury. Pen.Code, § 197.

2. Homicide ☞244(1)

Evidence held to sustain conviction of murder in the first degree as against defendant's plea of self-defense. Pen.Code, § 197.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Ruth Ingram was convicted of murder in the first degree, and she appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

WOOD, Acting Presiding Justice.

Defendant was charged by information with the crime of murdering Victor M. Paul on January 13, 1939. She entered pleas of not guilty and not guilty by reason of insanity and admitted the truth of the additional charge contained in the information

that she had previously been convicted of a felony. A jury returned a verdict finding her guilty of murder of the first degree and fixing her punishment at life imprisonment. The jury also found that she was sane at the time of the commission of the offense. The appeal is from the judgment of conviction.

Defendant argues that the evidence is insufficient to sustain the judgment. She contends that she shot Mr. Paul in self-defense and that the killing was justifiable and excusable; that if it be held that the killing was not justifiable or excusable, the evidence shows the commission of no offense greater than manslaughter.

The prosecution points to evidence in the record which fully sustains the verdict of the jury. The decedent, who was a deputy sheriff of Los Angeles county, met defendant while they were passengers on a bus travelling to El Paso, Texas. Defendant informed decedent that she had been convicted of robbery in Oklahoma, had served part of her term and been paroled, but had violated the terms of her parole and had been returned to the penitentiary from which she had escaped. Notwithstanding this information decedent asked her if she were a good cook and requested her to return to California and live with him. Thereupon decedent bought tickets for their return to California and they commenced to live together as husband and wife, and although they were not married, continued to live together in Norwalk until defendant killed decedent.

A witness for the prosecution, Edith Winget, also known by the nickname "Patsy", testified that in the evening of January 12, 1939, defendant and the witness drove by the house occupied by defendant and decedent and, finding no light in the house, drove on and visited several cafes and beer parlors, subsequently returning to defendant's home at about 3 o'clock in the morning of January 13. They went into the house, turned on the light and awakened decedent. After a few moments decedent said, "Quit", and pulled the bed covers over his head after defendant had pulled the covers down. Decedent used some profanity. Defendant said to the witness, "Come on, Patsy, let's get out of here", and said to decedent, "God damit, so you are still mad". The witness and defendant then left the house and visited other beer parlors and cafes, the last place being visited at approximately 9:30 a. m. on January 13.

They returned to the residence occupied by decedent and defendant at about 3 o'clock in the afternoon of January 13. Seeing unwashed dishes on the table defendant said, "Someone has surely cooked for him". Defendant then went out the back door.

Defendant found decedent at the house next door and the occurrences that took place there are related by other witnesses. Decedent had gone next door at about 11 o'clock in the morning and had consumed sandwiches and coffee. When she found decedent, defendant angrily ordered him to get out, using unprintable language. Decedent pleaded with defendant to wait for him and not be angry.

Edith Winget further testified that soon thereafter she observed defendant and decedent in the kitchen of their home engaged in a conversation in which decedent accused defendant of having been drinking. This was denied by defendant but decedent answered, "Nevertheless you must sleep it off". Decedent did not appear to be angry. Defendant and decedent walked toward the bedroom and the witness went into the living room. The doors were open and she heard defendant tell decedent that she could not get up because she did not have any clothes on. The witness heard no sounds of any blows or any struggle in the bedroom. Decedent remained in the bedroom five or ten minutes and then went into the kitchen. Both defendant and decedent appeared to the witness to be sober. In the course of the ensuing conversation between decedent and the witness decedent said, "I can't help it, I am through with her". Presently the witness heard the sound of steps of bare feet in the hall, apparently coming from the bedroom. She saw decedent take one step toward the hallway from which the sound of footsteps was coming and almost immediately after she heard one shot fired by defendant. Immediately the witness turned and saw decedent fall. Then she heard two more shots. Between the second and third shots she heard decedent say, "For Christ sake, Pat, get a doctor". At that time decedent was on the floor and defendant asked, "Are you through with me?". To this decedent replied, "No darling, you know I am not". The witness then asked defendant for the keys to the car telling defendant that she was going to take decedent to the hospital, whereupon defendant told the witness to go ahead and tell him what she had to say to him; that she was going to kill decedent

and then kill herself. Defendant did not offer to assist the witness to get a doctor.

Margaret Burrell, who lived in the house next door, testified that she heard the three shots fired, that there was a pause after the first shot but the other two shots were fired in rapid succession. After hearing the shots she went to defendant's house and found decedent lying on the porch. The witness asked, "My God, Gloria, is he dead?", to which defendant replied, "No, he isn't dead, but I am going to shoot the dirty son of a bitch until he is". (It appears that defendant was commonly called Gloria.) The witness further testified that defendant said, addressing her remarks to decedent, "I will teach you to call me a dirty little whore".

It was shown in evidence that a window opened from the bedroom and that defendant could have easily opened the window and escaped from the house without risk of injury to herself. At the time she seized the revolver from the closet and went down the hall toward decedent she was unclothed except for a blouse covering the upper part of her body.

[1,2] Defendant's contention that the homicide was excusable and justifiable is based upon her own testimony given at the trial in which she stated that decedent had beaten her on the head in the bedroom, jerked her up and down on the bed, and had threatened to kill her; that she only wanted to leave the house, and that she shot decedent in fear for her life. The jury was not bound to accept as true the testimony of defendant which is refuted in large part by the testimony of other witnesses and by the physical facts shown in evidence. Other witnesses did not hear the sounds of the beating and did not find marks upon defendant's body. The window was available for her escape if she in fact wanted to leave the premises. Instead of leaving by the window defendant chose to seize the weapon and carry it down the hall toward decedent. From the testimony of the witness Winget it appears that two of the shots were fired after the decedent had fallen to the floor. Moreover, in order to justify the killing of decedent on the ground of self-defense it was not sufficient to establish that defendant believed her life was in danger but it must have appeared that she had reasonable cause to believe that she was in imminent danger of losing her life or suffering great bodily injury. Sec. 197, Pen.Code; People v. Loom-

is, 86 Cal.App. 768, 261 P. 512; *People v. Ortiz*, 63 Cal.App. 662, 219 P. 1024. There is ample evidence in the record to support the conclusion of the jury that defendant without justification killed decedent maliciously and intentionally.

The judgment is affirmed.

I concur: McCOMB, J.



34 Cal.App.2d 546

Ex parte WOOLF et al.
Cr. 3262.

District Court of Appeal, Second District,
Division 1, California.
Sept. 12, 1939.

1. Habeas corpus ⇨92(3)

In habeas corpus proceeding to obtain relief from judgment finding petitioners guilty of contempt in violating an order of superior court modifying a temporary injunction limiting the amount of natural gas which could be produced from petitioners' well, where petitioners conceded that they had violated superior court's order, only question before District Court of Appeal was whether superior court had jurisdiction to make the order limiting gas production when gas in question was not blown into the air. Gen.Laws 1937, Act 4916, §§ 8b, 8d, 14b; Code Civ.Proc. § 1209, subd. 5.

2. Courts ⇨1

"Jurisdiction," as applied to courts, means the power to hear and determine the matter in controversy.

[Ed. Note.—For other definitions of "Jurisdiction (Of Courts)," see Words & Phrases.]

3. Habeas corpus ⇨92(3)

In habeas corpus proceeding to obtain relief from judgment finding petitioners guilty of contempt in violating an order of superior court modifying a temporary injunction limiting the amount of natural gas which could be produced from petitioners' well, whether superior court had erred in its decision with respect to order or whether court had improperly exercised its power

could not be inquired into if the court acted within its jurisdiction in making the order attacked. Gen.Laws 1937, Act 4916, §§ 8b, 8d, 14b; Code Civ.Proc. § 1209, subd. 5.

4. Injunction ⇨219

An injunction may be disregarded only when the injunction is void because of want of jurisdiction in the judge who issued it.

5. Mines and minerals ⇨47

The property right of an owner or lessee of land in and to the gas and oil beneath the surface thereof is not an absolute one.

6. Mines and minerals ⇨48

Oil and gas, because of their peculiarity in the natural state, partake of nature of "common property," title to which becomes absolute only when reduced to possession.

[Ed. Note.—For other definitions of "Common Property," see Words & Phrases.]

7. Mines and minerals ⇨92

Because of peculiar nature of oil and gas, and their character as natural resources, the public has an interest in their preservation from waste and destruction.

8. Mines and minerals ⇨92

A person's absolute power as an owner of gas and oil produced from beneath the surface of his land is subject to obligations to the public and to the restriction that he must make such use of his production as not to be injurious to the property or health of others.

9. Mines and minerals ⇨92

Gas, which has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion, amounts to an "unreasonable waste of natural gas" within contemplation of the Oil and Gas Conservation Act. Gen.Laws 1937, Act 4916, § 8b.

[Ed. Note.—For other definitions of "Unreasonable Waste of Natural Gas," see Words & Phrases.]

10. Mines and minerals ⇨92

Under the Oil and Gas Conservation Act prohibiting the unreasonable waste of natural gas, the primary function of gas in production of oil is recognized and its complete utilization in such respect, without unnecessary waste, is attempted to be safeguarded. Gen.Laws 1937, Act 4916, §§ 8b, 8d, 14b.

11. Mines and minerals Ⓒ92

That adherence to an order of superior court, entered in proceedings under the Oil and Gas Conservation Act, limiting the amount of natural gas which could be produced from petitioners' well would result in lessened production of oil with resultant damage, was not a valid objection to such order, since the lessening of daily production of oil, as result of operation of statute, was a matter for Legislature. Gen.Laws 1937, Act 4916, §§ 8b, 8d, 14b.

12. Mines and minerals Ⓒ92

In proceedings to restrain alleged unreasonable waste of natural gas from defendants' wells, superior court had jurisdiction to make findings, in substance, that good cause appeared for modification of a preliminary injunction previously issued, and that blowing of gas into air was an unreasonable waste of natural resources within contemplation of Oil and Gas Conservation Act, and to make findings with respect to what amount of gas could reasonably be produced from wells in question and to limit production of gas from such wells to a certain amount per day. Gen.Laws 1937, Act 4916, §§ 8b, 8d, 14b.

13. Habeas corpus Ⓒ92(3)

In habeas corpus proceeding to obtain relief from judgment finding petitioners guilty of contempt in violating an order of superior court modifying a temporary injunction limiting the amount of natural gas which could be produced daily from petitioners' well, correctness of daily allotment to each well, under superior court's order, could not be reviewed when superior court had acted within its jurisdiction in hearing and determining the matter in controversy. Gen.Laws 1937, Act 4916, §§ 8b, 8d, 14b.

Proceeding in the matter of the application of J. W. Wood and another for a writ of habeas corpus to obtain relief from a judgment finding petitioners guilty of contempt by violating an order modifying a preliminary injunction.

Writ discharged, and petitioners remanded to custody of sheriff.

Jonah Jones, Jr., of Long Beach, for petitioners.

Earl Warren, Atty. Gen., and Everett W. Mattoon, R. S. McLaughlin, and John L. Nourse, Deputies Atty. Gen., for respondent.

WHITE, Justice.

This matter involves an attack by writ of habeas corpus upon a judgment for contempt growing out of a violation of an order modifying a preliminary injunction issued by the superior court of Los Angeles county in an action brought in the name of the People of the State of California on the relation of George D. Nordenholt, Director of Natural Resources of the State of California, against petitioners herein and numerous others as defendants.

The purpose of the aforesaid action is to restrain the alleged unreasonable waste of natural gas from the wells of the defendants therein named. In response to an order to show cause such defendants appeared, and after a hearing the superior court on June 16, 1939, issued its preliminary injunction and continued the matter until June 22, at which time any party to the action was privileged to show cause why the preliminary injunction of June 16 should be modified, vacated or discharged, or a new and further preliminary injunction be made. On June 22 the matter was continued to June 27, 1939, on which last-named date the court made the following findings:

"1. That good cause appears for the modification of the preliminary injunction dated June 16, 1939, as hereinafter set forth, and good cause appears for the inclusion of the defendants La Merced Drilling Co., Hathaway Company, Stanley Oil Company, Vulcan Oil Company, R. R. Bush Oil Company.

"2. That there is an unreasonable waste of natural gas in and from the Montebello Oil Field in the county of Los Angeles, California.

"3. That the Texas Company have the only absorption plant in that field and that more gas is being processed by the Texas Company than there is use for in the field or for any commercial market, and that therefore a vast amount of dry gas is needlessly wasted by being blown to the air at the absorption plant.

"4. That this blowing of gas to the air is an unreasonable waste of the natural resources of the State of California, and is an act specifically prohibited by the California laws for the conservation of petroleum and gas.

"5. That the total of gas outlets for all uses, with a reasonable tolerance to take care of normal fluctuating demands, shrinkage, present field gas outlet and reason-

able waste, is not more than 23,000,000 cubic feet of gas each day.

"6. That the production of gas from each well should not be limited to less than 100,000 cubic feet of gas each day.

"7. That each well producing in excess of 4,500,000 cubic feet of gas per day is unreasonably wasting gas, and the potential power of said gas to lift oil, to the detriment of the natural resources of the State of California and to the detriment of all operators having wells in said Montebello field.

"8. That said 23,000,000 cubic feet of gas should be distributed between and among the wells in said Montebello field as hereinafter set forth.

"9. That the evidence shows that the unreasonable waste of natural gas in said field will be substantially reduced and that the equities of all parties may be fairly conserved by a preliminary injunction which will limit the waste of gas as hereinafter ordered, and that sufficient cause has been shown for the extraordinary relief of a preliminary injunction pending the trial of the action on the merits and the entry of a final judgment herein."

Based on the foregoing findings, and for the purpose, as stated by the court, "to conserve the natural gas in said field", the preliminary injunction was, under date of June 28, modified to restrain the defendants from producing more natural gas in the Montebello field than the amount allotted by the court to the respective defendants. By the terms of the order modifying the temporary injunction these petitioners as defendants in said action were restrained from producing from their well, known as "Harris Well No. 1", more than 990,000 cubic feet of gas per day. Subsequently, upon affidavits filed with the superior court, that tribunal issued its order directing these petitioners to appear and show cause why they should not be adjudged in contempt of said court for asserted violation of the order of June 28 modifying the temporary injunction. Pursuant to such last-named order to show cause in re contempt these petitioners appeared before said superior court on July 21, and after a hearing based on affidavits the court found that petitioners upon twelve separate days had produced from their "Harris Well No. 1" gas in excess of the 990,000 cubic feet allotted them by the order of June 28. As punishment for such violation, petitioners were fined respective-

ly in the sum of \$25 on each of the twelve counts of contempt, and in default of payment of such fines were ordered committed to the custody of the sheriff of Los Angeles county, from which imprisonment they seek release by this writ of habeas corpus.

The authority for the action in which the order modifying the temporary injunction was made is found in section 14b of the Oil and Gas Conservation Act (Stats. 1915, p. 1404 and amendments; Deering's Gen.Laws 1937, Act 4916). In the amended title to the act its purpose is stated in part as "an act to protect the natural resources of * * * gas from damage, waste and destruction". Section 8b of the amended act reads: "The unreasonable waste of natural gas by the act, omission, sufferance or insistence of the lessor, lessee or operator of any land containing oil or gas, or both, whether before or after the removal of gasoline from such natural gas, is hereby declared to be opposed to the public interest and is hereby prohibited and declared to be unlawful. The blowing, release or escape of natural gas into the air shall be prima facie evidence of unreasonable waste."

The claims of petitioners in this habeas corpus proceeding may be summarized as follows: That under the Oil and Gas Conservation Act the superior court is authorized to restrain only the unreasonable waste of gas; that all production of gas put to a beneficial use is not waste within the meaning of said act, and that the order of the court allotting and limiting the production of gas beneficially used was in excess of its jurisdiction. Petitioners concede that if the court possessed the power to limit the production of gas beyond such gas as is blown into the air or otherwise wasted, then the writ of habeas corpus must be denied.

It is established by the record before us that after the issuance of the order modifying the temporary injunction on June 28, petitioners herein did not blow any gas from their said well into the air; but such gas as was produced over and above that necessary for oil production from petitioners' well was used for industrial power in supplying energy to adjoining oil wells; that petitioners were supplying gas for twenty boilers in the Montebello oil field. Petitioners further showed without contradiction that they were under contract to furnish gas to complete certain wells,

and contend that if forced to abide by the court's order they would be compelled to buy gas from some other source in order to comply with their contracts to furnish that commodity to other drilling wells.

[1-4] The only question, therefore, in the proceeding before us, involving as it does a judgment pronounced in a contempt proceeding, is whether the superior court had jurisdiction to make the order modifying the temporary injunction and limiting gas production when such gas was not blown into the air; because it is conceded that petitioners violated such order of allotment. In *re Selowsky*, 189 Cal. 331, 208 P. 99; In *re Drew*, 188 Cal. 717, 207 P. 249; *Ex parte Ah Men*, 77 Cal. 198, 19 P. 380, 11 Am.St.Rep. 263; *Ex parte Levin*, 191 Cal. 207, 215 P. 908; sec. 1209, subd. 5, Code Civ.Proc. Jurisdiction has been defined as being the power to hear and determine the matter in controversy, and if the power existed the question of whether the court erred or the power was improperly exercised is not involved and errors of the court therein constitute no defense whatever. An injunction may be disregarded only when the same is void because of want of jurisdiction in the judge who issued it. *People v. McWeeney*, 259 Ill. 161, 102 N.E. 233, Ann.Cas.1916B, 34. We are, therefore, not concerned with the correctness of the decision made, but only with the question of the court's jurisdiction. If the order here in question was made in the exercise of jurisdiction then it must be obeyed until such order is modified or set aside by the court making it, or reversed in a direct proceeding by appeal therefrom.

[5-7] In *People v. Associated Oil Co.*, 211 Cal. 93, 294 P. 717, 722, we find a painstaking, comprehensive and detailed narrative of the development of the petroleum industry, as well as a careful analysis of both legislation and judicial decisions in connection with the rights of those engaged in oil and gas production; the correlative rights of adjoining landowners in a proven oil field, as well as the interest and concern of the state in the conservation of these resources. In the cited case our Supreme Court, speaking through Mr. Justice Shenk, says: "The generally accepted view, therefore, is that the property right of the owner or lessee of land in and to the gas and oil beneath the surface is not an absolute one. Such substances, because of their peculiarity in the

natural state, partake more of the nature of common property, title to which becomes absolute when they are captured and reduced to possession. Because of their peculiar nature the public has a definite interest in their preservation from waste and destruction. This is true because of their character as natural resources and also because the public interest has attached by virtue of positive statutory law or by court judgment independent of statute. In seven states of the Union legislation making unlawful the unreasonable waste of natural gas has been upheld: Indiana: *State of Indiana v. Ohio Oil & Gas Co.*, 150 Ind. 21, 49 N.E. 809, 47 L.R.A. 627; *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 20 S.Ct. 576, 44 L.Ed. 729. Kentucky: *Commonwealth v. Trent*, 117 Ky. 34, 77 S.W. 390, 4 Ann. Cas. 209. Wyoming: *Walls v. Midland Carbon Co.*, 254 U.S. 300, 41 S.Ct. 118, 65 L.Ed. 276. Oklahoma: *Quinton Relief O. & G. Co. v. Corporation Comm.*, 101 Okl. 164, 224 P. 156. Louisiana: *State v. Carson Carbon Co.*, 162 La. 781, 111 So. 162. Texas: *Oxford Oil Co. v. Atlantic Oil P. Co.*, [5 Cir.], 22 F.(2d) 597, certiorari denied United States Supreme Court, 277 U.S. 585, 48 S.Ct. 433, 72 L.Ed. 1000; *Railroad Commission of Texas v. Bass*, (Tex. Civ.App.) 10 S.W.(2d) 586; *Magnolia Petroleum Co. v. Stroud*, (Tex.Civ.App.) 3 S.W.(2d) 462. Kansas: *State v. Lebow*, 128 Kan. 715, 280 P. 773, 775; *Marrs v. City of Oxford* [8 Cir.], 32 F.(2d) 134, 67 A.L.R. 1336, rehearing denied, Circuit Court of Appeals, May 17, 1929, certiorari denied, United States Supreme Court, October 21, 1929, 280 U.S. 573, 50 S.Ct. 29, 74 L.Ed. 625."

[8] In the same case (*People v. Associated Oil Co.*, supra) we find the positive statement that independent of statute the waste of gas resulting merely in a depletion of the supply in a common reservoir has been enjoined, citing cases. Also in the same case the Supreme Court reiterates the doctrine declared by the United States Supreme Court in *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 20 S.Ct. 576, 44 L. Ed. 729, to the effect that in the disposition that one may make of gas and oil he is subject to two limitations, viz., his obligations to the public and his neighbor's right; and that if he uses his product in such a manner as to violate any rule of public policy or any positive provisions of the written law, he thereby brings himself within the reach of the courts, and that his abso-

lute power as an owner is subject to the restriction that he must make such use of his production as not to be injurious to the property or health of others.

[9] In *People v. Associated Oil Co.*, supra, the Supreme Court 211 Cal. on page 106, 294 P. on page 724, discusses the importance of gas in the oil-producing industry and the great concern of both the industry itself and the government that its function may be fully utilized without wasting, which discussion is followed by the direct and positive language: "Gas, therefore, which has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion, may be said to amount to an unreasonable waste of natural gas." The last-quoted language becomes important in the present case because of the fact that the record indicates that much, if not all, of the gas in addition to that allotted to petitioners by the superior court order was brought to the surface without its lifting power having been utilized to bring about the production of oil from the ground. The definition of the term "unreasonable waste", as used in section 8d of the act, is epitomized in *People v. Associated Oil Co.*, supra, by the following language: "It would seem, therefore, that the Legislature has plainly adopted the standard so expressed, viz.: that gas may not be produced, under existing conditions where the production thereof so greatly exceeds the market demand therefor, in quantities exceeding a reasonable proportion to the amount of oil produced, as the standard to be applied and beyond which the production is prohibited as being an unreasonable waste of natural gas."

[10] In the same case the Supreme Court views the terms of the Oil and Gas Conservation Act as establishing the fact that "the primary function of gas in the production of oil is recognized, and its complete utilization in that respect, without unnecessary waste, is attempted to be safeguarded". This is followed with the declaration that "the act, without doubt,

was a response to a growing recognition that the continuing and increasing waste of the propulsive energy of gas under ground and of its full energy above ground was unreasonable and should be inquired into and regulated, to the end that the public convenience and general prosperity of the commonwealth be promoted. Such legislation should not be stricken down because there may be an incidental and unavoidable interference in the economic field."

[11] Petitioners' complaint, that adherence to the order of the superior court would result in lessened production of oil with resultant damage, is answered by the Supreme Court in *People v. Associated Oil Co.*, supra, in the following language: "The result complained of—the lessening of the daily production of oil—if it follow from the operation of the statute, is a matter of concern for the Legislature and cannot of itself make void a police measure which is otherwise a constitutional exercise of a legislative power."

The foregoing principles of law find support and approval in *Ambassador Petroleum Co. v. Superior Court*, 208 Cal. 667, 284 P. 445; *People v. Associated Oil Co.*, 212 Cal. 76, 297 P. 536; and *Bandini Petroleum Co. v. Superior Court*, 110 Cal. App. 123, 293 P. 899.

[12, 13] We therefore conclude that the court had jurisdiction to make the findings contained in its order modifying the terms of the temporary injunction under date of June 28, and based thereon, was clothed with jurisdiction to limit the production of gas from petitioners' well to a definite amount per day. The correctness of the daily allotment cannot be reviewed by habeas corpus when, as here, the court was vested with jurisdiction and power to hear and determine the matter in controversy.

For the foregoing reasons, the writ is discharged and the petitioners are and each of them is remanded to the custody of the sheriff of the county of Los Angeles.

We concur: YORK, P. J.; DORAN, J.

34 Cal.App.2d 609

ELMORE JAMESON CO. v. SMITH
et al. (three cases).

Civ. 2332, 2341, 2342.

District Court of Appeal, Fourth District,
California.

Sept. 20, 1939.

1. Chattel mortgages ⇨258

A power of sale may be given in a chattel mortgage. Civ.Code, § 2932.

2. Chattel mortgages ⇨172(1)

Where chattel mortgage gives mortgagee the right to take possession of the property upon default, mortgagee's prior election to foreclose does not bar mortgagee from bringing replevin to recover possession of the property, as a remedy ancillary and auxiliary to the foreclosure, resting upon the right of possession given by the contract. Civ.Code, § 2932.

3. Chattel mortgages ⇨258

Generally, a power of sale given in a chattel mortgage or independent instrument must be executed in accordance with the provisions thereof and in the manner provided by law, and otherwise the sale is void and results in extinguishment of the mortgage lien. Civ.Code, §§ 2967, 3000, 3002, 3005.

4. Appeal and error ⇨544(1)

Matters not part of the judgment roll cannot be considered on appeal unless they are embodied in some other appropriate record.

5. Appeal and error ⇨907(3)

When appeal is heard upon the judgment roll alone, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken.

6. Appeal and error ⇨544(1)

Matters dehors the record, if relied on to destroy the presumptions in favor of validity of judgment on appeal upon the judgment roll alone, must be brought to the appellate court's attention by bill of exceptions or other appropriate methods.

7. Appeal and error ⇨907(3)

On appeal on the judgment roll from judgment foreclosing chattel mortgage, court must presume that all proceedings neces-

sary to validity of private sale authorized by the chattel mortgage were regularly taken, and hence would not hold that mortgagee's taking the property in replevin suit and subsequently selling it under authority of the chattel mortgage and agreement amounted to a conversion because of failure to give proper notice, in absence of findings concerning manner of sale. Civ.Code, §§ 2932, 2967, 3000, 3001, 3002, 3005.

8. Chattel mortgages ⇨269

A chattel mortgage foreclosure and action for accounting is an equitable proceeding.

9. Chattel mortgages ⇨265

Where chattel mortgage provided that mortgagee would pay all expenses of harvesting and threshing the mortgaged crop, the court properly imposed charge for expenses of harvesting and threshing by third person, and ordered it paid from proceeds of sale of the crop remaining in mortgagee's hands after foreclosure, as against contentions that crop was harvested subject to restraining order precluding the imposing of any lien on the crop, and that lien for harvesting was waived by failure to claim it when mortgagee took the property in replevin action. Civ.Code, § 2913.

10. Chattel mortgages ⇨265

Where chattel mortgage provided that mortgagee would bear all expenses of harvesting and threshing, third person's charges for harvesting and threshing were entirely payable from proceeds of sale in mortgagee's hands, as against contention that one-fourth of such charges, representing the harvesting of rental share of the crop, was chargeable against mortgagor.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Separate actions, consolidated on appeal, by the Elmore Jameson Company against Leslie Smith and others, upon a promissory note and to foreclose a crop mortgage, and in replevin to recover possession of crop. From portions of the judgments, plaintiff and defendants appeal.

Reversed with instructions.

S. P. Williams, of El Centro, for plaintiff.

Harry W. Horton, of El Centro, for defendants.

GRIFFIN, Justice.

The above-numbered actions were consolidated on appeal. One action, commenced July 1, 1932, was an ordinary action upon a promissory note and to foreclose a crop mortgage dated July 19, 1929, executed by Leslie Smith, mortgagor, to John J. Elmore, mortgagee, which mortgage was given as security for its payment upon all crops to be grown upon certain premises in Imperial county during the term of a certain lease held by the mortgagor from David N. Barry and George Diddock.

Plaintiff sought a restraining order and applied for the appointment of a receiver. Leslie Smith and Grace Smith, by way of answer, alleged the execution of some independent written agreement between John J. Elmore and Leslie Smith which they claimed was unfulfilled and repudiated and that by virtue thereof the mortgage "has been abandoned by the said John J. Elmore". T. N. Montgomery set up in a cross-complaint a request for an accounting and also alleged that he did on October 9, 1931, accept from Grace Smith and Leslie Smith two chattel mortgages (duly recorded, but recorded subsequent to the execution and recordation of the Elmore mortgage), upon certain crops to be grown on the same premises, believing that John J. Elmore and his assignee, Elmore Jameson Company, a corporation, had abandoned and repudiated its mortgage and alleged that Elmore Jameson Company, a corporation, assignee, was now estopped from asserting its chattel mortgage lien and claimed that his chattel mortgage was first and a superior lien upon the security. There was also an action in replevin filed by Elmore Jameson Company, a corporation, as assignee, to recover possession of the barley crop which had in the meantime been harvested by T. N. Montgomery, mortgagee, in the subsequent chattel mortgages.

In this second action the same general defense was interposed with the additional allegation of the defendant Montgomery that he had a claim or lien for services in the harvesting of the crop.

The application for the appointment of a receiver was denied by the court but on the first day of July, 1932, the court issued a temporary restraining order to defendants, restraining them from "removing any of said crop of barley * * * or from doing anything therewith that will

in anywise affect the lien of plaintiff's mortgage herein". This restraining order was dissolved July 8, 1932. On July 9, 1932, the present action in replevin was filed and after giving security in the form of a bond in the sum of \$3,000, plaintiff took the crop and sold it, as it claims under the terms of the mortgage, at a price higher than the then prevailing market price. Plaintiff also left on the premises sufficient barley to pay all rental charges. The crop sold for \$1,621.32, which sum was held by the plaintiff. These actions were consolidated for the purpose of trial.

The trial court found that Elmore Jameson Company, a corporation, as assignee, had a crop mortgage upon all of the crops involved in the action and that it was a first and superior lien thereon and prior to the lien of the second mortgages held by Montgomery. The court also sanctioned the sale of the grain made by the Elmore Jameson Company, a corporation, and rendered judgment that it pay to Montgomery \$756.08, which represented three-fourths of the reasonable value of his services in harvesting the crop and the reasonable value of the sacks which Montgomery furnished for that purpose. The balance, or one-fourth of the cost, was held to be a charge against the lessee, Leslie Smith. It also held that plaintiff was entitled to all of the proceeds of the sale of the crop, except the amount found due Montgomery as his harvesting and threshing charges set forth, and entered judgment accordingly. Defendants appealed from the judgment rendered in the consolidated actions, excepting that portion of the judgment in favor of T. N. Montgomery. Plaintiff appealed only from that part of the judgment awarding T. N. Montgomery \$756.08. The separate appeals are before us solely on the judgment roll alone.

Defendants contend that under section 2910 of the Civil Code the plaintiff's lien under its mortgage was lost or destroyed by its action in replevying the barley and then selling it without complying with section 2967 of the Civil Code, and while the barley was in its possession under the levy; that this was tantamount to a conversion and accordingly the mortgage lien was extinguished (citing *Steele v. Marlborough Hall Corp.*, 100 Cal.App. 491, 494, 280 P. 380; *Bailey v. Security Trust Co.*, 34 Cal. App. 348, 354, 167 P. 409; *Nelson v. Yonge*, 73 Cal.App. 704, 710, 239 P. 67).

It is further contended that plaintiff's lien was also lost because the sale was illegal, not being made after notice, as required by sections 2967, 3000, 3001, 3002, and 3005, Civil Code, citing *Metheny v. Davis*, 107 Cal.App. 137, 290 P. 91; *Blodgett v. Rheinschild*, 56 Cal.App. 728, 738, 206 P. 674; and that plaintiff's lien having been extinguished, defendant Montgomery was entitled to the entire value of the grain crop at the time of trial to satisfy his mortgage and "threshing lien".

John J. Elmore, in his agreement with defendant Smith, the grower, agreed to pay all harvesting and threshing charges and furnish necessary equipment therefor. Also, sufficient crops were to be released from the mortgage to pay the rental charges on the leased premises.

[1,2] It must be conceded that a power of sale may be given in a chattel mortgage. Sec. 2932, Civ.Code; *Sherlock v. Alturas State Bank*, 73 Cal.App. 391, 238 P. 816; *Peet v. People's Trust & Savings Bank*, 56 Cal.App. 46, 204 P. 413. It is also settled that where a chattel mortgage by its terms gives to the mortgagee the right to take possession of the mortgaged property, upon default in payment, the prior election by the mortgagee to foreclose the mortgage does not bar an action of replevin by the mortgagee to recover possession of the property. Such remedy is ancillary and auxiliary to the foreclosure, resting upon the right of possession given by the contract. *Ely v. Williams*, 6 Cal.App. 455, 92 P. 393; *Flinn v. Ferry*, 127 Cal. 648, 652, 60 P. 434.

[3] We are mindful of the provisions of section 2967 of the Civil Code which provides that "A mortgagee of personal property, when the debt to secure which the mortgage was executed becomes due, may foreclose the mortgagor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed by the title on 'pledge,' or by proceedings under the Code of Civil Procedure," and of the general rule that a power of sale, if given in a chattel mortgage or independent instrument, must be exercised in accordance with the provisions thereof and in the manner provided by law, and if not so exercised the sale is void, and results in the extinguishment of the mortgage lien. *Henderson v. Fisher*, 38 Cal.App. 270, 176 P. 63; *Helmick v. Holaday*, 106 Cal.App. 380, 386, 289 P. 224; *Sherlock v. Alturas State Bank*, supra, 73 Cal.App. at page

398, 238 P. 816; *Blodgett v. Rheinschild*, supra, 56 Cal.App. at page 738, 206 P. 674.

The pertinent portions of the contemporaneous agreement authorizing possession and sale of the crop are as follows: "When said crops mature, the party of the first part (Elmore) agrees to harvest and thresh the same and to bear and pay all expenses in connection therewith and furnish the necessary equipment therefor.

* * * It is further understood and agreed that as each season's crops are harvested there shall be paid the rental due on said premises therefrom and commissions due for obtaining leases, the balance then remaining shall then be divided between the parties hereto; provided, however, that the party of the first part shall have the right to retain from said second party's share a sufficient amount to reimburse him in full for all moneys then owing him by the party of the first part with interest at the rate of 8 per cent per annum. * * * It is understood and agreed that the portion of the barley set apart to the party of the first part shall constitute full payment to him of services rendered in the threshing and hauling of said crop * * * the party of the first part * * * agrees that in the event of said party of the second part failing to comply with the terms hereof to be by him performed, said party (Elmore) may enter upon said premises and take full and complete possession and control thereof and farm the same." The chattel mortgage dated July 19, 1929, provides that the said mortgagee (Elmore) is to thresh and deliver said barley and sell the same in accordance with the agreement dated October 15, 1928, and "as said crops mature, the mortgagor agrees to deliver possession of the same to the mortgagee for the purpose of said mortgagee harvesting, threshing and making division thereof in accordance with the terms of said contract hereinbefore mentioned. The mortgagor further agrees that in the event of his failure to perform any of the terms, covenants or conditions of this mortgage or of said contract, the mortgagee may take immediate possession of said crops and the premises upon which the same are growing and take the necessary steps for the caring for and growing of the same until the same have matured and then gather and harvest the same and from the share thereof to be paid to the mortgagor under the terms of said contract, deduct and withhold therefrom sufficient thereof to

pay all costs of the caring for and growing of said barley, as well as any other moneys owing by the mortgagor to the mortgagee, and any and all obligations * * *

The only finding of the trial court respecting the manner of sale of the barley by plaintiff under the chattel mortgage and agreement called to our attention was: "After giving security in the form of a bond in the sum of Three thousand dollars (\$3000) plaintiff Elmore Jameson Company took said crop and sold the same at a price higher than the then prevailing market price. That plaintiff Elmore Jameson Company left on said premises sufficient barley to pay all rental charges on said premises. That the remainder of the crop sold by plaintiff consisted of 2864 sacks of barley which plaintiff sold for the total sum of One thousand six hundred thirty one dollars and twenty-two cents (\$1,631.22) which sum is now held by plaintiff."

[4-7] We also find this conclusion set forth in paragraph VIII of the findings: "That by virtue of the terms of plaintiff's mortgage and contract, said default of the defendant Leslie Smith entitled and authorized plaintiff Elmore Jameson Company to enter upon the premises upon which the crops covered by plaintiff's mortgage were growing and to care for, harvest and dispose of said crops at private sale. * * *" It does appear from the record, however, that appellant requested that findings be made as to the actual facts shown by the evidence relative to the taking and manner of selling the property in question. However, no further or additional findings were made. The rule is well established in California that matters which are not part of the judgment roll cannot be considered on appeal unless they are embodied in some other appropriate record. *Brown v. Canty*, 31 Cal.App. 183, 159 P. 1056. When an appeal from a judgment is heard upon the judgment roll alone, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken. If error relied on to destroy such presumptions consists of matters dehors the record, such matters must be brought to the attention of the appellate court by bill of exceptions or other appropriate methods. *Caruthers v. Hensley*, 90 Cal. 559, 27 P. 411. It must be presumed in the instant case that all proceedings necessary to the validity of the sale

were regularly taken. We are not disposed to hold, therefore, that the taking of the property in the replevin suit and its subsequent sale under the authority of the chattel mortgage and agreement amounted to a conversion. The authorities cited by appellants are clearly distinguishable and not applicable to the facts in the instant case.

In considering the merits of plaintiff's appeal from that portion of the judgment allowing defendant Montgomery's claim or lien for expenses in harvesting the crop, it will be observed that it was clearly the obligation of plaintiff under the chattel mortgage and agreement to "harvest and thresh the same and to bear and pay all expenses in connection therewith * * * and furnish the necessary equipment therefor".

It now appears that under the conflicting claim of right, Montgomery harvested, threshed and paid all expenses in connection with the crop, which inured entirely to the advantage of plaintiff. Plaintiff now contends that the court should not permit defendant Montgomery to acquire a lien or be reimbursed for this expenditure when the act of harvesting was carried on while the restraining order precluding the imposing of any lien on the crop was in effect, and that Montgomery's failure to claim his lien when the property was taken by the plaintiff under the replevin action operated as a waiver thereof. Citing Civ.Code, sec. 2913; 16 Cal.Jur., p. 331.

[8] A mortgage foreclosure and an action for an accounting is an equitable proceeding. Under the chattel mortgages of both plaintiff and defendant Smith, the owner of the crop, was the one, by virtue of the instruments executed, who occasioned the disputed rights of all the parties, and thereby caused Montgomery to make the expenditures to preserve the crop and do the threshing, and all this inured directly to the benefit of the chattel mortgagee, John F. Elmore, and saved him, the chattel mortgagee, that amount of money.

[9] The trial court, notwithstanding the restraining order which was dissolved, imposed a charge of some character for this service, upon the proceeds of the sale of the property. That court acted within its equitable jurisdiction in holding that such a charge should be imposed and properly ordered it paid from the sum remaining in the hands of the plaintiff. *McColgan v.*

Bank of California Ass'n, 208 Cal. 329, 337, 281 P. 381, 65 A.L.R. 1075; Pomeroy's Equity Jurisprudence, vol. 3, 4th Ed., § 1235, p. 2962; Clatworthy v. Ferguson, 72 Colo. 259, 210 P. 693; Tulare County v. City of Dinuba, 205 Cal. 111, 270 P. 201; Mace v. Cole, 50 N.D. 866, 198 N.W. 816, 35 A.L.R. 445.

[10] The court allowed defendant Montgomery a recovery of \$157.58, as being the value of the sacks furnished and only \$598.50, or three-fourths of the cost of harvesting, holding that the remaining one-fourth was chargeable to the defendant Leslie Smith, being the cost of the harvesting of the rental share of the barley. If the defendant Montgomery was entitled to any reimbursement for the harvesting and furnishing of necessary sacks, it appears to us that under the terms of the agreement and chattel mortgage, Montgomery was entitled to recover from plaintiff the full amount expended for that purpose because the contract provided: "party of the first part (Elmore) agrees to harvest and thresh the same and to bear and pay all expenses in connection therewith", that is, \$798 for harvesting and \$157.58 costs of sacks, totaling \$955.58. The balance due or the amount of the deficiency judgment in favor of plaintiff and against the defendant Leslie Smith should also be increased accordingly.

The judgment of the trial court is reversed with instructions to enter judgment in accordance with the views herein expressed.

I concur: MARKS, Acting P. J.



34 Cal.App.2d 571

**BREITENGROSS v. THEODORE
KRUMM, Inc.**
CIV. 2196.

District Court of Appeal, Fourth District,
California.
Sept. 15, 1939.

I. Appeal and error — 800

Motion to dismiss appeal on ground that appellant failed to file its brief within time

allowed by law was denied, where appellant's opening brief was on file at time motion to dismiss was made in open court.

2. Appeal and error — 786

Motion to dismiss appeal as based on unsubstantial question was denied, where, on examination of moving papers and appellant's opening brief, it appeared that questions to be decided on appeal were close, and that appellate court should have assistance of additional briefs from counsel.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by A. H. Breitengross against Theodore Krumm, Incorporated, for breach of contract for sale of plaintiff's orange crops to defendant. From judgment for plaintiff, the defendant appeals. On motion to dismiss the appeal or affirm the judgment.

Motion denied.

Theodore G. Krumm, of San Bernardino, for appellant.

Howell W. Richardson, of San Bernardino, for respondent.

MARKS, Acting Presiding Justice.

This is a motion to dismiss this appeal or affirm the judgment on the grounds (1) that defendant failed to file its brief within the time allowed by law, and (2) that the grounds upon which the decision of the cause depends are so unsubstantial as not to need further argument.

[1] The motion to dismiss was noticed for the calendar called on September 12, 1939. Defendant's opening brief was filed on September 11, 1939, and was on file at the time the motion to dismiss was made in open court. This has been held sufficient reason for the denial of a motion made on the first ground. *Lisle v. Ragle*, 10 Cal. App.2d 758, 52 P.2d 608, and cases cited.

The action is one for damages for breach of contract. Plaintiff and certain of his assignors sold or contracted for the sale of their crops of oranges to defendant. The crops were subsequently severely damaged by frost. The principal question argued in the opening brief is whether title to the fruit passed to defendant on the execution of the contracts or remained in the growers until the fruit was picked, delivered and prepared for market. We are informed that in separate actions two

of the judges of the superior court of San Bernardino county reached opposite conclusions on this question.

No portion of the contracts are set forth in the moving papers. Fragments of one of them are quoted in the opening brief. It is apparent that we must have the contracts before us to properly construe them. This involves a study of the transcripts.

[2] This court has consistently denied motions to dismiss appeals made on the second ground where intelligent consideration of the motions required us to examine the moving papers, the opening briefs and the records on appeal. *Brown v. Gow*, 126 Cal.App. 113, 14 P.2d 322; *Thompson v. Boyer*, 127 Cal.App. 149, 15 P.2d 541; *North v. Evans*, 136 Cal.App. 434, 28 P.2d 938; *Lennon v. Woodbury*, 1 Cal.App.2d 381, 36 P.2d 415; *Barr v. Hall*, 9 Cal.App.2d 426, 49 P.2d 1124.

A reading of the portions of the contract set forth and summarized in the opening brief shows that the questions to be decided on the appeal are close and will need careful study. Under such circumstances we should have the assistance of additional briefs from counsel.

The motion is denied.

I concur: GRIFFIN, J.



34 Cal.App.2d 511

PEOPLE v. DOXIE.

Cr. 524.

District Court of Appeal, Fourth District,
California.

Sept. 11, 1939.

Rehearing Denied Sept. 22, 1939.

Hearing Denied Oct. 9, 1939.

1. Criminal law ☞878(4)

In California, inconsistent verdicts cannot be allowed to stand.

2. Criminal law ☞878(4)

In order that verdicts convicting defendant of one offense and acquitting him of another be inconsistent, verdicts must be

rendered in response to charges of offenses the elements of which are identical.

3. Criminal law ☞878(4)

Acquittal of charge of sex perversion was not inconsistent with conviction of a crime against a child, since elements of the offenses are not identical. Pen.Code, §§ 288, 288a.

4. Criminal law ☞757(1)

In prosecution on charge of committing the crime against a child and on charge of sex perversion, instruction that fact answers of child witness to questions consisted of words of one syllable was not conclusive that she did not tell truth about defendant's conduct toward her, and that jury in determining credibility of her testimony was to be governed by same rules as in determining credibility of other witnesses, as given in another instruction, was proper comment by trial judge. Pen.Code, § 288; Const. art. 6, § 19, as amended.

5. Criminal law ☞1170½(1)

Witnesses ☞243

In prosecution on charge of committing a crime against a child and on charge of sex perversion, permitting leading questions to be asked five-year-old child witness was not prejudicial error, especially where evidence of child was strongly corroborated by extrajudicial statements made by defendant and by his own testimony given under oath at his preliminary examination. Code Civ.Proc. § 2046.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Don Doxie was convicted of a crime against a child, and he appeals.

Affirmed.

W. C. Dorris and R. W. Henderson, both of Bakersfield, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

MARKS, Acting Presiding Justice.

This is an appeal from an order denying defendant's motion for a new trial and from the judgment pronounced upon him.

Defendant was charged with the violation of the provisions of section 288 and an attempt to violate the provisions of section 288a of the Penal Code, alleged to have been committed on the person

of a little girl slightly less than five years of age. He was found guilty of the first and not guilty of the second offense charged.

Defendant urges that the verdicts are inconsistent and that, as there was only one act involved, the verdict finding him not guilty of attempting to violate the provisions of section 288a of the Penal Code cannot be reconciled with the verdict finding him guilty of violating the provisions of section 288 of the same code.

[1,2] It is well settled in California that inconsistent verdicts cannot be allowed to stand. It is equally well settled in order to be inconsistent, verdicts must be rendered in response to charges of offenses the elements of which are identical. *People v. McCollum*, 116 Cal.App. 55, 2 P.2d 432; *People v. Jameson*, 136 Cal.App. 10, 27 P.2d 935.

[3] A reading of the two sections of the Penal Code involved here clearly demonstrates that the elements of the offenses defined in them are not identical. This is so evident that it should not be necessary to point out the dissimilarities here.

[4] Defendant complains of the following instruction given to the jury:

"The fact that the answers of a child witness to questions of counsel consisted of words of one syllable is not of itself conclusive that she did not tell the truth about the defendant's conduct towards her. If there is no inherent improbability in her account of the transaction, it is solely for the jury to determine whether her testimony is credible or otherwise; and in doing so you will be governed by the same rules as in determining the credibility of other witnesses as given you in another instruction."

Since the adoption of the amendment to section nineteen of article VI of the Constitution of California, trial courts "may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the prop-

er determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

While the exact language of the instruction is not to be praised, its intent clearly falls within the quoted language of the Constitution. The trial court elsewhere properly instructed the jurors that they were the sole judges of the weight and sufficiency of the evidence and of the credibility of the witnesses.

[5] Lastly, defendant complains of several rulings of the trial judge in overruling defendant's objections to leading questions put to the little girl during her direct examination.

In the interests of justice the trial judge, in the exercise of a sound discretion, may permit leading questions to be propounded to a witness on direct examination. Section 2046, Code Civ.Proc.

We can find no reversible error in the rulings of the trial judge on these objections to the leading questions. The testimony of the little girl was strongly corroborated by extrajudicial statements made by defendant and by his own testimony given under oath at his preliminary examination. The only material difference in the evidence of defendant at the preliminary examination and in the testimony of the little girl at the trial is found in this: defendant testified to an attempt to commit the crime that was interrupted by someone knocking on the door of his room, while the little girl testified that the crime was consummated. Under the state of the record before us, we find no prejudicial error in the questioned rulings. Further, we cannot conclude that there was an abuse of discretion in permitting leading questions to be propounded to the little girl.

The judgment and order denying the motion for new trial are affirmed.

I concur: GRIFFIN, J.



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SECOND SERIES

14 Cal.2d 313

STOCKBURGER v. DOLAN et al.**DOLAN et al. v. STOCKBURGER et al.****L. A. 17151, 17150.**

Supreme Court of California.

Sept. 19, 1939.

Rehearing Denied Oct. 19, 1939.

1. Mines and minerals ⚡58

Where lease suspended lessee's obligations during time lessee was prevented from drilling by municipal regulations and drilling for oil on property covered by lease was illegal under ordinance, lease was not thereby rendered void so as to relieve lessee of all responsibility under lease.

2. Evidence ⚡417(7)

Where drilling for oil on property covered by mineral lease was illegal under ordinance and lease was silent on question whether lessee should procure a zone variance so as to be permitted to drill, evidence of an oral agreement made contemporaneously with the lease that lessee agreed to seek zone variance but that he did not use due diligence in making application to the proper authorities of the city was admissible since it did not tend to vary the terms of written agreement.

3. Mines and minerals ⚡59

Where drilling for oil on property covered by mineral lease was illegal under ordinance and it appeared that lessee at some future time might procure a zone variance which would permit him to use property for purposes specified in the lease, there was no failure of consideration which would entitle lessee to recover sum paid by him upon execution of the lease.

4. Evidence ⚡441(4)

Where mineral lease provided that lessee's obligations should be suspended while lessee was prevented from complying with lease by municipal regulations, evidence that lessee could not take advantage of provision suspending payment of rental because it was agreed that such provision should not apply to any time when drilling was prohibited by terms of ordinance was inadmissible as varying the contract.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by R. R. Stockburger against Francis H. Dolan and another to recover

amount paid as consideration for a mineral lease, consolidated for trial by stipulation with an action by Francis H. Dolan and another against R. R. Stockburger to recover a sum alleged to be due as rent under the same lease. From judgments for R. R. Stockburger in both actions, Francis H. Dolan and Josephine H. Dolan appeal.

Judgments in accordance with opinion. Prior opinion, 87 P.2d 411.

Edw. C. Purpus, of Los Angeles, for appellants.

A. L. Abrahams and Abrahams & Love, all of Los Angeles, for respondents.

EDMONDS, Justice.

In two actions which were consolidated for trial in the superior court and are presented together upon appeal, the court is called upon to determine the rights of lessors of land to rental under an oil and gas lease.

The litigation between the parties commenced when Francis H. Dolan and his wife sued to recover delay rental in the sum of \$12,000 alleged to be due under a lease entered into by them with R. R. Stockburger as lessee. Thereafter, Mr. Stockburger filed an action against the Dolans to recover \$5,000 paid by him upon the execution of the lease. His suit was brought upon the theory that as the land leased to him was zoned against oil drilling operations by the city of Los Angeles and the city had refused him a permit therefor, there was a failure of consideration which entitled him to recover the rental paid by him. He also relied upon the same facts as a defense to the action brought by the lessors. Upon findings that the lease was made for an unlawful purpose, the court entered judgment for Mr. Stockburger in both cases.

The lease, executed in 1936, is for a term of twenty years, and so long thereafter as oil is produced from the property. The rental prescribed is \$5,000, paid by the lessee at the time it was executed, a one-sixth royalty, and, commencing with the fourth month of the term, the sum of \$1,000 per month if the lessee has not commenced drilling operations on the land or terminated the lease. The lessors' action is to recover rent for the year commencing September 1, 1937.

It is conceded that at the time the lease, prepared by the lessee, was executed by the parties, the land upon which the lessee

was to drill for oil was zoned by ordinance for residential purposes. It does not mention any restriction upon the use of the property. However, the record shows that the lessee, after entering into the lease, endeavored to secure a permit allowing him to drill for oil. This variance from the zoning requirements was sought by a petition filed by the lessee with the board of city planning commissioners pursuant to the terms of the ordinance which provides that the board may recommend to the city counsel a reclassification of the property.

This petition was denied without prejudice and sent to the city counsel with the request that it be returned for reconsideration after further study. Later the board disapproved the request, but Mr. Stockburger did not prosecute an appeal to the city counsel as allowed by the ordinance, nor did he take any further steps in the matter.

The lessee maintains that because of the restrictions imposed upon the use of the land by the zoning ordinance, the lease was illegal ab initio and that there has been a failure of consideration. However, the lessors contend that a contract *malum prohibitum* but not *malum in se* is enforceable if its object can be lawfully accomplished, and that as the municipal ordinance provided for the reclassification of property with the zone after petition and hearing, the lessee may not recover without proof of inability to obtain a drilling permit.

One provision of the lease is as follows: "The obligations of the Lessee hereunder shall be suspended while the Lessee is prevented from complying therewith, in whole or in part, by strikes, lockouts, action of the elements, accidents, rules and regulations of any Federal, State, Municipal or other governmental agency, or other matters or conditions beyond the control of the Lessee, whether similar to the matters or conditions herein specifically enumerated or not." The lessee, therefore, is not required to carry out his obligations during the time he is unable to drill or produce oil because of the zoning regulations, but they do not relieve him from all responsibility under the lease. The purpose of the agreement between the parties was to allow the lessee to drill for oil, but it is not contended, nor may it be presumed, that there was any intention to do so in violation of the city ordinance.

The lease does not require any act to be done in contravention of existing law and the lessee does not assert that he undertook the obligations assumed by him in ignorance of the zoning requirements nor because of any representations concerning their effect. He drew the lease and provided that he would not be liable for rent during the period that he was prevented by governmental regulations from complying with his agreement. This provision contemplates that there might be some period when zoning or other regulations would interfere with the purposes of the lease and the parties agreed that the lessee's obligations would be "suspended" for that time.

[1] This is not an unusual situation and a lease which contemplates action by governmental authorities before the property may be used for the purpose specified in it is not illegal. For example, property may be leased for saloon purposes to one who does not have a license to engage in that business. *Grace v. Croninger*, 56 Cal. App. 659, 206 P. 130; *Burke v. San Francisco Breweries, Ltd.*, 21 Cal. App. 198, 131 P. 83; *Shedlinsky v. Budweiser Brewing Co.*, 17 App. Div. 470, 45 N.Y.S. 174. Also, leases of property for purposes not allowed by existing zone regulations have been upheld where they have been entered into upon the agreement that application should be made to the board of standards and appeals for a variance, as provided by the zoning ordinance. *Silverman v. Isaac Goldmann Realty Corp.*, 232 App. Div. 292, 249 N.Y.S. 505; *Say-Phil Realty Corp. v. DeLignemare*, 131 Misc. 827, 228 N.Y.S. 365; *Louis Friedman Realty Co., Inc., v. DeStefan*, 220 App. Div. 661, 222 N.Y.S. 371.

[2] The lessors offered to prove that by an oral agreement, made contemporaneously with the lease, the lessee agreed to seek such a variance but that he did not use due diligence in making application to the proper authorities of the city. This testimony was rejected by the trial court upon the ground that it tended to vary the terms of the agreement made in writing. However, an oral understanding that the lessee should procure a zone variance does not contradict the written contract, which is silent upon this point, but would be consistent with its terms. The testimony was, therefore, admissible in evidence and should have been received. *Buckner v. Leon & Co.*, 204 Cal. 225, 267

P. 693; *Lindsay v. Mack*, 5 Cal.App.2d 491, 43 P.2d 350; *Gardiner v. Burket*, 3 Cal.App.2d 666, 40 P.2d 279; *Greathouse v. Daleno*, 57 Cal.App. 187, 206 P. 1019; 6 Cal.Jur. 265; 4 Cal.Jur.Supp. 96.

[3] So far as the record shows, the lessee may now, or at some future time, procure a zone variance which will permit him to use the property for the purposes specified in the lease. There has, therefore, been no failure of consideration entitling him to recover. Liability for delay rental presents a different question and depends, primarily, upon whether the lessee agreed to seek a reclassification of the property.

[4] The lessors urge that under no circumstances may the lessee take advantage of the provision suspending payment of rental because it was agreed that this provision should not apply to any time when drilling was prohibited by the terms of the zoning ordinance. However, evidence to that effect would vary the terms of the contract in that particular and was properly rejected by the trial court.

The judgment in the action entitled *Dolan v. Stockburger* (No. L. A. 17150) is reversed; the judgment in the action entitled *Stockburger v. Dolan* (No. L. A. 17151) is reversed with directions to the superior court to enter judgment for the appellants.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PULLEN, Justice pro tem.; YORK, Justice pro tem.



14 Cal.2d 328

LIGHT v. STATE BAR OF CALIFORNIA.
L. A. 17253.

Supreme Court of California.

Sept. 20, 1939.

Rehearing Denied Oct. 19, 1939.

1. Attorney and client ⇨54

Failure of local administrative committee of state bar to give attorney notice of committee's findings and recommendation of disbarment in disciplinary proceeding against him or his lack of knowledge or information of filing of such findings and recommen-

dation could have no adverse effect on legality of committee's determination.

2. Attorney and client ⇨48, 54

An attorney is not entitled to annulment or cancellation of recommendation by local administrative committee and board of governors of state bar that he be disbarred on ground that he had no notice, knowledge or information of committee's findings and recommendation or hearing before board, where record of proceedings before board affirmatively shows mailing to him of copy of letter transmitting such information and certified copy of minutes of board's meeting includes notation that notice of hearing was sent to him at his last known address.

3. Attorney and client ⇨48

An attorney, whose disbarment for professional misconduct was recommended to board of governors of state bar by local administrative committee thereof, was entitled to reasonable advance notice of date on which board proposed or intended to consider charges against him.

4. Attorney and client ⇨57

Where attorney did not appear before board of governors of state bar at time set in notice to him of hearing before board on charges against him or affirmatively show that he would have appeared had he received timely notice of date of hearing, nor suggest in proceeding before Supreme Court to review disciplinary proceedings that he could or would have presented additional evidence if afforded opportunity to be present at such time and place until oral argument before such court, failed to disclose names of witnesses he proposed to call, what pertinent evidence they would have given or how their evidence would have affected board's determination, and filed no affidavits supporting his statement of ability to produce such evidence, his ultimate rights were not prejudicially affected by his failure to receive notice of hearing.

5. Attorney and client ⇨53(2)

In disciplinary proceeding against attorney, evidence held sufficient to support state bar's local administrative committee's findings that respondent filed sham actions to quiet title to lands owned by others in disregard of expense and burden they might have to bear in order to clear title thereto, with knowledge that such actions were wholly without merit, so as to require his disbarment.

6. Attorney and client ⇨57

While fact findings by local administrative committee of state bar are not binding on Supreme Court on review of disciplinary proceedings against attorney, burden is on such attorney to show wherein decision of state bar's board of governors pursuant to committee's recommendation that he be disbarred is erroneous or unlawful. St.1927, p. 41, § 26.

7. Attorney and client ⇨57

In disciplinary proceedings against attorney, board of governors of state bar acts as administrative arm of Supreme Court, which will approve or disapprove board's findings according to court's opinion as to weight of evidence, so that such findings, supported by unquestionable and substantial evidence, are entitled to great weight on review thereof.

8. Attorney and client ⇨57

Fact findings of board of governors of state bar in disciplinary proceeding against attorney and conclusion on which board's recommendation is based should be accorded persuasive force by Supreme Court, though some evidence before board is impeached, if remainder thereof is legally sufficient in itself or sufficiently corroborative of that under suspicion to sustain such findings and conclusion.

9. Attorney and client ⇨53(2)

To sustain charge of attorney's professional misconduct in disciplinary proceeding, all allegations in several charges need not be found true, but Supreme Court may sustain recommendation of disbarment by board of governors of state bar, if combined fact findings of local administrative committee and such board are supported by substantial evidence and show violation of accused's duty as attorney.

10. Attorney and client ⇨49

The purpose of disbarment proceedings against attorney is not to punish individual, but to determine whether he should continue in capacity of attorney.

In Bank.

Proceeding by John E. Light, an attorney, for a writ of review of disciplinary proceedings against him by the State Bar of California.

Order disbaring petitioner from the practice of law.

J. E. Light, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

Founded upon several complaints which theretofore had been made against him to the respondent herein, J. E. Light, the petitioner, who was an attorney at law practicing his profession in the city of Los Angeles, was cited by an authorized local administrative committee of The State Bar of California, to show cause why he should not be disciplined in punishment for the alleged commission of certain acts of professional misconduct which in said citation were specifically charged against him. By his answer thereto, petitioner denied, collectively and severally, each of the allegations that thus had been made, either evidentially or as ultimate facts, and which purportedly showed the asserted breach of his moral obligation as a lawyer either to the public in general or to The State Bar of California in particular. Following an extended hearing on the charges which thus had been preferred, the local administrative committee made its findings of fact in harmony with many of the essential facts which assertedly formed the basis of the charges which theretofore had been set forth within the several accusations against petitioner—in consequence of which the said committee made its recommendation to the board of governors of The State Bar that petitioner be disbarred from the further practice of law by him in this state. Thereafter, at a regular meeting of said board, by its formal resolution duly adopted to that effect, an identical recommendation with respect to petitioner was made to this court. At the instance of petitioner a writ of review of the proceedings which resulted from the filing of the charges hereinbefore referred to, has been caused to issue by this court; and having been briefed and argued by the respective parties, the matter is now ready for determination.

[1-4] The first reason that is presented by the petitioner as being sufficient in law to justify an annulment or cancelation of the recommendation, is that "petitioner had no notice, knowledge, or information of the findings and recommendation of the Committee hearing this matter"; and that "petitioner had no notice, knowledge or information of the hearing before said Board of Governors on May 19, 1939, at which pe-

tioner was adjudged and ordered to be disbarred".

In that connection, it will be noted that as to the asserted lack of notice of the "findings and recommendation of the Committee", petitioner makes no definite statement as to the exact date, if ever, when he was given notice, or when he received the same, or of the date when he acquired "knowledge or information of the [filing of the] findings and recommendation of the Committee". But, manifestly, the possible fact that the committee may have failed to give "notice" to petitioner, or that he had not received "knowledge or information", of the filing of such findings and recommendation—although perhaps somewhat irregular and possibly erroneous—could have no adverse effect on the legality of the *determination* by the said committee. However, the record of the proceedings affirmatively shows the mailing to petitioner of "a copy of the letter of transmittal [of such information] bearing date of mailing and the name of the person mailing the same", which record constitutes "*prima facie* evidence of the mailing thereof upon said date". Rule 31, of Rules of Procedure of The State Bar of California. With reference to such asserted defects, as they might or did affect the subsequent and final hearing before the board of governors, it is clear that petitioner was entitled to reasonable advance notice of the date upon which the said board proposed or intended to consider the charges against him. But again, a certified copy of that part of the minutes of the meeting of the board of bar governors held in Los Angeles on May 19, 1939, which relate to the instant matter, includes the notation that "On April 24, 1939, a notice was sent to the respondent [petitioner] at his last known address as shown by the records of The State Bar, advising him that he would be permitted to be heard before the Board of Governors at 10:30 o'clock a. m., Friday, May 19, 1939, in Los Angeles. The respondent [petitioner] did not appear before the Board at the time set for his appearance nor otherwise communicate with the Board during its May meeting." Furthermore, it is not shown affirmatively that, had petitioner received timely notice of the date of such hearing, he would have appeared before said board either in person or represented by counsel; nor in his opening brief filed herein is it asserted or even suggested by petitioner that, had he been afforded an opportunity to be then and there present, he either could or would have pre-

sented any additional evidence which might have tended to show his innocence with respect to each or any of the charges of which theretofore he had been found guilty. In oral argument before this court, petitioner declared, for the first time in this proceeding, that had he received timely notice of the date and place of the hearing before the board of governors, he could and would have produced pertinent evidence before said board relative to the charges which theretofore had been made against him. However, he failed to disclose either the name or names of any witness or witnesses that he proposed to call on his behalf, what the pertinent evidence was that such or any witness might have given—or how or in what manner any evidence, if given, would have been either material to, or could or would have related to, or in anywise affected a determination of each or any of the said charges against him. Nor even at that late moment was petitioner's statement with regard to his ability to produce possible additional evidence supported either by his own affidavit, or by the affidavit of any person upon whom petitioner may have hoped or expected to rely in that connection. From aught that appears, it cannot conclusively be said that such purported evidence would have been admissible in any event. Neither is it anywhere shown that such evidence, even if received, would have been other than incidental to that which petitioner already had introduced; nor that such evidence might have resulted in a conclusion favorable to petitioner by either the committee or the board. In view of all those circumstances—assuming that as an established fact petitioner received no notice of the impending hearing—so far as now appears, obviously, it may not be said that his ultimate rights in the premises had been prejudicially affected.

[5] In effect, petitioner also has complained that the evidence which was adduced against him was insufficient to support the findings which were made by the committee. However, it is to be noted that in the accusation, in substance, it was charged that in an action which some time theretofore had been pending in the superior court of Los Angeles county, entitled *Jennie E. Osborne v. Ralph G. Armiston*, No. 374,214, petitioner knowingly filed a false affidavit of service of the complaint and summons therein; that the action was one to quiet title, but was not brought in good faith; that at all times petitioner "well knew that

the plaintiff in said action had no right or interest in or to the property concerning which he sought to quiet title"; that he filed a *lis pendens* for the purpose of clouding the title of the defendants in said action; that petitioner's purpose in so clouding the title to the property of the several defendants named in said action was to force all or some of said defendants to pay various sums of money by way of "nuisance value" to procure either quitclaim deeds or dismissals which would be necessary in order to remove the clouds on the titles to their respective properties; that if by chance one of said defendants learned of the pendency of said action petitioner would attempt to secure from such defendant as much money as possible in exchange for either a quitclaim deed or a dismissal; and that in the event any one of the defendants instituted an action to remove any such cloud on the title to his property and, under those circumstances, petitioner failed to exact any money from such defendant, petitioner would then dismiss the action as to that particular defendant.

As to those charges, the evidence was sufficient to establish the facts that, although petitioner had served a copy of the complaint and summons on a person bearing a name somewhat similar to that of each of three of the defendants, as a matter of fact, in each instance, petitioner knew that the person whom he thus served with a copy of such papers was not one of the defendants in the action; that petitioner not only was a lawyer of many years' experience, but also, for a considerable length of time, had been an expert "searcher" or examiner of titles for a title company, and, therefore, that at the time when the complaint was filed petitioner well knew that the plaintiff in the action had no right or interest in the property involved therein; that the only "paper" title the plaintiff possessed arose from a so-called "wild deed", which petitioner knew had no foundation from a legal standpoint, and which conveyed no interest whatsoever to the plaintiff; that, in one instance, and with regard to one defendant, petitioner requested the former to pay him the sum of \$25, either for a dismissal of the action in the defendant's favor, or for a quitclaim deed; that notwithstanding the fact that such sum was not paid, nevertheless, a disclaimer was filed by petitioner as to that defendant. It also appeared in evidence that, after the action had been instituted, petitioner recommended its dismissal for the reason that

he knew the plaintiff's interest in the property was based upon a "wild deed"; that the action was not dismissed, however, but, as to some of the defendants named therein, was prosecuted to a default judgment; that each of several of the defendants was compelled to employ counsel to protect his rights, and, that through the efforts of the respective counsel, each defendant had obtained a quitclaim deed from petitioner. In such circumstances, petitioner asserts that his conduct was commendatory. To the contrary, however, the evidence establishes the conclusion that petitioner well knew the action which he had instituted was wholly without merit and could not be sustained—hence his apparent willingness, at the instance of any of the defendants, either to dismiss the action in favor of such defendant, or to give him a quitclaim deed. Even if petitioner had believed in the justice of his cause—that is to say, that the plaintiff was the legal owner of the property—in that regard his conduct, if not reprehensible, at least would have invited, and been deserving of, adverse criticism.

What may be designated as the second cause of complaint, in many respects, presented a situation similar to that which hereinbefore has been set forth. From the evidence relating thereto there is justification for the conclusion of the committee that petitioner initiated the filing of an action which he well knew was lacking in substantial merit. In that regard, at the outset it appears that petitioner approached a Mr. Simon and represented to him that for the sum of \$250 and a note, or notes, totaling the sum of \$2,700, to be given to petitioner by Mr. Simon, petitioner could procure a deed to certain properties, which when procured would be used as a basis for the bringing of a quiet title action in the name of Mr. Simon, as plaintiff, against a large number of defendants, and that any profit which might accrue from the transaction would be divided equally between petitioner and Mr. Simon. Thereafter a deed or deeds were obtained to more than 600 pieces of real property, and petitioner began to check the records in Los Angeles county to ascertain the description of all property in which the grantor of the deeds, and his associates, might have had a record interest. Petitioner also investigated the said records as far back as the year 1923, even though he knew that the said grantor had gone into bankruptcy in 1930 or 1931, and that in consequence thereof, at that time the trustee in

bankruptcy had deeded to a third person all property in which the grantor might have had an interest. Thereafter, as attorney for the plaintiff Simon, petitioner caused a quiet title action to be filed, and incidental thereto he also filed a "lis pendens", which clouded the title to the property of many of the respective defendants in the action. Prior to filing the said action, petitioner, who theretofore had had office accommodations jointly with the grantor of such deeds, had removed his law office from that of the said grantor, for the reason that, as petitioner testified, he knew that the said grantor was wholly unreliable and dishonest, and for the further reason that petitioner was becoming "scared a little" because of the nature of the work he was doing for the grantor. At the time said action was instituted, petitioner knew or had reason to believe that neither the grantor nor any of his associates had any right, title or interest in, or claim to, or lien upon, any of the said 600 lots. At the time of initiating the transaction with Mr. Simon, petitioner had called Mr. Simon's attention to the fact that there might and probably would be some lots which were described in the complaint to which Mr. Simon would not have title, and that it therefore might or would be necessary to give some quitclaim deeds. Nevertheless, in the complaint that petitioner had prepared he alleged on behalf of the plaintiff Simon that said plaintiff was the owner in fee of all the property described in the complaint. At that time petitioner knew that plaintiff Simon was not the owner in fee of any of the property therein mentioned; and the fact appears that, at the instance of petitioner, the superior court entered judgment against two defaulting defendants wherein it was adjudged that the plaintiff was the owner in fee of all the property described in the complaint. Also, according to petitioner's statement, he did not know what parcels of property in Los Angeles county had been conveyed to plaintiff Simon, and in order to ascertain the description of such property, petitioner thoroughly checked the records in the office of the county recorder of Los Angeles county. It appears, however, that at no time during the entire hearing was any attempt made by petitioner to show that the plaintiffs—whom he had represented in the quiet title actions which involved hundreds of separate parcels of land—were the legal owners of such parcels, or any of them, or that they or any of the plaintiffs had any genuine interest

in any of the said lands. No testimony of any kind was introduced to show that any plaintiff represented by petitioner was the actual owner of, or had any genuine interest in, even one parcel of the property involved in the quiet title actions. Furthermore, petitioner admitted that he knew and had advised his client, Mr. Simon, prior to the filing of one of the actions (Simon v. Metropolitan Trust Company), that in all probability it would be necessary to give quitclaim deeds to some of the property described in the complaint for the reason that plaintiff Simon did not have title thereto.

It is apparent that petitioner utterly ignored the rights of property owners and filed sham actions to quiet title, therein describing parcels of land, owned by others, in disregard of the expense and burden which the respective property owners might be called upon to bear in order to clear the title to their respective properties—for evidently a quitclaim deed was given only in instances wherein the respective property owners employed counsel to protect their interests, or where they threatened to institute criminal proceedings against petitioner, and then, and only then, were they given a quitclaim deed.

[6-8] However, as to each of the two causes of complaint above referred to, it also should be noted that the findings of fact which were made by the local administrative committee represented conclusions which, in some respects, were reached on conflicting evidence. Notwithstanding the general rule that on review of proceedings of the nature of that here involved, findings of fact which have been made by such a committee are not considered binding on this court (*Furman v. State Bar*, 12 Cal.2d 212, 83 P.2d 12; *Fish v. The State Bar*, 214 Cal. 215; *Herrscher v. State Bar*, 4 Cal.2d 399, 49 P.2d 832), the burden is on the petitioner to show wherein the decision of the board of governors of The State Bar is erroneous or unlawful (*Aydelotte v. State Bar of California*, 209 Cal. 737, 209 P. 41; *Ring v. State Bar*, 218 Cal. 747, 751, 24 P.2d 821; *State Bar Act*, § 26, Stats. 1927, pp. 38, 41); and, as the court said in the case entitled *Herrscher v. State Bar*, 4 Cal.2d 399, 401, 49 P.2d 832, 833, in these proceedings, "the Board of Governors acts as an administrative arm of this court, and the court will approve or disapprove the board's findings, depending upon the court's opinion as to the weight of the evi-

dence", so that, when, on a review thereof, the findings are found to be supported by unquestionable and substantial evidence, they should be entitled to great weight. As was said in *Furman v. State Bar*, 12 Cal. 2d 212, 83 P.2d 12, (syllabus): "* * * such findings, and the conclusion upon which the recommendation of said board is based, should be accorded persuasive force by said [this] court, even though some of the evidence is impeached, if the remainder of the entire evidence be either legally sufficient in itself, or be sufficiently corroborative of that which is under suspicion."

[9] In the instant matter, although petitioner denied the truth of much of the evidence which was adduced against him, nevertheless, the apparently unimpeachable character of the evidence which was given in support of the findings in question may neither be denied, nor seriously questioned. In such circumstances, considering the comparatively broad opportunity which the committee had for arriving at the truth, this court is constrained to adopt the essential findings of fact which were made by the committee, rather than to depart therefrom and rely upon petitioner's uncorroborated testimony to the contrary. As a practitioner of long standing at the bar of Los Angeles county, his testimony was entitled to receive, and undoubtedly did receive, more than ordinary consideration; but, apparently, to the collective mind of the committee, the physical facts and other indisputable evidence presented at the hearing were sufficient to overbalance the evidence that was proffered by and received in behalf of petitioner. The fact that each of several of the allegations that were contained in the charges which were made against petitioner was not supported by the evidence and, consequently, was found by the local administrative committee to be untrue—although perhaps redounding to the credit of petitioner generally—does not suffice to absolve him from the charges in their entirety, in the light of other essential facts which were found to be true, as hereinbefore set forth. In other words, in order that the charge of professional misconduct may be sustained, it is unnecessary that *all* the allegations which were contained in the several charges against petitioner should have been found to be true. To the contrary, if the combined facts as found by both the committee and the board were supported by substantial evidence, and amounted to a violation of petitioner's duty as an attorney at law, this court is warranted in sustaining

the recommendation of the board of governors, to the effect that petitioner be disbarred. No serious claim is made by petitioner that the facts, as found, do not constitute sufficient grounds for his disbarment.

[10] It is with regret that this court feels impelled to accept as true the several conclusions which are represented by the respective findings of fact which were made by the local administrative committee. They lead but to the one conclusion, to-wit: that petitioner has grievously erred in his professional conduct and for that reason no longer is entitled to practice law within this state. However, the purpose of disbarment proceedings is not to punish the individual, but to determine whether the attorney should continue in that capacity. *Dudney v. State Bar*, 8 Cal.2d 555, 66 P.2d 1199; *Marsh v. State Bar*, 2 Cal.2d 75, 39 P.2d 403.

Accordingly, it is ordered that, in conformity with the recommendation made in said matter by the board of governors of The State Bar of California, petitioner be, and he is, disbarred.



14 Cal.2d 308

PEOPLE v. CORDOVA.**Cr. 4220.****Supreme Court of California.****Sept. 18, 1939.**

I. Constitutional law ☞250
Criminal law ☞624

The statutes providing for a dual trial in murder prosecution on plea of not guilty and not guilty by reason of insanity are not unconstitutional as depriving a defendant of equal protection of the law on ground that after entry of single plea of not guilty by reason of insanity, the trial of insanity issue precedes fixing degree of crime and penalty, whereas if dual pleas are entered, trial of insanity issue follows determination of degree of crime and penalty, since evidence bearing on issue of insanity could not be considered in determining degree of crime and penalty, and it will not be presumed that court or jury will violate such limitation.

2. Criminal law ☞48

Insanity is either a complete defense or none at all, and alleged insanity may not be used as a basis for extending leniency, or to reduce the degree of the crime.

3. Criminal law ☞624

Under statute authorizing separate hearing of issues presented by plea of not guilty and not guilty by reason of insanity, irrespective of the variable order of proof occasioned by the separate hearing of issues, the trial constitutes but a "single trial." Pen. Code, §§ 1016, 1020, 1026.

In Bank.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Jessie J. Cordova was convicted of murder in the first degree, and he appeals.

Affirmed.

Clarke A. Walker and Edgar G. Langford, both of San Diego, for appellant.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and James B. Abbey, Dist. Atty., and Seymour Wurfel, Deputy Dist. Atty., both of San Diego, for the People.

SHENK, Justice.

Pursuant to the provisions of section 1239 of the Penal Code there is here automatically presented an appeal by defendant from a judgment of conviction imposing the extreme penalty.

Accused by information of having murdered his three-year-old son, defendant entered the dual pleas of "not guilty" and "not guilty by reason of insanity". After jury trial on the main plea he was found guilty as charged, and the degree of crime was fixed as murder of the first degree. Trial was then had on the plea of insanity, and the jury returned a verdict finding that defendant was sane at the time of commission of the offense. Thereafter motion for new trial was denied, and judgment of death pronounced. This appeal followed.

No question whatsoever is raised by appellant concerning the sufficiency of the evidence to support the verdicts. Indeed, on oral argument counsel frankly conceded that in view of past rulings of this court he did not think that any such contention could be successfully maintained. It is therefore unnecessary to include in this

opinion a statement of the revolting facts and circumstances which led to and surrounded the perpetration of the crime. An examination of the record reveals abundant and conclusive evidence of guilt. Likewise as to the claim of insanity there is, despite some conflict, ample and convincing evidence in support of the verdict rendered on that issue. In short, the record made affords no basis for disturbance of the verdict of the jury, and no question of fact is presented for decision.

The argument of appellant consists solely of an attack upon the constitutionality of sections 1016, 1020, and 1026 of the Penal Code. These are the statutes which provide for a dual trial where a defendant pleads both not guilty and not guilty by reason of insanity. Many objections to this procedure have heretofore been urged on constitutional grounds, and answered by prior decisions. *People v. Hickman*, 204 Cal. 470, 268 P. 909, 270 P. 1117; *People v. Troche*, 206 Cal. 35, 273 P. 767; *People v. Leong Fook*, 206 Cal. 64, 273 P. 779; *People v. Dias*, 210 Cal. 495, 292 P. 459; *People v. French*, 12 Cal.2d 720, 87 P.2d 1014; *People v. D'Angelo*, Cal.Sup., 88 P. 2d 708; *People v. Davis*, 94 Cal.App. 192, 270 P. 715; *People v. La Crosse*, 5 Cal. App.2d 696, 43 P.2d 596; *People v. Groves*, 9 Cal.App.2d 317, 49 P.2d 888, 50 P.2d 813; 74 A.L.R., note, p. 265. Appellant pleads for adoption of the theories set forth in dissenting opinions in the cited cases (see particularly *People v. Troche*, supra, and *People v. Leong Fook*, supra), but at the same time he recognizes that the plea is not likely to be heeded in view of the strong entrenchment of the majority rule. In addition, however, he contends that there is a further and fatal point of weakness in the statutory plan which has never been called to the attention of an appellate court, and which demonstrates beyond cavil that the prescribed procedure deprives a defendant of the equal protection of the law, and is discriminatory and otherwise violative of constitutional rights.

He points out that where a defendant charged with murder enters the single plea of not guilty by reason of insanity, the procedure is: (1) Trial of insanity issue. (2) Circumstances of crime shown. (3) Degree of crime and penalty therefor fixed. See, as an illustration, *People v. David*, 12 Cal.2d 639, 86 P.2d 811. But where the dual pleas of not guilty and not guilty by reason of insanity are entered, the proce-

ture is: (1) Trial on main plea. (2) If defendant found guilty, degree of crime fixed. (3) Issue of insanity then tried. This variation in procedural steps, so appellant urges, creates an unjust and unreasonable discrimination in favor of a defendant who does not enter a plea of not guilty, and against one who does enter such a plea, in that in the first instance the penalty is not determined until after the trial court has heard all of the evidence touching upon the defendant's sanity or insanity at the time of commission of the offense, whereas in the second instance, the degree of crime and the penalty therefor must be determined by the jury, or by the court in cases of waiver of jury, without the benefit of any information concerning such sanity.

[1,2] This argument would perhaps be persuasive if in the one instance and not in the other, the evidence bearing on the issue of the defendant's sanity at the time of commission of the offense was taken into consideration in determining the degree of crime and the penalty. The fact is, however, that in neither case may such evidence be considered in making said determination. Where the dual pleas are entered, the insanity issue is not tried until after the defendant has been found guilty and the degree of the crime has been fixed by jury verdict, or, on waiver of jury, by finding of the court. On the other hand, where insanity alone is pleaded, without denial of commission of the homicide, there is a reversal of procedure in that the insanity issue is tried prior to determination of the degree of crime. But even so, in fixing the degree and penalty the court is limited to a consideration of evidence of the circumstances attendant upon and connected with the offense, and to such evidence only. The alleged insanity may not be used as a basis for extending leniency. It is either a complete defense, or none at all. There is no degree of insanity which may be established to affect the degree of crime. Therefore, so far as fixing the penalty is concerned, it is immaterial at what point the insanity hearing is held, for evidence adduced thereon can only be considered for proper purposes and cannot be used to measure the severity of the punishment which should be imposed.

The above-mentioned limitation upon the scope of evidence which may be considered in fixing the penalty has been frequently declared. In the majority opinion in the

Troche case, *supra* (206 Cal., at page 47, 273 P. at page 772), it is stated in the following language: "The only evidence admissible for the purpose of enabling the jury to determine whether the death penalty or life imprisonment should be imposed in the event the defendant should be found guilty of murder in the first degree was the evidence which the court did admit, and which concerned 'the circumstances connected with the offense.' *People v. Golsh*, 63 Cal.App. 609, 613, et seq., 219 P. 456. See, also, *People v. Witt*, 170 Cal. 104, 110, 148 P. 928. The insanity of a defendant cannot be used for the purpose of reducing his crime from murder in the first degree to murder in the second degree. If responsible at all in this respect, he is responsible in the same degree as a sane man, and if he is not responsible at all he is entitled to an acquittal in both degrees. *State v. Maioni*, 78 N.J.L. 339, 74 A. 526, 528, 20 Ann.Cas. 204." See, also, review of authorities in *People v. Pantages*, 212 Cal. 237, 271 et seq., 297 P. 890; *People v. French*, 12 Cal.2d 720, 737, 87 P.2d 1014; *People v. Lazarus*, 207 Cal. 507, 279 P. 145; *People v. Leong Fook*, *supra*; *People v. Witt*, 170 Cal. 104, 148 P. 928; *People v. Selph*, 106 Cal.App. 704, 289 P. 918; *People v. Phillips*, 102 Cal.App. 705, 708, 283 P. 821; *People v. Golsh*, 63 Cal.App. 609, 219 P. 456.

Appellant urges that a distinction exists between the duty of a court or jury in determining the degree of a murder and its exercise of discretion in fixing the punishment for first degree murder at either death or life imprisonment, in this: That in determining degree the course is charted by well-defined rules, a violation of which may be remedied on appeal, whereas in fixing the penalty the act is purely one of discretion (Pen.Code, § 190), and the conclusion reached is not subject to review. Under this distinction it is only reasonable to suppose, argues appellant, that a court or jury in exercising its entirely arbitrary discretion will be guided by something more than formal rules of law; it will be governed by its concept of the cause, formed and influenced by whatever evidence has been heard. Thus if in some instances evidence of insanity is heard before the exercise of discretion, and in others it is not, there is an unreasonable and unjust discrimination against the defendants in the latter class. In other words, where the insanity issue is heard before the penalty is fixed, the court consciously or uncon-

sciously, is bound to be influenced and persuaded to some extent by matters divulged on the insanity trial, and its exercise of discretion is bound to be affected accordingly.

[3] We cannot concur in this view. While it is true that under section 190 of the Penal Code the matter of determining the penalty is discretionary, it is not reasonable to suppose that in those cases where the determination is to be made by the court after trial of the insanity issue, the court will predicate its decision upon factors not properly before it for such purpose. The trial, although conducted with dual aspect, constitutes but a single trial (*People v. Leong Fook*, supra, at page 74 of 206 Cal., 273 P. at page 779), and irrespective of the variable order of proof occasioned by the separate hearing of issues, evidence as in any other single trial may be admitted and considered for one purpose and not for another. The trial court, knowing the limitation upon the evidence which it is entitled to consider in fixing the penalty, will not be presumed to have committed an abuse by failing to observe this limitation, but will be presumed to have wisely exercised the discretion conferred upon it.

The prior decisions above cited are determinative of all other points raised on this appeal. Under those holdings no successful assault can be maintained upon the constitutionality of the statutes in question.

The judgment is affirmed.

We concur: CURTIS, J.; EDMONDS, J.; YORK, Justice pro tem.



14 Cal.2d 318

GLENN v. STATE BAR OF CALIFORNIA.
L. A. 17132.

Supreme Court of California.

Sept. 20, 1939.

1. Attorney and client ⇨58

Evidence that attorney accepted fees from several clients for which he rendered little, if any, service, that he misinformed several of clients as to progress which he had made in their matters, that he used for his private purposes money advanced by cli-

ents to pay court costs, that on one occasion he failed to inform client of an advantageous offer of settlement, and that in course of handling one matter he had client sign a blank form of verification to a complaint which had not then been drawn, held to warrant 2-year suspension, rather than disbarment, in view of fact that attorney's conduct appeared to have been brought about by attorney's personal misfortunes and private embarrassments, and was not motivated by deliberate dishonesty or willful neglect. Code Civ.Proc. § 287, subds. 2, 5.

2. Attorney and client ⇨58

The Supreme Court will exercise much care in making an order of disbarment, since disbarment places an indelible stain upon the name of the disbarred attorney which affects him generally as a citizen.

Proceeding by Tom L. Glenn, Jr., against the State Bar of California to review the recommendation of the Board of Governors of the State Bar for petitioner's disbarment from the practice of law.

Petitioner suspended for a period of two years.

Fred O. Reed, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review the recommendation of the board of governors of The State Bar that petitioner be disbarred. The proceedings were heard before local administrative board No. 12 of The State Bar, for Los Angeles county, on two notices to show cause charging him with professional misconduct with reference to the business entrusted to him by several of his clients. The notices to show cause charged petitioner with a violation of his oath and duty as an attorney and counselor at law within the meaning of subdivision 2 of section 287 of the Code of Civil Procedure, and the commission of acts involving moral turpitude, dishonesty and corruption within the meaning of subdivision 5 of section 287 of the Code of Civil Procedure. After a rather extended hearing, the sessions of which were held intermittently and covered a period of several months, the local administrative committee made its findings by which they exonerated petitioner of certain of the charges preferred against him, found

him guilty on the remaining charges, and recommended that he be suspended from practice for a period of two years. The board of bar governors, on a review of the record, approved and adopted the findings of the local administrative committee but recommended that petitioner be disbarred.

After a careful reading of the record, we are of the opinion that petitioner, although perhaps a victim of unfortunate circumstances, was nevertheless guilty of conduct in relation to his clients which was censurable and warrants some disciplinary action. We do not believe, however, that his conduct with reference to the specific charges against him merits disbarment, and are satisfied that the recommendation of the local administrative committee that he be suspended from the practice of the law for a period of two years is a more fair and just penalty to be imposed.

As a preliminary to our discussion of the specific charges against petitioner, we may say that the seriousness of his offenses, and it must be admitted that his conduct in several particulars was blameworthy, depends largely on the motives which actuated him. If he intentionally contracted to undertake certain legal work for his clients and accepted fees therefor with no intention of performing such services, he was obviously guilty of the most flagrant dishonesty. If through gross negligence, he failed to attend to the legal matters he had undertaken to handle, his conduct was inexcusable. If, however, as petitioner claims during the period covered by the charges against him, he was under such a severe mental, physical, and financial strain, as to be unable to give his attention to his clients' business, such neglect, although blameworthy, does not merit the same degree of censure as conduct motivated by deliberate dishonesty or wilful neglect.

In general the charges preferred against petitioner are that he accepted from several different clients fees ranging from \$45 to \$250, for which he rendered little, if any, service; that on several occasions he misinformed these clients as to the progress which had been made in their matters, that he used for his private purposes money which had been advanced by these clients to pay court costs; that on one occasion he failed to inform a client of an advantageous offer of settlement in order that he might be retained to handle further litigation in the matter, and that during the course of handling one matter, he had his

client sign a blank form of verification to a complaint which had not then been drawn. Petitioner frankly admitted to the local administrative committee that he had received fees from clients for which he had rendered no service and admitted his obligation to reimburse them as soon as he was able. Petitioner, who is a young man with a wife and two small children, offers as an excuse for the situation in which he finds himself the fact that at the time in question he was in dire financial straits, that as a result he was unable to pay his office rent, and was evicted therefrom and his files retained by his landlord, that he was laboring under the mental stress occasioned by the preferring of a criminal charge against him for the issuance of a check without sufficient funds, given by him in connection with the lease on his home in Glendale, and that during a period of some days subsequent to his eviction from his office, he was ill with a streptococcus infection of his throat. There is no question that this is a true picture of petitioner's situation. The fact that he was evicted from his office for failure to pay his rent, and the fact that a criminal charge was pending against him from October 13, 1937, until January 29, 1938, when it was dismissed, is not denied. This being so, we are of the opinion that petitioner's explanation is genuine, and that his dereliction of duty grew out of his financial straits.

It will serve no good purpose in our opinion to go into the charges preferred against petitioner, setting forth in detail the conflict in evidence relative to each particular charge, or the different inferences which might possibly be drawn from the same evidence. There were seven charges preferred against petitioner. We shall discuss these charges in the same order in which they are discussed in the brief filed by the attorney for The State Bar.

The Tassio Matter.

In June, 1937, one Ralph Tassio, a licensed contractor, had a dispute with one Berthold, a subcontractor. The matter was discussed with a Mr. Lawson, inspector of contractors, and Tassio gave Lawson a check payable to petitioner in the sum of \$31.25. Petitioner was not the attorney for either Tassio or Berthold, but it appears that he had been the attorney for Lawson, and had theretofore performed certain services for him for which he had not yet been paid. The check was left at the office of petitioner by Lawson. Peti-

tioner cashed it and used the proceeds. Thereafter he learned what the check was for, and that he was only intended to be the stakeholder. Thereafter petitioner gave Tassio his check for \$31.25 which Tassio endorsed and gave to Berthold but which was dishonored by the bank. Tassio talked the matter over with a Mr. Butler, an attorney, who came over to see a friend of Mr. Tassio and who offered to take the matter up with The State Bar for him. Two days thereafter Tassio called petitioner on the phone with reference to the check and petitioner went over to Tassio's house and paid him the \$31.25 in cash. It will be noted, that the substance of this complaint is that petitioner, having cashed Tassio's check, probably through inadvertence, thereafter failed to reimburse him for several months. According to petitioner's explanation he was without any means to refund said sum. The failure cannot be correctly characterized in our opinion as wilful misappropriation of said money.

The Corazzo-Buchanan Matter.

In November, 1937, Corazzo and Buchanan employed petitioner to collect their claim of \$747 from one Susan Underwood, paying him a fee of \$25 as a retainer. Petitioner was unable to secure a settlement, and advised Corazzo and Buchanan that it would be necessary to file an action against Mrs. Underwood. He advised them that his fee would be \$50, which they agreed to pay, \$25 at the time, and \$25 when the case came on for trial. On December 15, 1937, Buchanan gave petitioner a check for \$45 which included, according to his testimony, \$25 on account of attorney's fees and \$20 for court costs. At the time, petitioner had Corazzo sign a blank form of verification for the complaint which had not yet been prepared. That day or the next day, petitioner was locked out of his office. Thereafter Corazzo and Buchanan vainly attempted to contact him but were unable to do so. They finally got in touch with him at the courthouse, and he promised them he would go ahead with their matter as soon as possible. Petitioner admits that he never did prepare or file a complaint, and that he owes these clients the \$45 which they paid to him. He explains his neglect in this matter by the fact that immediately after receiving his fee, he was locked out of his office, and by the fact that he was postponing the matter until after the criminal charge pending against him had terminated. We do not find that there was on

the part of the petitioner any actual intent to defraud his clients. With reference to the fact that he had his client sign a blank form of verification, this practice, although improperly indulged in by some attorneys, is one which is highly reprehensible, and, in our opinion, should be most severely condemned.

The Lund Matter.

During the fall of 1937, petitioner had handled the matter of paying off certain mechanic liens for Mrs. Margaret Lund. Although Mrs. Lund complained before The State Bar that he had failed to file the releases which he had received, the local administrative committee found that the money paid by Mrs. Lund to petitioner was not intended to cover the cost of filing these releases. In August, 1937, Mr. T. W. Patrick, the contractor who had built her house, filed a suit for a foreclosure of a mechanic's lien against Mrs. Lund, but did not serve the summons and complaint at that time. Mrs. Lund paid petitioner \$150 in full payment for his services to be rendered in defending the action for her. The local administrative committee found that said sum was not intended to include costs. Petitioner assured Mrs. Lund that she need not worry about being served and the various court proceedings as he would take care of all of them for her. She testified before the local administrative committee that he had informed her that he had filed a demurrer, and later informed her that the demurrer had been overruled. Mrs. Lund was served with summons on December 29, 1937, and upon telephoning to the clerk's office, found that no demurrer had been filed and no answer had been filed. Thereafter, and two days before the expiration of the time allowed to answer, Mrs. Lund employed other counsel who handled the matter for her. Petitioner denied that he had received the registered letter from Mrs. Lund demanding the return of her files and the fee of \$150, but after Mrs. Lund had made complaint to The State Bar, he turned over the files to her new attorney, and stated that he was willing to make a refund of the fee paid to him "as he had been paid for work he didn't complete". In addition to the charges made, with reference to this particular client, of his accepting a fee for services which were not performed, and misinforming his client as to matters pertaining to the progress of her action, a finding was made by the local administrative committee that he had failed

to inform his client, Mrs. Lund, of an offer made by T. W. Patrick, to accept the sum of \$200 in full settlement of the controversy existing between him and Mrs. Lund. The committee further found "that respondent failed to advise Mrs. Lund of the proposed settlement * * * for the purpose and in the hope that thereby respondent might be able to have and use said \$150 paid to him as attorney's fees". This failure to inform his client of an advantageous offer for his own private gain, if true, is one of the most serious charges preferred against petitioner, as it indicates a deliberate intent to take advantage of a client. There is a direct conflict of evidence in this regard between the testimony of Mrs. Lund and petitioner. Mrs. Lund testified that petitioner had never informed her of the proposed settlement. Petitioner testified that he had informed her of the proposed offer, but inasmuch as she had a claim against Patrick based upon damages as a result of Mr. Patrick's failure to complete the job and loss of rental during that period of time, she had said, "Why should I pay Mr. Patrick anything, he owes me money." The local administrative committee accepted as true the testimony of Mrs. Lund, and we cannot, of course, say that it was not justified in so doing. However, petitioner points out that the question with reference to the proposed settlement was first brought into the investigation by a volunteer statement of petitioner, himself, during the discussion of the \$150 from Mrs. Lund, to the effect that at or about the time he received the check, a proposal to settle the entire controversy for the sum of \$200 had been made by Mr. Patrick, of which offer he had informed Mrs. Lund. Mrs. Lund had not apparently learned of this proposal of settlement from Mr. Patrick or any other outside source as it was not set forth in the order to show caused served on petitioner. On the other hand, if petitioner had refrained from furnishing his client with information as to this proposed settlement for purposes to his own advantage, it is unreasonable to suppose he would have brought the matter up before the investigating committee.

There can, of course, be no denial of the fact that petitioner neglected his client's business and that his neglect to properly handle the matter is highly censurable. Besides the annoyance and worry which he caused his client by this neglect of her business, she was compelled to employ and pay other counsel to act for her, and the

fact that she was able to make an appearance in the case against her before any default was taken while fortunate for her was not anything for which petitioner could claim credit. It is useless, however, to conjecture whether petitioner would have been so derelict in his duty as to permit judgment to go against his client by default. Any such conclusion could never amount to more than a mere surmise. But whatever may be the explanation for his neglect, the fact should be emphasized that no amount of personal difficulties could in fact justify such neglect.

The Isett Matter.

Prior to July, 1936, G. W. Isett had filed an action in the superior court for the county of Los Angeles against one Frees for alleged malpractice. Isett, in the latter part of 1936, employed petitioner to represent him, and petitioner was substituted as his attorney in that case. At the time of taking the case it was agreed that it should be handled on a contingent fee basis of 50 per cent of any amount recovered and that petitioner would pay the cost of litigation. In the spring of 1937, petitioner informed Isett that he could not provide the money for costs, that there would be considerable preliminary work to be done in preparation of the trial, and the costs would amount to about \$300. It was then agreed between them that Isett would advance money for costs, and petitioner would handle it on a contingent fee basis of 35 per cent. Isett paid petitioner \$100 on June 1, 1937, and the remaining \$200 was paid during the course of the trial. The case after three days' trial resulted in a nonsuit. The gist of this charge against petitioner is that there was no authorization from Isett to spend the money furnished by him for certain items in the preparation of the case and that petitioner expended a portion of said money in payment of certain expenses which he should have paid himself, such as the payment of another attorney to do research in the law for him, the payment for stenographic services and an extra girl whom he called in to type instructions, as well as certain other items. Petitioner testified that he did not keep a system of books but put a memorandum of all items with the case in the files. Upon request from Isett, he furnished him with an itemized account of the money paid out by him. This itemized account was furnished by petitioner at the time of the preliminary hearing of the charges made against him by Isett. It is quite evident that the item-

ized statement contains items which are usually borne in contingent fee cases by the attorney handling the case, and it is possible that Isett did not specially authorize the particular items. But in view of the exigencies of petitioner's financial situation, of which Isett must have been aware since petitioner informed him that he did not have money to provide for the costs of preparing for trial and changed his contract with Isett for that reason, it does not seem unreasonable to us that petitioner honestly felt that he was justified in charging the entire cost of the trial and its preparation to Isett. The fact that petitioner included the items which were questioned in the account furnished to Isett at the preliminary hearing of the investigation against him would seem to indicate good faith on his part. The local administrative committee found that \$197 had properly been expended by petitioner, and also that the portion of the sum of \$82.26 paid by petitioner which might properly be allocated to the investigation of witnesses, was properly paid by respondent. We are of the opinion, from a perusal of the itemized account, that possibly \$50 of the amount paid to Boland was paid for investigation and therefore properly paid. It is also apparent from the record that petitioner had personally obligated himself to pay Dr. Gassman \$50 as expert witness's fee. It seems a fair conclusion, therefore, that the amount properly chargeable against said fund by petitioner is approximately \$300 and that if he personally pays Dr. Gassman, he will have properly accounted for the entire amount of money advanced by Isett.

There was a finding to the effect that an item of \$4.20 included under one heading in the account was also included in the other two items totaling \$9.25. Petitioner at the hearing admitted that this might be possible due to the fact that he had made up the account from his own recollection aided solely by the memoranda in the file.

Complaint was also made with reference to the Isett matter that petitioner had advised Isett that he would take an appeal. It is admitted that Isett was told by petitioner that a transcript of evidence would cost \$180, but petitioner never told Isett that the \$300 had been entirely expended, and that Isett would need to furnish an additional \$180 for the appeal. Isett secured another attorney to handle the matter for him. Petitioner's conduct in failing to advise his client that he was financially unable to take the appeal, and his leading

his client to believe that the matter was being properly taken care of when it was not, cannot be condoned.

The Gassman Matter.

Petitioner gave to Dr. Gassman, as an expert witness in the Isett matter, his check for \$50 which was refused payment by the bank. Petitioner admits his liability to Dr. Gassman on this obligation, and has stated that he will pay him as soon as he is able. Petitioner's financial straits were undoubtedly responsible for his transgression in this instance.

The Osborne Matter.

The notices to show cause charge petitioner with professional misconduct in respect to four matters in which he was employed by one Lewis W. Osborne. The local administrative committee expressly found that he was not negligent with reference to three of these matters. With reference to the matter of the foreclosure of a deed of trust of one Di Maria, the committee found that petitioner had accepted a fee of \$250, to foreclose said deed of trust and had not consummated said work. It appears that when Osborne was unable to locate the petitioner by reason of the fact that petitioner's office had been closed, Osborne got in touch with another attorney, who contacted petitioner, and after giving petitioner ten days in which to take care of the matter, took over the matter himself. The finding of the committee is that petitioner "has not completed the services for which he was paid \$250 by Osborne". The attorney who took the matter over testified that in his conversation with petitioner, petitioner had informed him that he had already filed a *lis pendens* when in fact no complaint had been filed. It appears that petitioner had received \$250 for services which he has not rendered, and which he is in good conscience obligated to return to his client.

The Lowery Matter.

Petitioner in 1937 had represented one R. J. Lowery in certain criminal cases in the city of Bell, near Los Angeles. These services were, according to petitioner, worth \$150. Prior to his representation of Lowery in the criminal cases, Lowery had sought to employ petitioner to secure the removal of one Leona Stiler as the guardian of Mrs. Lowery, who had been adjudged incompetent. In a conversation with Mr. Lowery, and one Mike Senko, a relative of Mrs. Lowery, Senko offered to furnish \$100 of the \$250 fee asked by petitioner, and paid

petitioner \$20 at the time, and later sent him a cashier's check for \$80. Petitioner, in addition to representing Lowery upon the criminal charges, also argued the motion for a new trial in the case of Lowery v. Lowery, but took no action whatever with reference to the removal of the guardian. The committee found itself unable to decide whether the \$100 paid to Senko was intended as payment or part payment for services rendered in the past, or whether said \$100 or any part thereof was intended to be in payment of a portion of the fee for services to be rendered in the removal proceeding. They did find that petitioner had promised to proceed to take some action looking toward the removal of the guardian, and he had failed to take any whatever. It is apparent that in this particular also, petitioner was remiss in his duty.

As stated before, a reading of the record does not convince us that petitioner was wilfully dishonest nor deliberately neglectful of his clients' business, but that his dereliction of duty in the main grew out of his financial embarrassment. While this fact does not, of course, justify his conduct or absolve him from wrongdoing, it does in a measure lessen to at least a slight degree its blameworthiness. We are well aware that the protection of the public requires that the rules of professional conduct be adhered to, and we also believe that the ethical standards of the legal profession demand the ostracism from its ranks of any member who has proven himself unworthy to be a member. We are also of the opinion that an attorney's personal misfortunes and private embarrassments, however serious, cannot be accepted as extenuating circumstances to the extent of absolving him from discipline.

[1.2] We do not believe that petitioner should escape all disciplinary action, but we do feel that in the instant case disbarment is too severe a penalty and that a two years' suspension from the practice of the law is sufficient. In the case of Wilcox v. State Bar, 2 Cal.2d 614, 42 P.2d 631, 633, in an opinion written by Mr. Justice Seawell, it is said, "The disbarment of an attorney, which means the denial of his right to practice law in this state, is a grave matter, as it places an indelible stain upon the name of the disbarred lawyer which affects him generally as a citizen. Once disbarred, experience teaches us that the barrier which is thereby raised becomes almost insuperable to reinstatement. Therefore, the court

should and does exercise much care in making an order of disbarment."

We are, however, firmly convinced that petitioner's clients, from whom he accepted fees without rendering services, had just and serious cause for complaint. The fact that petitioner himself has recognized that fact, and in his final brief has offered to reimburse his clients, is a hopeful sign of his rehabilitation. This offer, we are persuaded, was made in good faith by petitioner and will be carried out by him.

It is ordered that thirty days after the filing of this opinion, petitioner be suspended from the practice of law in this state for a period of two years.



34 Cal.App.2d 609

HAUPTMAN v. HEEBNER.

Civ. 11073.

District Court of Appeal, First District,
Division 2, California.

Sept. 19, 1939.

Hearing Denied Nov. 16, 1939.

1. Appeal and error ⇐927(2)

On appeal taken on the judgment roll which did not show that plaintiff's request for voluntary dismissal was entered in the clerk's register, reviewing court would presume in support of judgment obtained by defendant dismissing the action that such entry was not made and the purported dismissal was not effective at the time judgment was entered. Code Civ.Proc. § 581.

2. Costs ⇐203

Where defendant obtained judgment dismissing action and awarding her costs before plaintiff's attempt to dismiss had become complete or effective, filing of cost bill after judgment of dismissal and award of costs thereon was not error. Code Civ.Proc. §§ 581, 1032.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Sidney M. Hauptman, as trustee of the Charles Nelson Company, a cor-

poration, against Metha Nelson Heebner. From a judgment of dismissal with costs and from an order denying a motion to strike the cost bill and to vacate the judgment, plaintiff appeals.

Judgment and order affirmed.

Hearing denied; CURTIS, EDMONDS, and CARTER, JJ., dissenting.

Sterling Carr, of San Francisco, for appellant.

Francis V. Keesling and Garton D. Key-ston, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff appeals on the judgment roll alone from a judgment of dismissal with costs and from an order denying his motion to strike the cost bill and to vacate the judgment. The controversy between the parties narrows to the question of the propriety of the award of costs in view of the time when the cost bill was filed.

The facts are these: the defendant appeared in the action and, upon motion, obtained a stay of proceedings. Thereafter the plaintiff gave notice of a voluntary dismissal and requested the clerk to file same "as provided by law". The clerk filed on July 2, 1938. On November 7, 1938, the defendant obtained a judgment, signed by the trial judge, dismissing the action and awarding her costs. The cost bill was filed on November 12, 1938. The record does not disclose that the dismissal filed by the plaintiff was at any time entered in the clerk's register.

Section 581 of the Code of Civil Procedure provides for the dismissal of a civil action: "1. By the plaintiff, by written request to the clerk, filed with the papers in the case * * *." The same section provides: "The dismissals mentioned in subdivisions one and two hereof * * * must be made by entry in the clerk's register * * * and are effective for all purposes when so entered."

[1,2] The appeal is taken on the judgment roll which does not show that such entry was made in the clerk's register. We must therefore presume in support of the judgment that such entry was not made. Hence, the purported dismissal was not effective at the time the judgment was entered. The time for filing a cost bill had not commenced to run when the judgment was entered. It is conceded that, under

section 1032, Code of Civil Procedure, the defendant was entitled to her costs upon the dismissal of the action. Hence, though the judgment may have been unnecessary in view of the voluntary dismissal under subdivision one of section 581, nevertheless the cost bill could be filed at that time because the attempt to dismiss had not then become complete or effective.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



34 Cal.App.2d 582
LIEBER v. RIGBY et al.
Civ. 11013.

District Court of Appeal, First District,
Division 2, California.

Sept. 19, 1939.

Hearing Denied Nov. 16, 1939.

1. Joint tenancy ⇨3

Where a bank account is held in joint tenancy, on death of either depositor, in absence of fraud or undue influence, presumption of sole and exclusive ownership in survivor becomes conclusive, or irrebuttable in respect to any moneys left in account, but continues to be rebuttable presumption as to any moneys previously withdrawn.

2. Evidence ⇨89

A "rebuttable presumption" is a species of evidence which standing alone will support a finding against contradictory evidence produced by other party.

[Ed. Note.—For other definitions of "Rebuttable Presumption," see Words & Phrases.]

3. Joint tenancy ⇨3

Where husband and wife opened a commercial bank account and signed and delivered to bank an agreement that fund deposited in account should be property of both of them as joint tenants, and husband subsequently withdrew money from the account and had such sum in his possession, represented by a cashier's check, at time of his death, a finding, in action by wife to secure possession of sum represented by cashier's check, that bank account was one in joint

tenancy, was sufficiently supported by presumption based on the voluntary act of husband in creating account.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Amelia Lieber against Minnie Rigby and Richard tum Suden, as executrix and executor, respectively, of the estate of William A. Lieber, deceased, to recover a sum of money represented by a cashier's check which was in possession of deceased, William A. Lieber, at time of his death. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Peter tum Suden and Joseph A. Garry, both of San Francisco, for appellants.

Weinmann, Quayle & Berry, of Oakland, and George Olshausen, of San Francisco, for respondent.

DOOLING, Justice pro tem.

Respondent, plaintiff below, had judgment for \$12,500 with interest against the executors of her husband's will and estate. From this judgment the executors appeal.

It appeared on the trial that on April 27, 1934, the husband and wife opened a commercial account with the American Trust Company and at that time signed and delivered to the bank an agreement that the funds deposited in the account should be the property of both of them as joint tenants. On April 8, 1936, the husband withdrew \$12,500 from this account and caused the bank to issue to him a cashier's check for that amount. The husband died on May 31, 1936, with this check still in his possession, and the executors deposited it to the credit of his estate. The trial court found that the \$12,500 represented by the check was the joint property of respondent and her husband, and vested in her by right of survivorship.

The plaintiff rested her case on the joint tenancy agreement. Appellants in compliance with section 2, rule VIII of the Rules of the Supreme Court and District Court of Appeal state the question involved on the appeal in the following language:

"A husband opens a joint commercial account with his wife. The initial and all subsequent deposits originated from the husband's separate estate. Community funds are not involved. The husband made

frequent deposits to and withdrawals from the account. He paid current bills and made gifts of substantial sums therefrom to members of his family including his wife. It was a continuing current commercial account and the husband enjoyed and exercised unrestricted use and control thereof. Two months prior to his death the husband made a substantial withdrawal from this account and retained the same in the form of a cashier's check payable to himself.

"Question. Is the money evidenced by this cashier's check an asset of his estate or does it belong solely to the wife?"

Appellants claim that where the money has been withdrawn before death the presumption of joint tenancy is rebuttable and may be disputed by the representatives of the decedent, just as it may be between the parties to the account while both are living. This we may concede without deciding.

[1] The two cases on which they most strongly rely for a reversal are *Wallace v. Riley*, 23 Cal.App.2d 654, 74 P.2d 807, and *Wallace v. Riley*, 23 Cal.App.2d 669, 74 P.2d 800. These were actions between living parties to bank accounts which were in form joint. In the latter of these cases the court said, 23 Cal.App.2d at page 675, 74 P.2d at page 804: "Under the construction given to these provisions [sec. 15a of the Bank Act] both in New York and California, the intentional creation by the depositors of a bank account, substantially in the form prescribed, raises a presumption at once that the interest of the depositors is that of joint tenants in the sense commonly attributed in law to that term. Upon the death of either depositor, then, in the absence of fraud or undue influence, the presumption of sole and exclusive ownership in the survivor becomes conclusive, or irrebuttable, in respect of any moneys then left in the account, but continues to be a rebuttable presumption as to any moneys previously withdrawn."

[2,3] At least since the decision of our Supreme Court in *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529, our courts are committed to the rule that a rebuttable presumption is a species of evidence which standing alone will support a finding against contradictory evidence produced by the other party. The finding of the trial court that the account was one in joint tenancy is therefore sufficiently supported by the presumption based on the voluntary act of the deceased husband in

creating the account, even though appellants' evidence in the absence of the presumption might compel the opposite conclusion.

Cases from other jurisdictions cited by appellants to the effect that contradictory evidence introduced by the adverse party may destroy the presumption of joint tenancy and necessitate a finding against it are out of harmony with the law of this state as announced in the Smellie case and the decisions which have uniformly followed it since its pronouncement.

Appellants complain of error of the trial court in sustaining an objection to certain evidence of the deceased husband's intent in opening the joint account. The point is barely mentioned in the opening brief and we believe the error, if any was committed, was not prejudicial.

Judgment affirmed.

We concur: NOURSE, P. J.;
STURTEVANT, J.



34 Cal.App.2d 618

**DENNIS v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N et al.**
Civ. 11834.

District Court of Appeal, Second District,
Division 1, California.

Sept. 21, 1939.

Hearing Denied Nov. 20, 1939.

1. Automobiles ⇨19

Where dealer delivered used automobile to plaintiff, a cash buyer, promising to forward ownership certificate to State Motor Vehicle Department for transfer to plaintiff's name, but dealer in subsequently executing a conditional sales contract with another described plaintiff's automobile, had the other sign ownership certificate belonging to plaintiff's automobile as transferee, and then discounted contract with bank, bank, in action to quiet title to automobile, was estopped to invoke statute providing that title to an automobile shall not be deemed to have passed in absence of change of registration. Vehicle Code, §§ 175 to 179, 186, St.1935, pp. 115, 118.

2. Assignments ⇨100, 104

While assignee of nonnegotiable instrument succeeds to all right, title and interest of assignor, he also inherits the infirmities of such contract and receives it subject to all available defenses.

3. Fraudulent conveyances ⇨206(2)

Where dealer delivered used automobile to plaintiff, a cash buyer, promising to forward ownership certificate to the State Motor Vehicle Department for transfer to plaintiff's name, but dealer in subsequently executing a conditional sales contract with another described plaintiff's automobile, had the other sign ownership certificate belonging to plaintiff's automobile as transferee, and then discounted contract with bank, even though sale to plaintiff was not valid, plaintiff would be creditor of dealer for money had and received, so that purported sale by dealer to second purchaser would be void, since second sale was unaccompanied by a change of possession. Vehicle Code, §§ 175 to 179, 186, St.1935, pp. 115, 118; Civ.Code, § 3440.

4. Automobiles ⇨19

Fraudulent conveyances ⇨137(1)

Provision of Motor Vehicle Code relating to transfer of motor vehicles is not intended to provide an exclusive and complete means of transferring such property, and does not exclude transfer of motor vehicles from statute providing that sale of personally without change of possession is void against seller's creditors. Vehicle Code, §§ 175 to 179, 186, St.1935, pp. 115, 118; Civ. Code, § 3440.

5. Automobiles ⇨19

In action to quiet title to automobile, where dealer delivered used automobile to plaintiff, a cash buyer, promising to forward ownership certificate to State Motor Vehicle Department for transfer to plaintiff's name, but dealer in subsequently executing a conditional sales contract with another described plaintiff's automobile, had the other sign ownership certificate belonging to plaintiff's automobile, and then discounted contract at bank, testimony of supervising investigator of division of registration of the State Motor Vehicle Department to effect that in about 95 per cent. of sales made by dealers ownership certificates are forwarded to Motor Vehicle Department by dealers was admissible upon issue whether plaintiff was negligent in failing to secure ownership certificate. Vehicle Code, §§ 175 to 179, 186, St.1935, pp. 115, 118.

6. Estoppel ◀72

Where dealer delivered used automobile to plaintiff, a cash buyer, promising to forward ownership certificate to State Motor Vehicle Department for transfer to plaintiff's name, but dealer in subsequently executing a conditional sales contract with another described plaintiff's automobile, had the other sign ownership certificate belonging to plaintiff's automobile, and then discounted contract at defendant bank, contract was discounted 13 days after plaintiff entrusted ownership certificate to dealer, and bank made no investigation as to correctness of description of automobile purportedly sold under contract, bank was not entitled to rely upon equitable maxim that where one of two innocent parties must suffer by act of third, he by whose negligence it happened, must be sufferer. Vehicle Code, §§ 175 to 179, 186, St.1935, pp. 115, 118; Civ. Code, § 3543.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by A. L. Dennis, also known as Annie L. Dennis, against the Bank of America National Trust & Savings Association and H. M. Magruder, to quiet title and determine the respective rights of the parties in and to a certain automobile, wherein the Bank of America National Trust & Savings Association filed a cross-complaint. From an adverse judgment and an order denying the motion for new trial, the Bank of America National Trust & Savings Association alone appeals.

Appeal from order denying motion for new trial dismissed, and judgment affirmed.

Hearing denied; CARTER, J., not participating.

Louis Ferrari, of San Francisco, and Edmund Nelson and John E. Walter, both of Los Angeles, for appellant.

Daniel M. Potter and George S. Hupp, both of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by defendant and cross-complainant from an adverse judgment rendered in an action to quiet title and determine the respective rights of the parties in and to a certain automobile.

The practically uncontroverted facts are that on March 16, 1937, plaintiff, Annie L. Dennis, purchased a 1935 Plymouth coupe from Paul Schwab, a dealer in used

automobiles. In this transaction plaintiff traded in a used car and paid the balance of the purchase price in cash to Schwab. Being a used car, the Plymouth coupe had previously been registered with the California state motor vehicle department and had attached to it the license plates issued to that vehicle. Actual delivery of the Plymouth coupe was made by the dealer, Schwab, to plaintiff, Mrs. Dennis, and at all times thereafter possession of the automobile remained with plaintiff. However, at the time payment was made for and possession of the car taken by plaintiff she did not procure from the dealer the ownership certificate; she did not sign it on the back thereof as transferee, nor did she forward the same to the state motor vehicle department within ten days for transfer to her name, as required by sections 175 to 179 of the California Vehicle Code, St.1935, p. 115. Instead, the purchaser relied on the promise of the dealer when he told her at the time of the sale that he would send the ownership certificate, commonly and hereafter referred to as the "pink slip", to the motor vehicle department and would attend to the legal formalities in connection therewith. The dealer, however, instead of fulfilling his promise to plaintiff purchaser, kept the "pink slip" belonging to her Plymouth coupe, and on April 1, 1937, negotiated a conditional sales contract with one H. M. Magruder for a 1935 Plymouth coupe, for which Magruder paid the dealer, Schwab, fifty dollars in cash, gave his promissory note for one hundred dollars, and executed a conditional sales contract for installment payments in the sum of \$434.52, thus making the total purchase price of the vehicle sold to Magruder \$584.52. In executing the conditional sales contract with Magruder, the dealer, Schwab, described therein the Plymouth coupe he had already sold and delivered to plaintiff herein, and which of course he could not deliver to Magruder, and instead he delivered to Magruder another 1935 Plymouth coupe different from that described in the conditional sales contract with Magruder. Then, taking the "pink slip" belonging to the automobile sold to plaintiff herein and which the dealer Schwab had promised to forward to the motor vehicle department, Schwab had Magruder sign the same as transferee, and attached the "pink slip" to the Magruder conditional sales contract. Later the same day the dealer, Schwab, took the "pink slip", registration certi-

cate, conditional sales contract and a dealer's report of sale to a branch of the defendant Bank of America National Trust and Savings Association, where the latter agreed to discount it, and thereupon the dealer assigned the Magruder contract to the bank, delivered the ownership certificate and the registration certificate, together with the dealer's report of sale, to the bank, and received from the latter a valuable consideration therefor. Through the perfidy of the dealer, Schwab, the bank held a conditional sales contract and a "pink slip" for the Plymouth coupe that had been delivered to plaintiff, Mrs. Dennis, by the dishonest dealer, for which the latter had received full payment.

Without actual knowledge of plaintiff's claim to the automobile, the bank on April 2, 1937, forwarded the "pink slip", registration certificate and dealer's report of sale to the motor vehicle department at Sacramento, and on April 9 the department issued a new "pink slip" showing H. M. Magruder as registered owner and defendant bank as legal owner. To further complicate matters, it appears that on the evening of the day when the dealer Schwab procured fifty dollars, a promissory note and a conditional sales contract from Magruder for the Plymouth automobile, Schwab made another deal with Magruder wherein they rescinded the purchase of the Plymouth automobile and Magruder purchased a Ford, for which he executed another conditional sales contract, received back his hundred-dollar note, and was assured by the dealer Schwab that the conditional sales contract he had theretofore executed for the Plymouth would be destroyed immediately upon Schwab's return to his office, which of course Schwab did not do because he had already assigned and delivered the Magruder contract for a Plymouth coupe to defendant bank and received his consideration therefor.

Some two months later, when a payment was due under the Magruder conditional sales contract for the Plymouth coupe, the bank notified him thereof, whereupon Magruder called at the bank and informed it of the rescission of that contract, resulting in a disclosure of the fraud perpetrated by the dealer Schwab, the latter in the meantime having taken his departure for places unknown. Plaintiff then commenced this action to quiet title in her to the Plymouth coupe paid for by her and delivered

to her by Schwab and to foreclose any right, title or interest in or to the automobile claimed by defendant bank. By appropriate pleadings defendant bank claimed the automobile free and clear of all liens of any person whomsoever and contended that it has a lien on the Plymouth coupe in the possession of plaintiff for the balance due on the conditional sales contract in the sum of \$381.31. Following the rendition and entry of judgment in favor of plaintiff, the defendant bank prosecutes this appeal therefrom, as well as from an order denying its motion for a new trial, but now abandons its appeal from the order denying the motion for a new trial and consents that the same may be dismissed.

At the time the automobile was sold to respondent on March 16, 1937, the pertinent sections of the California Vehicle Code affecting transfers of automobiles were as follows:

Sec. "175. *Endorsement of Certificate Upon a Transfer.* Upon a transfer of the title or any interest of the legal owner or owner in or to a vehicle registered hereunder, the person whose title or interest is to be transferred shall write his signature with pen and ink, and the transferee shall write his signature and address with pen and ink, in the appropriate space provided upon the reverse side of the certificate of ownership issued for such vehicle."

Sec. "179. *Transferee to Apply for Transfer.* Whenever any person has received as transferee a properly endorsed certificate of ownership, the registration card and possession of the vehicle described in said certificate and card, such transferee shall within ten days thereafter forward such certificate and card with the proper transfer fee to the department and thereby make application for a transfer of registration, except as provided in the next section."

Sec. "186. *When Transfer Deemed Complete.* No transfer of the title or any interest in or to a vehicle registered hereunder shall pass nor shall delivery of any said vehicle be deemed to have been made and any attempted transfer shall not be effective for any purpose until transfer of registration is made and the department has issued a new certificate of ownership and registration card with respect thereto as provided herein, except as a transferor may be estopped by law to deny a trans-

fer and except as provided in sections 178 and 180 hereof, and in Chapter 3 of this division."

[1,2] In this regard it is the contention of appellant that respondent having failed to comply with the aforesaid provisions of the Vehicle Code, no transfer of title or interest in the Plymouth coupe was made to her; that delivery was not deemed to have been made to her, and that the attempted transfer from the dealer to respondent was ineffective for any purpose. It is further argued that appellant proved legal title in itself by virtue of the ownership certificate which it obtained from the motor vehicle department. In support of its position appellant in the main relies upon the above-quoted provisions of section 186 of the Vehicle Code. It is true, as claimed by appellant, that the section provides that no transfer of title or of any interest in or to a registered vehicle shall pass and that delivery of any such vehicle shall not be deemed made until transfer of registration is accomplished and the motor vehicle department has issued a new certificate of ownership and registration card. The same section also provides that the provisions thereof cannot be availed of by a transferor who "may be estopped by law to deny a transfer". In *Boles v. Stiles*, 188 Cal. 304, 204 P. 848, 849, this language was construed to mean that where, as in the case before us, the transferring dealer by his own act and agreement placed respondent in the "immediate and exclusive" possession of the automobile, such transferor cannot invoke the provisions of the quoted statute. Undoubtedly, innocent parties who suffer damage by reason of noncompliance with the section by a transferor and transferee can take advantage of its provisions, but it would be abhorrent to justice and shocking to every semblance of equity to allow a transferor to profit by his own fraud in dealing with his transferee. It is obvious that the provisions of section 186 of the Vehicle Code were not available to the dealer Schwab. Therefore, while appellant bank, as the assignee of the transferor, Schwab, succeeded to all his right, title and interest in the Schwab-Magruder nonnegotiable instrument, it also inherited the infirmities of such contract and received the same subject to all available defenses. With reference to respondent, Mrs. Dennis, appellant bank stood in the same position as its assignor, Schwab, and

like him is estopped to claim the protection of the estoppel provisions of section 186 of the Vehicle Code.

[3,4] We are further impressed with the fact that the purported sale by Schwab to Magruder was not a valid sale of the Plymouth coupe then possessed by the respondent, Mrs. Dennis, after sale and delivery to her by Schwab, and the conditional sales contract assigned to appellant bank and predicated and founded as it was upon such pretended and fictitious sale, is not a valid instrument. We are drawn to this conclusion because the attempted sale by Schwab to Magruder of the Plymouth coupe was unaccompanied by any actual and continuous change of possession between Schwab and Magruder. Indeed, such change of possession from Schwab to Magruder was impossible because Schwab did not have in his possession the Plymouth coupe he pretended to sell Magruder, he having previously sold and delivered the same to respondent, Mrs. Dennis, and accepted her money therefor. As was said in *Davenport v. Alexander*, 53 Cal.App. 688, 690, 200 P. 771, 772, "the attempted transfer was not accompanied by such a change of possession as is required under the provisions of section 3440 of the Civil Code. Under that law a transfer of personal property is ineffectual and void against creditors where it is not 'accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred.'"

Even though it be conceded that the sale by Schwab to respondent, Mrs. Dennis, was not valid, she was nevertheless a creditor of Schwab's entitled as such to bring an action against him for money had and received, consisting of the \$476 she paid Schwab on the purchase price of the automobile. Being such a creditor, the purported sale from Schwab to Magruder, being unaccompanied by any actual change of possession as required by section 3440 of the Civil Code, was ineffectual and void as against her. In *Washington Lumber & Millwork Co. v. McGuire*, 213 Cal. 13, 1 P.2d 437, 439, it was held that the aforesaid Vehicle Code provisions with reference to the transfer of title to automobiles was not intended to provide an exclusive and complete means of transferring such property and does not exclude the transfer of motor vehicles from the provisions of section 3440 of the Civil Code; the court there saying: "It must be concluded,

therefore, that whatever reasons of policy or practical expediency might be advanced in favor of defendant's proposition the Legislature has given no indication of an intention to exclude the transfer of motor vehicles from the provisions of section 3440, and, without such an indication, we must hold the section applicable to them."

[5] It must be remembered that in the case before us, wherein equitable principles are involved, the respondent, Mrs. Dennis, when she purchased the Plymouth coupe, paid her money therefor, and at the suggestion of the dealer entrusted him with the "pink slip" to forward the same to the motor vehicle department at Sacramento. In so doing she followed a custom testified by a supervising investigator of the division of registration, department of motor vehicles of this state, to be the procedure followed in "about ninety-five per cent of the sales made by dealers"; in connection with which the witness further testified: "They" (the dealers) "secure the certificate, the ownership certificate, if they have it in their possession, if not, they generally get it from their safety deposit box, have the customer sign on as the new owner, issue a dealer's report of the sale, and attach them both together and forward them to the Department and then the transfer is made by the Department and the ownership certificate and white slip is made to the respective legal and registered owner, if they are the registered and legal owner, if not both to the registered owner."

This same witness was asked the following question: "Q. Then what you have just stated, Mr. Smith, is not what the Motor Vehicle Department in any way recommends, is that correct? A. Well, answering that question, we have in our Manual, a dealer's manual of procedure which requires the dealer to send the ownership certificate directly to Sacramento with the report of sales on all sales of used cars."

Vigorous objection was made to the foregoing line of testimony in the trial court, and its admission is now assigned by appellant as prejudicial error. We think it was admissible upon the issue raised by appellant that respondent was negligent in not securing the "pink slip" on purchasing her Plymouth coupe, and that it was her negligence that enabled Schwab to impose upon the appellant bank, by reason of which

appellant asserts she should be held responsible.

[6] As to the claimed negligence on the part of respondent, it is to be noted that only thirteen days elapsed from the time she entrusted the "pink slip" to the dealer until he negotiated the fictitious contract with appellant bank. Had a substantial period of time elapsed and had respondent remained indifferent to the non-receipt by her of the "pink slip" from the motor vehicle department at Sacramento, some degree of negligence might be predicated upon her inactivity, but thirteen days does not appear to us to be such a length of time as would arouse the anxiety of an ordinarily prudent and cautious person. Also in this connection it must be remembered that at the time it discounted the fictitious conditional sales contract for the dealer Schwab, appellant bank made no inquiry or investigation as to the correctness of the description of the automobile purportedly sold to Magruder, nor as to the bona fide character of the transaction. Indeed, appellant bank did not notify Magruder of the assignment of his contract to them until some two months after they had discounted it and then only when a payment thereon became due. Had appellant bank demanded of the dealer Schwab that the automobile referred to in the conditional sales contract be produced for its inspection, and had it examined the serial number and motor number of the Plymouth coupe, it would have discovered the fraud, and if it had contacted Magruder prior to discounting the fictitious conditional sales contract, it would have discovered that Magruder and the dealer Schwab had by mutual agreement rescinded the contract upon which Schwab was attempting to obtain money from the bank. In the light of what we have just said, appellant is not aided by the provisions of section 3543 of the Civil Code.

Appellant next complains that the court erred in not making findings on the issues presented by its affirmative defense and cross-complaint. The issues thus tendered went to the question of whether or not respondent should have procured from Schwab the "pink slip" of the Plymouth properly endorsed to her; as to whether or not respondent was estopped to deny that appellant had an interest in the Plymouth coupe to the extent of \$384.91, the balance due on the fictitious contract at

the time of trial; whether or not payments were due and unpaid to appellant under the contract signed by Magruder; whether by reason of the default of payments on the Magruder contract appellant had the right or any right of possession of the Plymouth coupe; and whether the reasonable value of said automobile was \$25 per month as stipulated; whether appellant had been damaged in the sum of \$25 per month for each month since April 1, 1937; also whether respondent was liable to appellant for said damage. In view of what we have said with reference to the law applicable to the factual situation herein, coupled with the findings as made by the court, we conclude that no evidence was introduced sufficient to sustain a finding in favor of appellant upon any of the issues presented by its affirmative defense or cross-complaint.

Appellant's final contention that the complaint and amendment thereto did not state a cause of action, and that respondent did not prove a cause of action, is without merit.

The purported appeal from the order denying the motion for a new trial is dismissed; and for the reasons herein stated the judgment from which this appeal is taken is affirmed.

We concur: YORK, P. J.; DORAN, J.



HUDDY v. CHRONICLE PUB. CO. *
Civ. 10947.

District Court of Appeal, First District,
Division 2, California,
Sept. 19, 1939.

Hearing Granted Nov. 16, 1939.

I. Automobiles ⚡245(30)

In motorist's action arising out of collision involving automobile driven by district manager of newspaper company where evidence tended to establish that collision occurred on manager's night off, at a time when he had no duties to perform for newspaper and far from his place of employment, evidence that a sticker reading "Chronicle

Press Car" was affixed to manager's automobile, that three bundles of newspapers not proved to be of current issue were in automobile, and that newspaper company was in habit of sending papers along highway on which accident occurred to racetrack which was closed at time of collision, was insufficient to present jury question as to whether manager was acting for newspaper at time of accident.

2. Evidence ⚡595

An inference is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action for damages for injuries suffered in an automobile accident by Violet Huddy against the Chronicle Publishing Company (a corporation). From a judgment for the plaintiff, the defendant appeals.

Reversed.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for appellant.

Robert G. Partridge, of San Francisco (Wallace O'Connell, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

In an action for damages for personal injuries the plaintiff sued the publishing company and Daniel O'Brien, one of its employees. Before the cause went to trial the plaintiff voluntarily dismissed as to O'Brien. The principal issue at the trial was whether O'Brien was acting within the scope of his employment at the time of plaintiff's injuries. This is the only question which calls for discussion on the appeal.

O'Brien was employed by the publishing company as a district manager to perform specific work in connection with the distribution of the Chronicle newspaper "in a specified district, with certain definite boundaries, during specified hours". He furnished his own automobile which he was driving at the time he collided with and injured plaintiff. The collision occurred on O'Brien's night off, at a time when he had no duties to perform for his employer, and at a place far removed from

*For subsequent opinion see 103 P.2d 421.

his place of employment. In short, O'Brien appears to have been celebrating his freedom from employment, as he was observed leaving a saloon immediately preceding the accident, and at the time of the collision was driving recklessly on the wrong side of the highway going in the opposite direction from his liquor place of employment. Neither party produced him at the trial, and his negligence is now admitted.

Against the positive evidence that the employee was on leave and not engaged in the service of his employer at the time of the collision, the respondent relies on three pieces of evidence from which she argues that the inference may be drawn that he was then acting within the scope of his employment. We will consider these in the order of their presentation.

A sticker was affixed to the windshield of O'Brien's car reading "Chronicle Press Car". The appellant explained that the purpose of carrying these stickers was to admit the cars to the special parking place at the printing offices where the cars were loaded with papers for distribution. This testimony was not controverted. There was no testimony tending to prove that this sticker, which was firmly pasted on the windshield, was removed when the car was not being used in the employment. The inference would be that it was not attached.

Three bundles of Chronicle newspapers were found in O'Brien's car at the time of the collision. The respondent endeavored to prove that these papers were of the current issue of the night of the collision. Her witnesses gave testimony as to the news headlines printed on the papers in the car. The collision occurred at 11:30 p. m. at the intersection of Potrero avenue and Twenty-fourth street, which is several miles from the place of publication. The papers identified by the witnesses were not published until several hours later. The only reasonable inference which can be drawn from the testimony is that the witnesses were mistaken in their identification and had in mind the headlines of the Ex-

aminer which papers were being sold on the street corner at the time, and which did carry the news and bear the headlines testified to covering a matter of news in which the Chronicle was "scooped" by the rival paper on that particular night by a matter of an hour or more. Hence, so far as any evidence is concerned, these papers may have been old issues of a week or more past and their presence had no bearing on the issue of employment.

Evidence was offered by the respondent that dog races were being conducted a mile or more from the scene and that the Chronicle was in the habit of sending papers past this intersection to be sold at the arena. From this it is argued that the jury might infer that O'Brien was carrying papers to be sold at the dog races. Uncontradicted evidence was offered that the dog races always closed before 11:10 p. m., that they had closed on the night of the collision long before the collision occurred and that the respondent had been a patron of the races that night. No evidence was offered as to when she left the arena, but we may presume if she had any evidence favorable to her side she would have produced it.

[1] These three pieces of evidence are insufficient to support the inference upon which respondent relies in view of the positive evidence that O'Brien was off duty and engaged in his own pursuit of pleasure at the time of the collision.

[2] The rule applicable here is thus stated in *Engstrom v. Auburn Automobile Sales Corp.*, 11 Cal.2d 64, 70, 77 P.2d 1059, 1063: "An inference is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side." See, also, *Crouch v. Gilmore Oil Co., Ltd.*, 5 Cal.2d 330, 333-335, 54 P.2d 709; *Montanya v. Brown*, 31 Cal.App.2d 642, 88 P.2d 745.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

34 Cal.App.2d 594

**BURKE et al. v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.**

Civ. 10970.

District Court of Appeal, First District,
Division 2, California.

Sept. 19, 1939.

1. Gifts ⇐16

A promise to make a gift is unenforceable.

2. Wills ⇐58(1)

Where promisor signed instrument in which he promised to name promisee executor of his will and to devise to him a joint interest in house and lot, and instrument which showed no promise on part of promisee recited "these gifts will appear in my will and must never be disputed," instrument was promise to make a gift and not a contract which could be enforced against promisor's estate. Civ.Code, § 1624, subd. 6.

3. Wills ⇐58(1)

Where promisor signed instrument in which he promised to name promisee executor of promisor's will and to devise to promisee and his wife a joint interest in house and lot and to leave to promisee's wife certain sum of money in return for "service and kindness shown to me in the past and will continue to show in the future," and instrument showed no promise on part of the promisee and acts of service and kindness were gratuitous or of negligible value, promisee and wife could not recover for breach of contract from promisor's estate.

4. Wills ⇐58(1)

Where promisee and wife sought to recover for breach of alleged contract whereby deceased promised to name promisee executor of his will and to devise to him and wife a joint interest in house and lot and certain sum of money to wife, and promisee and wife stood in relation of trust and confidence with promisor, court would view the transaction with the most scrutinizing jealousy.

5. Appeal and error ⇐1012(1)

Where promisee and wife sought to recover for breach of alleged contract whereby promisor promised to name promisee executor of his will and to devise to him and wife joint interest in house and lot and certain sum of money to promisee's wife, weight

of promisee's testimony was for the trial court, and reviewing court would not say that trial court erred in conclusion that promisee gave false testimony.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Actions for breach of contract by Mary Burke and Edward F. Burke against the Bank of America National Trust & Savings Association, a corporation, as executor of the last will and testament of Joseph Stanton, alias, deceased. From adverse judgments, plaintiffs appeal.

Affirmed.

Sullivan & Sullivan, Edward F. Sullivan, and George H. Sullivan, all of San Francisco, for appellants.

W. Urie Walsh, of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff, Mary Burke, the wife of the plaintiff Edward F. Burke, commenced an action against the defendant to obtain a judgment for damages caused by a breach of contract by Joseph Stanton, defendant's testator. Her husband, Edward F. Burke, commenced a similar action. Both actions were tried together. The trial court made findings in favor of the defendant in each case and both plaintiffs have appealed. In each case the clerk prepared a separate judgment roll and certified a separate transcript. However, both cases are supported by a single transcript by the reporter.

The substance of the complaint of Mary Burke is as follows: On October 8, 1937, Joseph Stanton died leaving a will dated December 28, 1926, which was admitted to probate. On October 27, 1937, the defendant was appointed executor of said will, and thereafter qualified and is now acting as such executor. On the 29th day of October, 1937, the defendant caused a notice to creditors to be published directing the presentation of claims within six months after the first publication of said note. Within that period of time the plaintiff presented a claim against said estate. It is not alleged what the contents of said claim were and no copy is contained in the record. The claim was rejected. It is alleged: "II. That on or about the 16th

day of September, 1936, at the city and county of San Francisco, state of California, plaintiff and the said Joseph Stanton entered into a contract wherein and whereby the said Joseph Stanton agreed that in consideration of the services that had then been rendered to him by plaintiff and which services plaintiff would continue to render to him in the future, he would by his last will and testament, devise to plaintiff an undivided one-half ($\frac{1}{2}$) interest in and to his real property commonly known and designated as number 165 Stillman street, San Francisco, California, and in addition thereto he would in said last will and testament bequeath to plaintiff the sum of \$1,000, cash, lawful money of the United States." It is alleged that Joseph Stanton in his life did not devise to plaintiff any interest in the real estate above mentioned and did devise to plaintiff \$300 only. It is alleged that the value of a one-half interest in said real property was \$2,500 plus \$700, making \$3,200 in all. It is also alleged that plaintiff has done and performed all of the covenants on her part to be performed.

In its answer the defendant denied that Joseph Stanton, the decedent, and plaintiff made any contract and alleged that the plaintiff had been fully paid by Joseph Stanton for all services performed by her.

In its findings the trial court found against the plaintiff on the allegations set forth in paragraph II of her complaint and found in favor of the defendant on the affirmative allegations set forth in its answer.

In principle the pleadings and findings in the action filed by Edward F. Burke are the same. For these reasons we will proceed to discuss the two actions as though only one action was before us.

The plaintiffs contend that the trial court made findings against them which are not supported by the evidence, but we think there is no merit whatever in that contention. The plaintiffs called to the stand Edward F. Burke. He produced a written instrument and testified it was in his possession on the date Joseph Stanton died. That instrument was in words and figures as follows:

"San Francisco, Sept. 16, 1936

"This agreement made the day Sept. 1936, between Joseph Stanton, 165 Stillman St. San Fran. Calif. party of the first part and Edward F. Burke and his wife Mary,

of 371 Jules Ave., S. F. parties of the second part, I, Joseph Stanton have appointed Edward F. Burke executor of all wills that I may make during my life; I also agree to leave my house at 165 Stillman St., S. F., to Edward F. Burke and wife, Mary; I also have agreed to leave to Mary Burke, wife of Edward the sum of One thousand dollars (\$1,000) in return for service and kindness shown to me in the past and will continue to show in the future; these gifts will appear in my will and must never be disputed.

"Joseph Stanton"

[1,2] There was evidence to the effect that the name Joseph Stanton was in the handwriting of the deceased and that the balance was written by Mrs. Burke. Both in the trial court and in this court the plaintiffs have contended said instrument was the contract between Joseph Stanton and Mr. and Mrs. Burke. They introduced no evidence that any other contract was made. They introduced no evidence of any circumstances which in any manner explains the above mentioned instrument. It follows their rights to a recovery rest wholly on said instrument. We have carefully examined its terms. Joseph Stanton promised to name Mr. Burke executor of his will and to convey to him a joint interest in the house and lot at 165 Stillman street. Mr. Burke made no promise whatsoever. Said provisions constituted promises to make gifts. That interpretation is reinforced by the last clause, "* * * these gifts will appear in my will and must never be disputed." But a promise to make a gift is unenforceable. *Hart v. Ketchum*, 121 Cal. 426, 429, 53 P. 931. As the instrument showed no promise on the part of Mr. Burke it did not on its face constitute a contract. *Shortell v. Evans-Ferguson Corp.*, 98 Cal.App. 650, 660, 277 P. 519. As he had no contract that would support this action unless "the same, or some note or memorandum thereof, is in writing", (Civ.Code, sec. 1624, subd. 6), his cause of action is not sustained by the proof.

As to Mrs. Burke, the instrument contains words from which it may be claimed Joseph Stanton promised to convey to her a joint interest with her husband in said real estate and to leave her \$1,000, in return for "service and kindness shown to me in the past and will continue to show in the future". Therefore, the purported

contract was, as to Mrs. Burke, of more vitality, but, as will presently appear, both plaintiffs failed to prove any cause of action.

Assuming, solely for the purposes of this decision, that the writing hereinabove set forth was sufficient as to Mr. Burke, nevertheless the court did not err in rendering judgment in favor of the defendant. While there was evidence that Mr. Burke rendered services to Joseph Stanton, there was also evidence that he had been fully paid day by day as said services were rendered.

[3,4] At all times both Mr. and Mrs. Burke stood, and claimed to stand, in a relation of trust and confidence to Joseph Stanton. On different occasions Mrs. Burke called on him. At times she cooked and took to him a dish of delicate food. when informed on one occasion that he was quite sick, she and her husband, in the middle of the night, went to his bedside. The record contains evidence that those acts on the part of both plaintiffs were gratuitous. It does not contain any evidence of the value of any one or all of said acts but the value thereof, however measured, was negligible. Under these circumstances the trial court did not err in denying the plaintiffs monetary judgments. In *Mead v. Mead*, 41 Cal.App. 280, at page 285, 182 P. 761, at page 763, the court said the rule in cases such as the one before us is that the court must view the transaction with "the most scrutinizing jealousy". As so viewed it is manifest the plaintiffs proved no case. *Herbert v. Lankershim*, 9 Cal.2d 409, 484, 71 P.2d 220.

[5] The plaintiffs assert that the trial court made findings that the decedent, Joseph Stanton, never delivered the above instrument. They then call attention to the testimony given by Mr. Burke and they quote various rules regarding inferences and presumptions and contend the trial court erroneously found against the positive testimony introduced by the plaintiffs. To these contentions there are several answers. In their complaints the plaintiffs did not plead a written contract was executed or delivered. As recited above the claims filed in the probate proceedings do not appear in the record and we are not advised as to the contents of either claim. In its answer the defendant did not plead, nor did it deny, the existence of a written contract. Nevertheless, in making findings

the trial court found that Joseph Stanton never delivered the contract set forth in plaintiffs' complaint. Those findings were without the issues made by the pleadings. Assuming, solely for the purposes of this decision, that the existence of a written contract was an issue, we are unable to say the findings complained of were not sustained by the evidence. If Joseph Stanton ever delivered the written instrument above mentioned, the proof of such fact rested on the testimony of Mr. Burke and the presumptions of law applicable thereto. However, there was evidence introduced by the defendant from which the court was entitled to draw the conclusion that Mr. Burke gave false testimony. It will serve no useful purpose to set forth that evidence. It is sufficient to state the weight of his testimony was to be measured by the trial court and this court may not say, with all the circumstances appearing in the record, that the trial court erred in weighing the evidence. *Caldwell v. Weiner*, 203 Cal. 543, 264 P. 1100, is closely in point. It is nearly parallel in its fact. There, as here, the trial court made findings against the plaintiffs. There, as here, it was contended one of the witnesses for the plaintiff had given positive testimony in support of the plaintiff's case. On page 546 of 203 Cal., 264 P. on page 1101, the court said: "It would seem that this case, with all the circumstances appearing in the record, comes within the rule of *Blanc v. Conner*, 167 Cal. 719, 141 P. 217, and *Davis v. Judson*, 159 Cal. 121, 113 P. 147, to the effect that while it is a general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions, and the most positive testimony may be contradicted by the circumstances in evidence in connection with the matter which satisfy the court of its falsity and the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact.

"The instant case presents the type of alleged contract which in many jurisdictions is scrutinized by the courts with great care, and is only sustained upon the most satisfactory proof. *Owens v. McNally*, 113 Cal. [444] 446, 45 P. 710, 33 L.R.A. 369. The record before us presents abundant justification for the findings made by the

trial court, and as there is no other error assigned by appellant the judgment appealed from is affirmed."

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.;
SPENCE, J.



34 Cal.App.2d 602

NUFFER v. WARE, Sheriff-Coroner.

HOOPER v. THORNE et al.

Civ. 2366.

District Court of Appeal, Fourth District,
California.

Sept. 19, 1939.

Appeal and error ⇨554(2)

Where notice of appeal from judgment was filed, with clerk of county in which action was brought, on June 24, 1939, and from clerk's certificate it appeared that after filing of notice of appeal no proceeding was instituted for the preparation of a bill of exceptions or transcript, and that time for instituting a proceeding for preparation of bill of exceptions or transcript had expired and service of notice of motion to dismiss appeal was duly made, the appeal was dismissed. Code Civ.Proc. § 953a.

Appeal from Superior Court, Imperial County.

Proceeding by Lee Nuffer against Robert W. Ware, Sheriff-Coroner, County of Imperial, State of California, wherein Charles W. Hooper intervened, and B. H. Thorne and another were made defendants in the intervention. From an unsatisfactory judgment, Charles W. Hooper appeals. On motion to dismiss the appeal.

Appeal dismissed.

John J. Dillon, of Culver City, for appellant.

Kenneth A. White, of Los Angeles, for respondent in intervention.

GRIFFIN, Justice.

This is a motion to dismiss the appeal. Notice of appeal from the judgment in the above-entitled matter was filed by Charles W. Hooper, intervener, on June 24, 1939, with the clerk of Imperial county. From the certificate of the clerk it appears that since filing of the notice of appeal no proceeding was ever instituted for the preparation of a bill of exceptions or a transcript under section 953a of the Code of Civil Procedure, and that the time to institute the same has expired. Service of the notice of motion to dismiss was duly made.

Under the authority of *Robinson v. Pismo Oil Dome Co.*, 31 Cal.App.2d 716, 88 P.2d 725, the appeal is dismissed.

I concur: MARKS, Acting P. J.



GONSALVES v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.*

Civ. 6137.

District Court of Appeal, Third District,
California.

Sept. 22, 1939.

Reargument Granted Oct. 16, 1939.

Subsequent Opinion 96 P.2d 391.

1. Banks and banking ⇨134(1)

The right of a bank to proceed against a deposit of a customer for a debt owing the bank is a right of set-off, for it rests upon and is coextensive with the right to set-off as to mutual demands.

2. Set-off and counterclaim ⇨24

A claim barred by the statute of limitations is not available as a counterclaim or set-off.

3. Limitation of actions ⇨115

The commencement of an action within four years on a demand note suspended the running of the statute of limitations. Code Civ.Proc. § 337.

4. Banks and banking ⇨134(1)

Where bank's action on demand note dated in 1929 was commenced within four

* For subsequent opinion, see 105 P.2d 118.

years after note was given and bank in 1937 offset amount due on note against maker's deposit before action was dismissed in 1938, pursuant to statute, for failure to serve and return summons within three years after commencement of action, action was pending and running of statute of limitations was suspended so that right of set-off against the deposit was not barred. Code Civ.Proc. §§ 337, 581a; Civ.Code, § 3054.

5. Limitation of actions $\S$ 119(3)

The statute providing for dismissal of action for failure to serve and return summons within three years from the commencement of the action, even though mandatory in character, merely confers a right which may or may not be enforced by the court, but until such enforcement takes place, the statute of limitations remains suspended and even after such adjudication it would remain suspended until time for appeal expired. Code Civ.Proc. §§ 337, 581a.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action to recover a bank deposit by Joe S. Gonsalves against the Bank of America National Trust & Savings Association, a banking corporation. From a judgment for the full amount of the deposit, defendant appeals, and from judgment disallowing a claim for damages, plaintiff appeals.

Reversed, with directions.

Dennett & Zion, of Modesto, for appellant.

Louis Ferrari, G. D. Schilling, D. Bianco, and C. H. White, all of San Francisco, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action to recover the amount of a bank deposit, together with interest thereon, and damages. The trial court rendered judgment for the full amount of the deposit, with interest, but disallowed the claim for damages. Defendant appeals from the judgment against it, and plaintiff appeals from that portion of the judgment which disallows damages claimed by him.

The stipulated facts are briefly as follows:

On June 18, 1929, Gonsalves and his wife executed a note to the predecessor of the bank in the amount of \$5,360, payable on

demand, which note was secured by a chattel mortgage. By successorship, the bank became the owner of the note, and on February 15, 1932, the security was sold and the proceeds applied on the note, leaving a balance of \$2,338.60. Thereafter, the note was assigned by the bank to one H. C. Winklemen for the purpose of collection and suit, that H. C. Winklemen was the agent and trustee for the bank, and never, at any time, had any part of the beneficial interest in the note, nor the action predicated thereon. On June 15, 1933, said H. C. Winklemen filed an action on the note against Gonsalves and his wife in the superior court of the state of California, in and for the City and County of San Francisco. Service of the summons in said action was never effected on the defendants therein.

On June 23, 1937, Gonsalves had on deposit in a general commercial account with the Turlock branch of the bank, the sum of \$1,308.91. At that time the bank notified him that it would not pay him this sum because of his debt to it in the sum of \$2,338.60. Thereafter, and on July 13, 1937, a check signed by Gonsalves was presented for the balance of the account, payment whereof was refused by the bank, because of the claimed right to hold the deposit on account of the above note. On July 29, 1937, the present action was filed in the superior court of Stanislaus county, to recover the amount of his said deposit, and also to recover damages for the failure to pay over the same. The stipulation of facts provides that if plaintiff recovers judgment for the amount of his deposit, the damages shall be limited to \$150, if the trial court should determine that damages be allowed. Thereafter, on April 21, 1938, the action of H. C. Winklemen v. Gonsalves et al., in the superior court of the city and county of San Francisco, was dismissed by the said superior court for *failure to serve and return summons within three years* of the filing of the action, and the San Francisco court further incorporated in its order that the defendants had not been absent from the state of California during said three years.

Appellant bank justifies its refusal to pay the check by invoking the provisions of section 3054 of the Civil Code, which reads as follows:

"Banker's lien. A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer.

for the balance due to him from such customer in the course of the business."

The note was payable on demand, and was admittedly due upon the date when the bank refused payment upon the check drawn upon plaintiff's account.

[1,2] It is the contention of plaintiff that the statute of limitations had run against the note at the time when the check was refused payment, and that the bank could not then offset the amount due upon the note against the deposit of plaintiff. The right of a bank to thus proceed against a deposit of a customer "is more accurately a right of setoff, for it rests upon, and is coextensive with, the right to setoff as to mutual demands". 7 Am.Jur., sec. 629. "A claim barred by the Statute of Limitations is not available as a counterclaim or setoff." 23 Cal.Jur., p. 234, sec. 12. It would therefore appear that if the statute of limitations had run against the note at the time of the presentation of the check, the act of the bank in refusing to honor the check was unlawful, as it would then have no right to setoff the deposit against the amount of said check.

[3,4] Was any action on the note barred by the statute of limitations which it is conceded is the four-year period provided for in section 337, of the Code of Civil Procedure? The demand note was dated June 18, 1929. The four-year period would expire June 18, 1933. Prior to the latter date, and on June 15, 1933, the bank, through its admitted and stipulated agent and trustee, filed suit in the superior court of San Francisco to enforce collection of the note. The commencement of this action suspended the running of the statute of limitations. 16 Cal.Jur., p. 539, sec. 137. The said action was dismissed on April 21, 1938, for failure to serve and return summons within three years from the commencement of the action. Code Civ.Proc., sec. 581a. As payment was refused on the check long before the last-named date,—to-wit, on July 13, 1937,—we are of the opinion that the action was then pending, and that the statute of limitations had therefore not run against the note. The right of offset had not been lost.

[5] Referring to the contention of respondent that since the three-year period under section 581a, had expired when the bank enforced its right of offset, the action on the note was "dead" at that time, we are unable to follow this view. It means that,

without any adjudication whatever every action is automatically obliterated when the time has expired. We are of the opinion that the section quoted, even though it may be mandatory in character, merely confers a right which may or may not be enforced by the court of a litigant. Until such enforcement takes place, the statute of limitations is still suspended, and even after such adjudication, it would remain suspended until the time for appeal had expired.

The appeal of plaintiff, based on the contention that damages should have been allowed, is disposed of adversely to him for the reason that he is not entitled to recover.

The judgment is reversed, with directions to the trial court to enter judgment in conformity with this opinion.

We concur: THOMPSON, Acting P. J.; DEIRUP, Justice pro tem.



34 Cal.App.2d 628

**STATE v. SUPERIOR COURT IN AND
FOR SACRAMENTO COUNTY.**

Civ. 6294.

District Court of Appeal, Third District,
California.

Sept. 22, 1939.

1. Undertakings ☞

Failure to file an affidavit of justification with a statutory undertaking does not affect liability of sureties on the obligation, since such affidavit is not part of the contract. Code Civ.Proc. § 1057.

2. Costs ☞134

Generally, if there has been an attempt to comply with the cost bond law by giving security, the cause should not be dismissed without giving opportunity to give additional and sufficient security. Pol.Code, § 688; Code Civ.Proc. § 1057.

3. Bonds ☞33

The statute requiring affidavit of justification by surety on statutory bond should be liberally construed with a view to effect-

ing its objects and promoting justice. Code Civ.Proc. §§ 4, 1057.

4. Costs $\Rightarrow$ 124

Where sureties on cost bond given in action against state actually justified before a judge of the superior court, their failure to file affidavit of justification as evidence of the fact was not a jurisdictional matter so as to require dismissal of the action. Code Civ.Proc. § 1057.

Petition by the State of California for a writ of mandate directing the Superior Court of the State of California, in and for the County of Sacramento, to dismiss a certain civil action.

Writ denied and proceedings dismissed.

Earl Warren, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and Gerald M. Desmond, of Sacramento, for the State.

Hervey & Holt, of San Diego, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an application for a writ of mandate directing the Superior Court of the State of California, in and for the County of Sacramento, to dismiss a certain civil action.

On December 22, 1938, an action was filed in the Superior Court of the State of California, in and for the County of San Diego, entitled "Marian Louise Brewer and Lee M. Brewer, plaintiffs, vs. The State of California and John Doe, defendants". The plaintiffs in said action sought to recover damages from the state occasioned by personal injuries alleged to have been sustained by them in a collision between an automobile in which they were riding and an automobile which is alleged to have been driven by an employee of the State of California.

On the 10th day of April, 1939, defendants, after due notice, moved the court to dismiss said action upon the ground that the undertaking filed by plaintiffs "is insufficient as a matter of law to comply with the terms of Section 688 of the Political Code of the State of California". It appeared upon said hearing that the sole contention of defendants was that plaintiffs had failed to file the affidavit of the sureties upon the undertaking, as required by the provisions of section 1057 of the Code of Civil Procedure. It further ap-

pears that the following writing was endorsed upon said undertaking:

"Good cause appearing, the amount of bond required by Section 688, Political Code, is hereby fixed at the sum of Five Hundred Dollars (\$500.00), and the sureties in the above undertaking having been examined by me, the said undertaking is approved.

"Dated this 22 day of December, 1938.

"Arthur L. Mundo,

"Judge of the Superior Court."

Prior to the date of said hearing plaintiffs filed such affidavit in the form required by the statute, and it is not controverted by the state that at the time of said hearing the undertaking complied with the law in all respects. The motion was denied by the trial court.

Section 688 of the Political Code reads as follows: "At the time of filing the complaint in any such suit, the plaintiff shall file therewith an undertaking in such sum, but not less than five hundred dollars, as a judge of the court shall fix, with two sufficient sureties, to be approved by a judge of the court, and conditioned that, in case the plaintiff fails to recover judgment, he shall pay all costs incurred by the state in such suit, including a reasonable counsel fee, to be fixed by the court."

Section 1057 of the Code of Civil Procedure reads as follows: "In any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must * * * require the sureties to accompany it with an affidavit that they are each residents and householders, or freeholders, within the state, and are each worth the sum specified in the undertaking or bond, over and above all their just debts and liabilities, exclusive of property exempt from execution; * * *."

[1,2] The failure to file with the undertaking an affidavit of justification would not affect in any manner the liability of the sureties on the obligation. Such affidavit forms no part of the contract. *Moffat v. Greenwalt*, 90 Cal. 368, 27 P. 296; *Murdock v. Brooks*, 38 Cal. 596; *People v. Shirley*, 18 Cal. 121. It is not pointed out by the state, nor can we see how any substantial prejudice would result from the failure to comply with the letter of the law. The general rule is that, "if there has been an attempt to comply with the law by giving security, the cause should not be dismissed without giving the party

an opportunity to give additional and sufficient security". 15 C.J., p. 221, sec. 544. This is the rule prevailing in California in respect to an undertaking for costs on appeal to the Supreme Court (Dixon v. Allen, 69 Cal. 527, 11 P. 179), and also in respect to an undertaking given to secure the payment of costs in an action for slander. Becker v. Schmidlin, 153 Cal. 669, 96 P. 280. In the latter case it is said:

"It is true that a plaintiff neglecting to file a sufficient undertaking when suit is commenced incurs the danger of having his action dismissed upon the motion of the defendant for such failure, but when such motion is made and is well taken, the court may, nevertheless, in the exercise of a sound discretion, having jurisdiction of the action, permit the plaintiff to file a new and sufficient undertaking. The undertaking provided by the statute to be given runs in terms in favor of a defendant, and is intended to secure him in the costs and charges of the action which may ultimately be awarded him. The provision is for his sole benefit, and this being true, the discretion vested in the court of permitting plaintiff to file a new undertaking which will afford a defendant all the protection the law intends, should be exercised to effect that end. *So exercised, it will permit the cause to be tried on its merits, which the law favors, instead of preventing it, which it discountenances. Especially should this permission be granted where it appears that a party in good faith has originally endeavored to comply with the statute by filing an undertaking when the suit is commenced. This the plaintiff here did.*" (Italics ours.)

[3,4] The argument of appellant is predicated upon a strict construction of section 1057 of the Code of Civil Procedure. It is our duty, however, to construe that section liberally, "with a view to effect its objects and to promote justice". Sec. 4, Code Civ.Proc. The sureties here actually did justify before a judge of the superior court, and the only omission was a failure to comply with the law in respect to filing evidence of that fact. Such omission was not a jurisdictional matter. Furthermore, the formal affidavit of the sureties was filed when the motion was heard. In the case of Standahl v. Splivalo, 13 Cal. App.2d 85, 56 P.2d 298, no undertaking whatever was filed, and it was held that a motion to dismiss was proper. Here, the undertaking was filed in good faith, but

certain technical requirements were not met. We do not regard the Standahl case as authority for the position taken by the state here.

The action of the trial court in denying the motion to dismiss was, in the language of the Code of Civil Procedure used above, "to promote justice".

The writ is denied and the proceedings dismissed.

We concur: THOMPSON, Acting P. J.; DEIRUP, Justice pro tem.



34 Cal.App.2d 524

CASNER v. SAN DIEGO TRUST & SAVINGS BANK.

Civ. 2328.

District Court of Appeal, Fourth District,
California.

Sept. 11, 1939.

1. Husband and wife ⇨25(3)

A woman, whose husband, acting as her agent, agreed to loan by her to parties executing note indorsed to her without recourse by loan company, of which husband was president, after its refusal to make loan to makers, did not become holder of note without notice of such refusal, as husband's knowledge thereof was imputed to wife.

2. Bills and notes ⇨49

A wife, signing trust deed of her realty, on which improvements were to be made by her husband with proceeds of spouses' note secured by such deed, and directly receiving none of such proceeds, which were used to finance husband's building operations elsewhere, was not accommodation maker or surety, but party to contract as maker of note.

3. Bills and notes ⇨519

Where spouses' note discloses that wife signed it as maker and there is no testimony that she signed it as surety or accommodation maker or that holder thereof dealt with or accepted her on any other basis than

note disclosed, burden is on anyone claiming that she signed it other than as maker to establish such fact by preponderance of evidence.

4. Limitation of actions ⚡87(3)

The 4-year statute of limitations, governing action on rejected claim against decedent's estate for amount due on notes signed by decedent, is inapplicable, where decedent resided in state only little over year before her death. Code Civ.Proc. § 351.

5. Limitation of actions ⚡155(5)

A payment on spouses' note by husband automatically extended time for filing action thereon in Missouri, wherein note was executed, for 10 years from date of such payment. Mo.St.Ann. §§ 860, 861, pp. 1136, 1139.

6. Limitation of actions ⚡51(1)

A cause of action on note without acceleration clause did not accrue when trust deed securing note was foreclosed pursuant to such clause therein before due date of note, so that action, brought on note within 10 years after such date, was not barred by Missouri 10-year statute of limitations. Mo.St.Ann. § 861, p. 1139.

7. Limitation of actions ⚡85(2)

The Missouri 10-year statute of limitations, governing action on note, was tolled during maker's absence from such state for time beginning before maturity of note, so that action, brought thereon within statutory time after her return to state, was not barred, even if due date of note was accelerated by foreclosure of trust deed securing it while maker was still resident of state. Mo. St.Ann. § 871, p. 1159.

8. Domicile ⚡8

Normally, husband's residence is deemed in law to be that of wife.

9. Limitation of actions ⚡197(1)

In action against administrator of decedent's estate for amount of rejected claim on note executed by decedent and her husband in Missouri, evidence held insufficient to show that decedent definitely intended to abandon her residence in such state when she left it three years before maturity of note or in following year when defendant claimed that cause of action on note accrued because of acceleration of due date by foreclosure of trust deed securing note, so that action thereon was not barred by Missouri statute of limitations. Mo.St.Ann. §§ 861, 871, pp. 1139, 1159.

10. Judgment ⚡342(1)

In Missouri, judgment regularly given in due course may not be disturbed by court which rendered it after term at which rendered. Mo.St.Ann. § 1101, p. 1396.

11. Appeal and error ⚡1187

To reinvest lower court with jurisdiction of case after rendition of judgment on appeal, there should generally be a mandate or other order of remand issued by appellate court.

12. Appeal and error ⚡1187

A mandate of appellate court is not always necessary to authorize issuance of execution on simple affirmance of judgment appealed from.

13. Appeal and error ⚡1187

In Missouri, trial court may not disregard its original judgment after reversal thereof by appellate court and act on basis of such reversal until mandate pursuant to reversal has been filed with trial court.

14. Appeal and error ⚡1187

Under Missouri law, when order granting new trial has been subject of appeal, trial court cannot dispose of case until mandate is received from or at least issued out of higher court.

15. Appeal and error ⚡1187

Dismissal of action on note by Missouri circuit court for want of prosecution before issuance and receipt of Missouri Supreme Court's mandate on affirmance of circuit court's order, granting plaintiff new trial after verdict and judgment for defendant, was void as beyond power of circuit court, which therefore had power to set it aside, with or without notice, at any time.

16. Judgment ⚡346

A court has right to set aside its order or judgment when it is void and mere nullity.

17. Appeal and error ⚡1187

As Missouri circuit court's dismissal of action, brought on notes within statutory time, before issuance and receipt of Missouri Supreme Court's mandate on affirmance of circuit court's order granting plaintiff new trial after verdict and judgment for defendant, was absolutely void, it had no effect on pendency of action when plaintiff filed action in California on rejected claim against deceased maker's estate for amount of notes so that California action was not barred, though it was too late to bring new action on notes in Missouri. Code Civ.Proc. § 361.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by C. S. Casner against the San Diego Trust & Savings Bank, as administrator with the will annexed of the estate of Viola D. Herrick, deceased, on a rejected claim against the estate. Judgment for plaintiff, and defendant appeals.

Affirmed.

Wirt Francis, of San Diego, for appellant.

Stone, Munkelt & Gazlay, of San Diego, for respondent.

GRIFFIN, Justice.

This is an action upon a rejected claim against the estate of Viola D. Herrick, deceased, and is based upon twelve (12) promissory notes all signed by Viola D. Herrick and her husband Robert T. Herrick. One note was for the sum of six thousand dollars (\$6,000) dated April 18, 1909, due five years after date, payable to Irrigation Loan & Trust Company. One was for five thousand dollars (\$5,000) dated April 3, 1911, due five years after date, payable to respondent. Ten were for the sum of \$150 each, dated April 3, 1911, due respectively on the third days of each October and April thereafter and were interest notes on the \$5,000 note last above described.

Respondent's husband, F. W. Casner, at the time of the execution of the notes here involved, was the president of a loan corporation known as the Irrigation Loan & Trust Company, doing business at Kansas City, Missouri. Robert T. Herrick and appellant's testatrix, Viola D. Herrick, were, during the times referred to, husband and wife and resided at Kansas City, Missouri, where Robert T. Herrick was engaged in building operations which were customarily financed by the Irrigation Loan & Trust Company. Mr. Herrick prepared and offered for sale to the Irrigation Loan & Trust Company the note for the principal sum of \$6,000 signed by himself and Viola D. Herrick, and made payable to the Irrigation Loan & Trust Company or order. The note was accompanied by a deed of trust made to secure it, signed by the Herricks, affecting certain lots in Indianapolis Place, an addition to Kansas City. Mr. Casner claims that this property was worth about \$2,200. Casner's testimony is that the Irrigation Loan & Trust Company deemed itself unable to make

this loan, but that he accepted the loan for his wife, and that the Irrigation Loan & Trust Company endorsed the note without recourse, in order to pass the title to her. The lots were unimproved and the proceeds of the loan were not used to improve them, as represented, but were expended for other purposes. On April 3, 1911, the Herricks executed direct to the respondent C. S. Casner the \$5,000 note above described and the ten notes for \$150 each. The \$5,000 note, together with those given for the interest, were secured by a deed of trust of even date, affecting certain lots in Countryside Addition to Kansas City, Missouri.

The lots that were made security for the \$6,000 loan turned out to be subject to certain prior trust deeds, one of which was foreclosed in March, 1911, in consequence of which the security was lost. There are endorsed in pencil in Mr. Casner's handwriting, as having been paid on this note, several sums. The last one was for \$75 on March 25, 1917. The trust deed given to secure the \$5,000 note with the annexed interest notes, was foreclosed in April, 1914, and \$1,000 realized at the foreclosure sale, the property being bought in by one Lindberg, in reality for Mrs. Casner. The selling price was applied to settle mechanics' liens and tax delinquencies on the property and, according to respondent's claim, nothing remained to be applied on the debt. The trial court held that of this amount, to-wit, \$1,000, the costs and expenses of sale were \$55, leaving a balance of \$945, which "should be treated as having satisfied each of these first five interest notes in full and having still left to defendant's credit a net balance of \$99, applicable on the sixth interest note which fell due in the same month that the sale occurred, thereby reducing it to \$51". No point has been raised on this appeal as to this ruling or order directing the application of the proceeds of the sale.

The evidence is to the effect that Viola D. Herrick lived in Kansas City with her husband until December, 1913, at which time she went to live with her father at Topeka, Kansas, where she remained until 1925. Her husband, Robert T. Herrick, remained in the family dwelling in Kansas City, Missouri, until sometime in the summer of 1915, when he stored the furniture and went next door to live with his mother, with whom he remained until Sep-

tember, 1916, when he definitely removed to Independence, Kansas, where he subsequently died.

Viola D. Herrick having in 1925 returned to live in Missouri, action was in May of that year brought against her on both notes in the circuit court of Jackson county in that state. The cause having been there tried before a jury, verdict and judgment went for the defendant, but the circuit court granted a new trial. From that action an appeal was taken by Mrs. Herrick to the supreme court of Missouri, which on September 5, 1931, rendered its decision affirming the order granting the new trial and which, in effect, ordered a new trial. *Casner v. Herrick*, 43 S.W.2d 768. Application for a rehearing having been made to the supreme court within the time allowed by its rules therefor, the same was by it denied on November 20, 1931. On December 4, 1931, on what was known as a "peremptory" call of the calendar of the circuit court, noticed according to routine in the Kansas City legal publication, but, so far as appears, without actual appearance at the hearing on behalf of either party, or other notice to either party, an order was made purporting to dismiss the case for want of prosecution. The supreme court mandate, corresponding to our remittitur, had not in fact yet issued and did not issue until December 14, 1931, and was not filed with the circuit court until December 15, 1931. Mrs. Herrick having moved to California in the fall of 1935, died a resident thereof on December 30, 1936, and the appellant San Diego Trust & Savings Bank was appointed administrator with the will annexed of her estate. On July 26, 1937, the respondent C. S. Casner, on discovering the fact that an order had been made dismissing her action, filed in the circuit court at Kansas City, Missouri, her *ex parte* motion to set aside the dismissal of her action in that court, and to reinstate the case on its docket, on the ground that the dismissal was made without actual notice to her and was without jurisdiction since, as she claimed, the cause was at the time still pending in the supreme court; and on July 29, 1937, the circuit court made an order purporting to set aside the dismissal and to reinstate the case. On July 12, 1937, the respondent presented in California to the appellant administrator with the will annexed her claim against Mrs. Herrick's estate upon the notes, and, the claim

having been rejected, the present action was filed on December 2, 1937.

The complaint alleges the execution and, except for the credits referred to, the nonpayment of the notes, and pleads certain provisions of the Missouri statutes. These are sections 860, 861 and 871 of chapter 5, article IX of the 1929 statutes of that state, Mo.St. Ann. §§ 860, 861, 871, pp. 1136, 1139, 1159, all of which are but re-enactments of earlier statutes, as follows:

"§ 860. Civil actions, other than for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued. * * *

"§ 861. What actions shall be commenced within ten years. Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property. * * *

"§ 871. If at any time when any cause of action herein specified accrues against any person who is a resident of this state, and he is absent therefrom, such action may be commenced within the times herein respectively limited after the return of such person into the state; and if, after such cause of action shall have accrued, such person depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

The complaint sets out the situation as above stated with respect to the whereabouts of Robert T. Herrick and Viola D. Herrick at the various times mentioned, pleads the commencement of the suit in Missouri on May 1, 1925, and personal service of process therein on Viola D. Herrick in her lifetime in Missouri, and the death of her husband prior to the institution of the action, pleads that the action remains pending and undisposed of, sets out the presentation of the claim against Viola D. Herrick's estate in California and its rejection, and asks judgment for the amounts of the notes with interest accrued and unpaid. The effect of the answer is to deny the execution by Mrs. Herrick of the notes, as well as their nonpayment, to admit the existence of the Missouri statutes pleaded, to allege a change of Viola D. Herrick's residence as of December, 1913, from Missouri to Kansas, and her continued residence in the latter state until March, 1925, when it is admit-

ted that she again took up her residence in Missouri, and to admit that she moved to California in September, 1935. The commencement of the Missouri action on May 1, 1925, is admitted, as well as the personal service there of process upon Mrs. Herrick and her appearance therein, but it is claimed that this action was disposed of by dismissal on December 4, 1931. The Missouri statutes referred to are set up as a bar to the present action, as are also sections 337, 361 and 580a, Code of Civil Procedure, of the state of California.

The appellant first claims that the endorsement by the Irrigation Loan & Trust Company of the \$6,000 note was ineffectual to pass any title to the same to the respondent Mrs. Casner. The argument is that, though named as payee in the note, the Irrigation Loan & Trust Company never in fact owned the note or had any proprietary right in it and never received any delivery of it except merely its momentary possession to enable the endorsement to be made, and, therefore, never bore any such relation to the paper as to authorize that corporation to endorse it, and accordingly that such endorsement was unauthorized and a mere nullity. In support of this contention the appellant cites *Chitwood v. Hatfield et al.*, 136 Mo. App. 688, 118 S.W. 1192. The facts in that case are stated in the opinion. The plaintiff having sued Hatfield, the maker, and various of the sureties on the note, was given judgment against Hatfield, but was refused any judgment against the sureties. The action of the trial court was affirmed on appeal. The appellate court there noted that the maker, Hatfield, had received from the plaintiff Chitwood, money represented by the note before obtaining Cunningham's (the payee's) endorsement on the paper; that the sureties had undertaken to contract with Cunningham, not with the plaintiff; that Cunningham had neither received any delivery of the note to himself as owner nor accepted any such delivery, and, therefore, that he had no rights to pass to anyone by his endorsement; that there was a complete absence of contractual relations between the sureties and the plaintiff and that the plaintiff therefore had no cause of action against them.

The appellant claims that this case is directly in point in that the principal obligor on the present \$6,000 note is Mr. Herrick, to whom alone the respondent

advanced the money, and that Mrs. Herrick received none of respondent's money, and never was in fact any more than a surety on the note. As bearing on the situation so far as Mrs. Herrick was concerned, the appellant also calls attention to the Texas case of *Rabb v. Seidel*, Texas Commission of Appeals, Section B, April 25, 1923, 250 S.W. 420, 423, reversing Texas Civil Appeals 218 S.W. 607, wherein it is stated that: "Whether or not an accommodation note never accepted by the payee is binding on the accommodation surety when disposed of by another of the makers * * * without the knowledge or consent of the accommodation surety is a question on which the Courts of Civil Appeals in Texas are not in harmony, and on which the holdings of the courts of last resort in other states are in conflict."

[1] Cases are then cited both from the Texas courts of civil appeals and from the courts of other states, from which it appears that the question has been variously decided. There cannot, of course, be any claim in the case at bar that the respondent became the holder of the note without notice that the Irrigation Loan & Trust Company had refused the loan, for Mr. Casner was at all times aware of the circumstances, and, as he was the respondent's agent in the matter, his knowledge on the subject is imputed by law to her.

Respondent, however, calls attention, as upholding endorsements in circumstances similar to those involved in the case at bar, to the case of *Webb v. Rolla Produce Co.*, St. Louis Court of Appeals 1921, 234 S.W. 1068, in which, however, *Chitwood v. Hatfield*, supra, is distinguished as not in point for the reason that in the Hatfield case the defendants were mere sureties on the note and received no benefit therefrom. And also calls our attention to *Broyles v. Morris*, St. Louis Court of Appeals, 1922, 245 S.W. 341. Undoubtedly this latter case does militate against the applicability of *Chitwood v. Hatfield*, supra, to the case at bar, for it is there held (quoting from the syllabus) that: "Where defendants signed a note for another, but the consideration was advanced by W. before maturity after the note was signed over to him by payee, the delivery to payee gave effect to the note, and in W.'s action for collection defendants could not claim * * that there was no delivery on the ground that no consideration passed between them and payee, since they were not thereby de-

prived of any defense which they might have had against payee had he retained the note."

In the body of the opinion, *Chitwood v. Hatfield*, supra, is distinguished on the ground that there the original payee, Cunningham, did not endorse the note until after it had been negotiated to the plaintiff and one of the signers of the note was procured after the original payee had refused to accept it, so that there became applicable the rule laid down by Missouri statute that "where an incomplete instrument has not been delivered, it will not, when completed and negotiated without authority, be binding in the hands of any holder as against any person whose signature was placed thereon before delivery". Assuming, however, for the sake of argument, that the Texas case of *Rabb v. Seidel*, supra, is sound law, and that, in view of the decision in *Chitwood v. Hatfield*, supra, it must, despite anything to the contrary said in *Broyles v. Morris*, supra, be treated also as expressing the law of Missouri, it is still true that its applicability in the case at bar is dependent on the question whether Mrs. Herrick was a mere surety on the \$6,000 note which she signed with her husband or had all the responsibilities of one primarily liable on the paper. The respondent urges that the detriment to her, that is the respondent, from advancing money to Mrs. Herrick, was sufficient consideration for Mrs. Herrick's signing the note, citing *Crocker National Bank of San Francisco v. Say*, 209 Cal. 436, 440, 288 P. 69. The point made by the appellant, in respect to Mrs. Herrick, is not that the circumstance, which respondent's brief concedes, that she received none of respondent's money herself, would alone exonerate her from liability as a surety, but that what exonerates her is that she did not receive the consideration purporting to be evidenced by the note which she signed, that is, consideration from the Irrigation Loan & Trust Company, and that she cannot be found to have agreed to delivery of the note for a consideration moving to her husband or anyone else from some other party than the Irrigation Loan & Trust Company. It may be conceded that such a defense would not be available to Mr. Herrick, who actually participated in the arrangement whereby respondent, rather than the Irrigation Loan & Trust Company, advanced the money represented by the note, but the question is not whether

it would have been available to him, but whether or not it was available to her, and, therefore, is or is it not available to appellant as her executor. Respondent calls attention to section 2688 of the Revised Statutes of Missouri of 1929, Mo.St. Ann. § 2688, p. 684 (formerly section 846 of the Revised Statutes of 1919), reading as follows: "Liability of maker. The maker of a negotiable instrument, by making it, engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse."

[2, 3] We are not convinced that Mrs. Herrick ought to be regarded as an accommodation maker or as a surety. The circumstance that she signed a deed of trust to property standing in her name, upon which improvements were to be made, as security for the note is, in itself, evidence against her being such. Appellant's counsel have cited various authorities to the effect that the test is simply whether or not she received anything from the transaction for her own personal use and benefit. Here no improvements from the proceeds of the note were erected on her property which was made security for its payment. Neither did she directly receive any part of the cash proceeds of the loan. The testimony is that the proceeds were used to finance her husband's building operations elsewhere. From the evidence it appears that what he was doing was erecting buildings on certain properties presumably for sale, and as a member of a company or partnership. During the time in question, Mr. Herrick built several houses, one of which Mr. and Mrs. Herrick occupied, and another was occupied by Mr. Herrick's mother. The title to this last-mentioned house stood in the name of Viola D. Herrick and she conveyed this property after the death of her husband. Mr. Herrick also carried certain life insurance which Mrs. Herrick received upon his death. There is no testimony that Mrs. Herrick did not receive the benefit of the \$6,000 or that the manner in which the money was paid out was entirely with her approval and consent. The Herricks had also borrowed money from the Irrigation Loan & Trust Company on other occasions for these building operations.

Examination of the \$6,000 note discloses that Mrs. Herrick signed the note as a maker, and there is no testimony that she

signed it as a surety or accommodation maker, or that respondent dealt with her or accepted her on any other basis than is disclosed by the note. The burden would be on anyone claiming that Mrs. Herrick signed the note other than as a maker to establish such fact by a preponderance of the evidence.

In *Stephenson v. Joplin State Bank*, 160 Mo.App. 47, 141 S.W. 691, it was held that the fact that the payee of the note knew that two of the others who signed as principals were, as between themselves, sureties for the third signer, would not make them sureties as to the payee, where it appeared from the note that they signed as makers. See, also, *First National Bank & Trust Co. v. Limpp*, 221 Mo.App. 951, 288 S.W. 957. We are of the opinion that the doctrine applied in *Chitwood v. Hatfield*, supra, cannot be applied to the instant case. The distinction is sufficiently pointed out in *Broyles v. Morris*, supra, and *Webb v. Rolla Produce Co.*, supra. We therefore concur in the finding of the trial court that the defense claimed by appellant that Mrs. Herrick was not a party to the contract was not a valid one.

[4] The appellant advances various contentions in support of its claim that, as to each of the respective notes sued upon, the respondent's cause of action is barred under the statute of limitations applicable. Mrs. Herrick only resided in California a little over a year prior to her death so that, by virtue of the provisions of section 351, Code of Civil Procedure, the four-year limit after the accrual of the cause of action, within which this action might have been filed had she been here, is inapplicable. *Dougall v. Schulenberg*, 101 Cal. 154, 35 P. 635; *McKee v. Dodd*, 152 Cal. 637, 93 P. 854, 14 L.R.A.,N.S., 780, 125 Am.St.Rep. 82; *Chappell v. Thompson*, 21 Cal.App. 136, 131 P. 82. The only other provision of the California statute that requires notice in the instant case is section 361, Code of Civil Procedure, to the effect that: "When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued."

There appears to be no real dispute that the question whether or not the present action could have been properly maintained here, was dependent, as to each of the respective notes, on the question whether a cause of action thereon could have been maintained in Missouri. It is undisputed that the Missouri statutes involved are those hereinbefore set out.

The \$6,000 note matured on April 18, 1914, and unless the Missouri statute was in some manner tolled, the right to commence an action on it would, therefore, have become barred if such action were not commenced by April 18, 1924, whereas, as already noticed, respondent's action there was not in fact commenced until May, 1925.

[5] There is no dispute that, under the law of Missouri, a payment on a promissory note has the effect of tolling the statute, so as to require the lapse thereafter of the whole ten years from the date of such payment before an action on the note is barred, nor that the payment by one of two joint makers of a note is effectual to toll the statute as to the time for beginning an action as against both makers. *Vernon County v. Stewart*, 64 Mo. 408, 27 Am. Rep. 250; *Clinton County v. Smith*, 238 Mo. 118, 141 S.W. 1091, 37 L.R.A.,N.S., 272; *Harris v. Stewart*, 197 Mo. 489, 196 S.W. 1033, 1034; *Fowler v. Sone*, Mo. App., 226 S.W. 995, 996. As has been seen, the last payment on this note by Mr. Herrick is one of \$75 on March 25, 1917. The time for filing an action in Missouri on the note was automatically extended to March 25, 1927, which would mean that respondent's Missouri action upon it was brought in proper time. It follows that as to the \$6,000 note, the action in the Missouri court must be held to have been brought in time. What we have just said affects, of course, the \$6,000 note only. On the \$5,000 note no payments were ever made otherwise than such, if any, as may have been implied by the law from the realization of \$1,000 from the sale of the land by which it was in some degree secured.

[6,7] The next question, then, is whether or not there is any basis for the appellant's claim that the Missouri ten-year statute of limitations barred the respondent's right to sue on the \$5,000 note before she actually brought her Missouri action thereon in 1925. The \$5,000 note

would not in the ordinary course of events have matured until April 3, 1916, which would mean that action on it in Missouri would not, unless its maturity were accelerated, have become barred as to it until April 3, 1926. It follows that the Missouri action, so far as this note was concerned, having been commenced in May, 1925, was begun in time unless the maturity of the note was accelerated by reason of the action taken in foreclosing the deed of trust made to secure it. The note itself contains no acceleration clause. However, the deed of trust made to secure it and the interest notes which accompanied it contains the language: "But if default be made in the payment of said notes, any part thereof, or any of the interest thereon when due, or in the faithful performance of any or either of said agreements as aforesaid, then the whole of said note shall become due, and be paid as herein-after provided."

It is also provided that any statement or recital in the trustee's deed in the event of foreclosure shall be prima facie evidence of the truth of that which is recited. The trustee's deed recites the default in payment of interest on the indebtedness and "that said indebtedness is due and unpaid". The appellant claims that these circumstances evidence an acceleration in the maturity of the \$5,000 note so that the whole matured in 1914 and became barred at the corresponding date in 1924, that is before the respondent's Missouri action was commenced. It was unquestionably held in *Noell v. Gaines*, 1878, 68 Mo. 649, in a case where two notes, neither of which contained an acceleration clause, and which by their terms fell due at different times, were secured by a deed of trust which did contain such a clause, that an election by the payee on default in interest to proceed with foreclosure of the deed of trust, had the effect of so accelerating the maturity of both notes, as to require notice of dishonor to be immediately given to an endorser as a prerequisite to holding him. This was a decision by the supreme court of Missouri in banc and it is appellant's contention that it is not only in accord with the weight of authority elsewhere, but also that it has never been effectually overruled in Missouri. A contrary view was reached in *Owings v. MacKenzie*, 1896, 133 Mo. 323, 33 S.W. 802, wherein it was held that a promissory note is not affected as to the date of its ma-

turity by the provisions of a deed of trust securing it declaring that it shall become due on default of payment of another note, except for purposes of enforcing the deed of trust and realizing on the security; that being a separate instrument, enforceable independently of the deed of trust and governed by the law merchant, the holder has the right to treat it in accordance with its own terms. This case was followed by *Board of Trustees of Westminster College v. Piersol*, 1901, 161 Mo. 270, 61 S.W. 811, following *Owings v. MacKenzie*, supra, and to the same effect. *Owings v. MacKenzie*, supra, had meanwhile been followed by the St. Louis court of appeals in *Lawson v. Cundiff & Spencer*, 1899, 81 Mo.App. 169, 177, and its doctrine is referred to by that court in *Curry v. La Fon*, 1911, 155 Mo.App. 678, 135 S.W. 511, and in *Brinsmade v. Johnson*, 1915, 192 Mo. App. 684, 179 S.W. 967, as having overruled what had earlier been decided on the subject. See, also, *Springfield Court of Appeals in Frye v. Shepherd*, 1913, 173 Mo.App. 200, 158 S.W. 717, 720; *City National Bank v. Goodloe-McClelland Com. Co.*, 1902, 93 Mo.App. 123, 136; *Beavers v. Farmers' & Traders' Bank*, 1914, 177 Mo.App. 100, 163 S.W. 529, 530. There are two cases in which the supreme court of Missouri in banc has referred to *Owings v. MacKenzie*, supra, as stating the correct rule. *Rumsey v. People's Ry. Co.*, 154 Mo. 215, 246, 55 S.W. 615, 624; and *State ex rel. Schmohl v. Ellison*, 266 Mo. 580, 182 S.W. 740, 743. See, also, *Graves v. Davidson*, 334 Mo. 882, 68 S.W.2d 711.

It follows, in our opinion, that the cause of action upon the \$5,000 note here involved did not accrue in 1914 by reason of the foreclosure, prior to its due date, of the trust deed whereby the notes were secured, but that the obligation so secured then matured only for the purpose of permitting a resort to the security but not otherwise. Even if the due date of the \$5,000 note was accelerated as claimed by appellant, still it is of no value to the appellant for the reason that if the court has properly found that Mrs. Herrick was a resident of the state of Missouri in 1914, the statute of limitations was tolled during her absence from the state. Section 871, chap. 5, art. IX, 1929 Statutes of Missouri, Mo.St.Ann. § 871, p. 1159.

[8] Appellant next claims that because Mrs. Herrick left Missouri in December,

1913, and remained in Kansas until 1925, that the statute of limitations ran upon the notes involved in the suit, and that they were, therefore, barred by the statute of limitations. Respondent claims that Mrs. Herrick was a legal resident of the state of Missouri until 1916, when her husband left Missouri and moved to the state of Kansas. Appellant bases its theory on the proposition that Mr. Herrick's conduct was such as to give Mrs. Herrick a right to establish a domicile separate from that of her husband. Respondent claims that the evidence is not sufficient for that purpose nor does the law justify this conclusion. It is normally true that the residence of the husband is, in law, deemed to be that of the wife, and that is as true in Missouri as it is anywhere else. *McPherson's Administrator v. McPherson*, 70 Mo.App. 330, 336; *Comerford v. Coulter*, 82 Mo.App. 362; *State ex rel. Taylor v. Wurdeman*, 129 Mo.App. 263, 108 S.W. 144; *Wyrick v. Wyrick*, 162 Mo.App. 723, 145 S.W. 144; *Ware v. Flory*, 199 Mo.App. 60, 201 S.W. 593; *State ex rel. Taubman v. Davis*, 199 Mo.App. 439, 203 S.W. 654, 656.

[9] The evidence discloses that the home in Missouri was maintained by Mrs. Herrick's husband for some time after she had gone to Topeka, and even after it was given up. Mrs. Herrick remained in Kansas City until late in 1916. The evidence tends to indicate that Mrs. Herrick's absence in Topeka was, largely at least, due to the financial misfortune of the family, although it may to some extent have been induced by his drinking. This did not prove, however, that she did not entertain the expectation of returning if conditions were better. At no time did she commence any legal proceedings against her husband. True, later, and possibly not until after his death, she registered as a voter in Kansas. But assuming that she then intended to make that her home, the question remains whether that intention can be properly found to date back to the time when her husband still remained in Missouri. We cannot say that we are convinced that it did. The testimony of Mrs. Brewer, a daughter of Mrs. Herrick, indicates that the relation between her father and mother remained friendly even after their separation. Taking this testimony in conjunction with the testimony that Mr. Herrick maintained a family home in Missouri until 1915, when he placed the furniture in storage and moved into the home occupied by

his mother, we are convinced that the trial court was justified in finding that the separation of Mr. and Mrs. Herrick was only the result of financial stress; that the parties were friendly and that they hoped that the financial circumstances would change and they would be reunited at their old home; that the proof on the whole was insufficient to show that when Mrs. Herrick came to Topeka in 1913 she intended definitely to abandon her Kansas City residence, or that she had formed any such intention as early as 1914 when the appellant claims that respondent's cause of action on the \$5,000 note accrued. *Comerford v. Coulter*, supra; *McPherson's Administrator v. McPherson*, supra; *Ware v. Flory*, supra; *State ex rel. Taubman v. Davis*, supra.

It is claimed, on the part of appellant, that the Missouri action was dismissed on December 4, 1931, and that since it is too late to bring any new action on the respondent's demand in Missouri, her cause of action by virtue of section 361 of the California Code of Civil Procedure was barred in this state before she presented her claim against the decedent's estate here and before she brought the present action here. What was done in the Missouri courts has already been recited. What has now to be considered is its legal effect. The appellant's claim is that, the Missouri action having once been dismissed, it was not competent to set the dismissal aside as purported to have been done but that it was effectual to dispose of the action here. Respondent, on the other hand, claims that the dismissal in Missouri was at all times absolutely void and might therefore be expunged at any time from the court's record there. Manifestly, the action of the circuit court in undertaking to dismiss respondent's case was either regular and valid or irregular and voidable, or wholly without jurisdiction and void.

[10] It seems to be well settled in Missouri that a judgment regularly given in due course may not be disturbed by the court that rendered it after the term at which it was rendered. *State ex rel. Holtkamp v. Hartmann*, 330 Mo. 386, 51 S.W. 2d 22, 24, 25. With respect to irregular judgments it is in section 1101 of the Revised Statutes of Missouri of 1929, Mo.St. Ann. § 1101, p. 1396, provided that: "Judgments in any court of record shall not be set aside for irregularity, on motion, unless

such motion be made within three years after the term at which such judgment was rendered."

If it be true, as respondent claims, that the action of the circuit court of Jackson county, Missouri, in undertaking to dismiss her action for want of prosecution was wholly without jurisdiction and void, then it will probably not be questioned that it was competent for that court at any time and with or without notice to vacate and set it aside.

[11, 12] As bearing on the question whether the circuit court of Jackson county was or was not wholly without jurisdiction of the case at the time it undertook to dismiss it, counsel for the respective parties have called attention to a considerable number of Missouri decisions. It appears that there is not in Missouri any statutory requirement that the supreme court of that state entertain a motion for rehearing after one of its decisions (*Ex parte Craig*, 1895, 130 Mo. 590, 594, 32 S.W. 1121), but it is provided for only by court rule. The general rule as to the effect of the mandate is that in order to reinvest the lower court with jurisdiction after the rendition of judgment on appeal there should be a mandate or other order of remand issued by the appellate court. However, it has been held in some cases, that, when the lower court ascertains the judgment above and proceeds thereunder, its proceedings are not vitiated by the absence of a formal mandate, and that the voluntary appearance of the parties and their participation in subsequent proceedings in the lower court without objection constitute a waiver of a formal remanding order. A mandate is not always necessary to authorize an issuance of execution on a simple affirmance. 4 Cor.Jur., pp. 1208, 1209, par. 3256; 5 C.J.S. Appeal and Error, pages 1487, 1488, § 1959; 3 Am. Jur., p. 727.

Appellant, however, cites *Meyer v. Campbell, McNiff & Barnes*, 1849, 12 Mo. 603; *Van Hafften v. Clayton*, Mo.App., 1924, 259 S.W. 530; *Newberry v. City of St. Louis*, Mo.App., 109 S.W.2d 876, at page 881.

In *Pickel v. Pickel*, 1913, 251 Mo. 197, 158 S.W. 8, 11 the court said:

"The case was not simply affirmed by this court but was reversed in part, consequently certain decisions dealing with simple affirmances may be ignored. Further, those cases in which the filing of the mandate in the trial court was waived are not in point.

By the statute (section 2089, R.S.1909 [Mo. St. Ann. § 1069, p. 1369]) it is made the duty of the clerk of this court to transmit, within 30 days, a copy of its opinion to the court from which the appeal was taken, and it has always been the practice to transmit therewith a copy of the judgment of this court which it is then the duty of the clerk of the trial court (section 2152, R.S.1909 [Mo. St. Ann. § 1132, p. 1410]) to enter in the judgment docket.

"The opinion and judgment constitute the mandate of this court which 'is the official mode of communicating the judgment of the appellate court to the lower court.' 13 Ency. of Pl. & Pr., p. 837. The great weight of authority is that no proceeding can be had, in the absence of waiver, controlling statute or exceptional circumstances until the mandate has been filed. *Id.* Whatever may be said as to the possible effect of defendants' filing the bond after the opinion was filed in this court and before the mandate was filed in the trial court, there is ample authority for the conclusion that he was not required to act affirmatively, in the circumstances of this case, until the mandate reached the court below. *Horton v. State ex rel.*, 63 Neb. 34, 88 N.W. 146; *Marzen v. People*, 190 Ill. [81], loc. cit. 86, 60 N.E. 102; *Barnwell v. Marion* [56 S.C. 54, 33 S.E. 719]; *Trowbridge v. Sickler*, 48 Wis. 424, 4 N.W. 563; *Messenger v. Marsh*, 6 Iowa, 491.

"Parties are not advised in advance of the day on which this court intends to decide a particular case, and no formal method of notification to them is prescribed. The notice of the result is given to the trial court itself by the mandate, and until that mandate is filed, in a case like this, the trial court is not and cannot be required to proceed, and, as the cases cited hold, time granted by the judgment affected by the appeal cannot well be said to begin to run until the party against whom it runs is vested, or revested, with the right to act in the premises. Certainly the weight of authority and, we think, the reason of the thing supports the conclusion that the stay of proceedings did not terminate until the mandate was filed."

In *Argeropoulos v. Kansas City Rys. Co.*, 1919, 201 Mo.App. 287, 212 S.W. 369, it is said in the third syllabus that: "The handing down of an opinion reversing a judgment does not affect the judgment of the lower court until there is a judgment of the appellate court and the filing of a man-

date based thereon * * *." (Italics ours.)

[13] The Missouri cases referred to exhibit a wide variety of situations pertinent in a general way to the inquiry as to the stage at which decisions of various courts of appellate and nisi prius jurisdiction become, in that state, conclusive upon the tribunals rendering them or upon subordinate courts. None of them appear to settle in terms the Missouri law upon the precise point we are called upon to decide here. Undoubtedly a distinction is often drawn between the reversal of a decision of a lower court and its affirmation, with respect to the effect of the action taken on the power of that court to proceed further with the case. In the light of the case of *Ageropoulos v. Kansas City Rys. Co.*, supra, it appears to be the law of Missouri that a trial court may not in Missouri disregard its original judgment where such judgment has been reversed and act upon the basis of such reversal until a mandate pursuant to the reversal has been filed with it.

It is urged that the situation is otherwise in the case of an affirmation. Some color is given to that view by the cases cited by appellant. In the instant case, however, it was not a judgment that was affirmed, but an order granting a new trial. The affirmation of a judgment would call for no further action by a trial court going to the merits of the case. Contrariwise, the affirmation of an order granting a new trial would. Therein the two situations are in considerable degree different. Counsel have found it impossible to produce any Missouri case directly determinative of the precise question, in the sense of involving facts precisely presenting it. However, the rule cited in *State ex rel. McGrew Coal Co. et al. v. Ragland*, 339 Mo. 452, 97 S.W.2d 113, 115, it seems to us, would apply to the facts in this case. The court there said: "No proceeding can be had in the lower court until the mandate has been filed in such court, or at least issued (13 Ency.Pl. & Pr., pp. 837, 840). Mandate denotes the judgment, as shown above, or the judgment and order, issued by an appellate court upon the decision of an appeal or writ of error. Under the statute (Mo.St.Ann., § 1069, p. 1369) and under the practice of this court, a certified copy of the opinion accompanies the mandate. In certain instances—for example when the judgment is reversed and the

cause remanded with directions to proceed as directed in the opinion (*Pickel v. Pickel*, 251 Mo. 197, 208, 158 S.W. 8; *Keaton v. Jorndt*, 259 Mo. 179, 190, 168 S.W. 734), and in other conceivable situation where the opinion might properly be considered—the opinion by such reference made to it becomes pro tanto incorporated with the judgment or mandate, which then constitutes a limited 'power of attorney' to the court below."

The court then continues further to say that the situation is different with a simple reversal. It goes without saying, although the court does not discuss the matter, that the situation is also different when the higher court's judgment is one of affirmation of a judgment rendered below. On the other hand, when there is an affirmation of an order granting a new trial, it would not be far wrong to describe the mandate as a "limited power of attorney to the lower court" since the only manner in which that court may obey it, assuming that the parties seeking to pursue the litigation act with proper dispatch, is to proceed with the new trial.

[14, 15] We are therefore convinced that it is the Missouri law that when an order granting a new trial has been the subject of an appeal, the trial court is without any power to dispose of the case until the mandate is received or has at least been issued out of the higher court. Jurisdiction is, despite an appeal, in many circumstances retained during its pendency by a trial court to deal with collateral matters, but a dismissal of the whole case cannot be said to be a mere collateral matter, since its effect would be to wholly nullify the very order which was the subject of the appeal. In view, then, of the authorities cited we think it must now be considered and held that the dismissal of the Missouri action was beyond the power of the circuit court and void at the time that it was ordered, and, therefore that that court had power at any time to set it aside with or without notice.

[16] The order setting aside the order dismissing the action was predicated on the ground set forth in the application that the previous order was void for the reason that "*said Circuit Court had no jurisdiction or authority to call said case or to dismiss same at the time it did.*" We need cite no authority as to the right of a court to set aside its order or judgment when it is void and is a mere nullity. Such an order has

been characterized as a dead limb on the judicial tree, incapable of bearing fruit, which may be chopped off at any time. *National Union Fire Ins. Co. v. Vermillion*, Mo.App., 19 S.W.2d 776, 783; 34 Cor.Jur., p. 509; *Freeman on Judgments*, 5th ed., p. 643.

[17] What we have said in reference to the \$5,000 note applies with equal force to the several interest notes accompanying said \$5,000 note. We are therefore of the opinion that the action having been brought on all of the notes within the time permitted by the statute of limitations, the action was pending and being maintained in Missouri until it was in some manner legally disposed of. The dismissal of the trial court in Missouri on December 4, 1931, being absolutely void, had no effect upon the pendency of the action. The action was pending and being maintained in Missouri at the time the present action was filed in California and therefore comes within the provisions of section 361, Code of Civil Procedure, of the state of California.

From the facts found and the authorities cited, it follows that the judgment of the Superior Court should be and is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



34 Cal.App.2d 585

WATSON v. BORCOVICH, et al.

Civ. 11049.

District Court of Appeal, First District,
Division 2, California.

Sept. 19, 1939.

Rehearing Denied Oct. 19, 1939.

Hearing Denied Nov. 16, 1939.

1. Work and labor ☞28(5)

In action for money alleged to be due for work, labor and services performed for defendants at their special instance, evidence that work was done under a share-cropping agreement supported judgment for defendants.

2. Appeal and error ☞931(9)

Every intendment is to be indulged in favor of the judgment on appeal, and where trial court fails to make findings of fact and conclusions of law, it will be presumed that they were waived, unless contrary is made to appear affirmatively by the record. Code Civ.Proc. § 632.

3. Appeal and error ☞612(2)

Where purported minutes of trial were certified by clerk but not by trial judge, minutes were not properly before District Court of Appeal, and hence minutes could not be looked to for purpose of contradicting recital of waiver of findings in the judgment. Code Civ.Proc. §§ 632, 670.

4. Appeal and error ☞662(2)

Where trial court reporter's transcript showed no waiver of findings at time of trial, but it did not affirmatively appear that there might not have been a waiver in open court at some later time, either in presence or absence of reporter, and minutes of trial were not properly before District Court of Appeal, the recital of waiver in the judgment must be taken to be true. Code Civ.Proc. §§ 632, 670.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by Jesse Watson against Martin Borcovich and others for money alleged to be due for work, labor and services performed for defendants at their special instance and request. From judgment for defendants, the plaintiff appeals.

Affirmed.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

Edward D. Mabson, of San Francisco, for appellant.

Sans, Hudson & Perry, of Watsonville, for respondents.

DOOLING, Justice pro tem.

Appellant filed an unverified complaint for money alleged to be due for work, labor and services performed for respondents at their special instance and request. The answer was a general denial and after trial without a jury judgment went for defendants.

[1] From the evidence of respondent Axis and the witness Sans the trial court was justified in concluding that the work was done under a share-cropping agreement.

This issue was properly presented by the general denial and the showing that appellant was a share-cropper was a defense to his action for work and labor. *Cull v. San Francisco & Fresno Land Co.*, 124 Cal. 591, 57 P. 456. The evidence therefore supports the judgment for defendants.

The judgment recites that findings of fact and conclusions of law were waived in open court and no findings appear in the record. Appellant claims that the record shows that findings were not waived.

The reporter's transcript shows that at the close of the evidence the case was submitted and the trial judge then said: "Judgment in favor of the defendants on all issues is ordered, and if it is necessary to prepare any findings you will prepare them."

Purported minutes of the trial are included in the clerk's transcript, certified by the clerk but not by the judge. These purported minutes show no entry of a waiver of findings. Where findings are waived in open court by oral consent the code requires that the fact of such waiver be entered in the minutes. Section 632, Code Civ.Proc.

[2] It does not follow from the facts shown by the record that we should find on appeal that the recital in the judgment that findings were waived is false. Every intendment is to be indulged in favor of the judgment and where the court fails to make findings of fact and conclusions of law it will be presumed that they were waived unless the contrary is made to appear affirmatively by the record on appeal. 2 Cal.Jur., Appeal and Error, sec. 516, p. 882.

[3] The purported minutes of the trial are not properly before this court. The clerk cannot certify to the minutes of the trial since they are not enumerated in section 670, Code of Civil Procedure, and hence the minutes so certified cannot be looked to for the purpose of contradicting the recital of waiver in the judgment. *De Acosta v. De Acosta*, 218 Cal. 176, 22 P.2d 1; 2 Cal.Jur., Appeal and Error, sec. 255, pp. 515-6.

[4] The reporter's transcript shows no waiver at the time of trial but it does not affirmatively appear therefrom that there may not have been a waiver of findings in open court at some later time, either in the presence or absence of the reporter. Since the minutes are not properly before us and the reporter's transcript fails to

show affirmatively that findings were not waived, the recital in the judgment that they were must be taken to be true.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



34 Cal.App.2d 632

SHERRY v. INGELS et al.

Civ. 6259.

District Court of Appeal, Third District,
California.

Sept. 22, 1939.

1. Automobiles ⇨138

An order of a trial court, dismissing an accusation against a person convicted of drunken driving after the person had fulfilled terms of his probation and had been permitted to withdraw plea of guilty, was binding on department of motor vehicles with respect to granting a probationary driver's license to such person. Pen.Code, § 1203.4; Vehicle Code, §§ 304(c), 502, 744, St.1935, pp. 136, 174, 241; Vehicle Code, § 307, and subd. 6, St.1937, p. 338.

2. Automobiles ⇨138

Failure of Legislature to except crime of driving a motor vehicle while intoxicated from provision of Penal Code concerning dismissal of accusation against a defendant who has fulfilled conditions of a probation manifested a legislative intent to leave such offense in same category as other penal offenses with respect to effect of dismissal of accusation for drunken driving, after accused had fulfilled conditions of a probation, as respects duty of department of motor vehicles to grant accused a probationary driver's license. Pen.Code, § 1203.4; Vehicle Code, §§ 304(c), 502, 744, St.1935, pp. 136, 174, 241; Vehicle Code, § 307, and subd. 6, St.1937, p. 338.

3. Automobiles ⇨138

Under the 1937 amendment to the Motor Vehicle Code providing, in effect, that convictions of two offenses which would be grounds for suspension of a driver's license

were required to give the department of motor vehicles the right to require proof of ability to respond in damages as a prerequisite to the grant of a probationary driver's license, the Legislature manifested an intention in the direction of leniency in dealing with the offense of drunken driving. Vehicle Code, § 307, subd. 6, St.1937, p. 338.

4. Automobiles ⇐ 138

Where petitioner was convicted on October 28, 1935, for drunken driving and, without having given proof of ability to respond in damages, was convicted on April 3, 1937, for same offense and petitioner fulfilled terms of his probation under second conviction, and on May 23, 1938, was permitted to withdraw plea of guilty and accusation was dismissed as authorized by Penal Code, petitioner was entitled to a probationary driver's license as one who, by records of department of motor vehicles, had been but once convicted of drunken driving. Pen. Code, § 1203.4; Vehicle Code, §§ 304(c), 502, 744, St.1935, pp. 136, 174, 241; Vehicle Code, § 307, and subd. 6, St.1937, p. 338.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Mandamus by Albert F. Sherry against Ray Ingels and another to compel defendants, as director of motor vehicles and chief of the division of drivers' licenses of the department of motor vehicles, respectively, to issue petitioner a probationary driver's license provided for in the Motor Vehicle Code, § 307. From a judgment entered on an order sustaining defendants' general demurrer, petitioner appeals.

Reversed and trial court directed to issue the writ as prayed.

Richard P. MacNulty and J. A. Donnelley, both of San Diego, for appellant.

Earl Warren, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is a mandamus proceeding brought in the superior court in and for the county of Sacramento, to compel the respondents as director of motor vehicles and chief of the division of drivers' licenses of the department of motor vehicles, respectively, to issue the appellant the probationary driver's license provided for in section 307 of

the Vehicle Code, St.1935, p. 138, as amended by St.1937, p. 338. A general demurrer to the petition was filed, which was sustained. Appellant elected to stand upon his original petition, and appeals from the judgment entered on the order sustaining the demurrer.

On October 28, 1935, appellant was first convicted of drunken driving (an offense defined by section 502 of the Vehicle Code St.1935, p. 174). Section 304(c) of the Vehicle Code then provided: "The department upon receipt of a duly certified abstract of the record of any court showing that any person has been convicted under section 502 hereof shall suspend all licenses issued hereunder which the person then holds until the person gives proof of ability to respond in damages as provided in this code." St.1935, p. 136.

On April 3, 1937, the appellant, without having given such proof, was again convicted of drunken driving and was, in addition, convicted of driving without an operator's license. Both convictions of drunken driving were reported to the department of motor vehicles, as required by section 744 of the Vehicle Code, St.1935, p. 241.

Following the second conviction of drunken driving, the court placed the petitioner on probation. The petitioner fulfilled the terms of his probation and on May 23, 1938, was permitted to withdraw his plea of guilty, and the court thereupon dismissed the accusation, as permitted by section 1203.4 of the Penal Code, which was enacted in 1935, St.1935, p. 1709, and which provides: "Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time prior to the expiration of the maximum period of punishment for the offense of which he has been convicted, dating from said discharge from probation of said termination of said period of probation, be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusation or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right and privilege in

his probation papers. The probationer may make such application and change of plea in person or by attorney authorized in writing; provided, that in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed."

Effective August 27, 1937, section 307 was added to the Vehicle Code, subdivision 6 of which provides that: "Any person whose privilege of operating a motor vehicle upon the highway has heretofore been suspended pending the giving of proof of ability to respond in damages under the provisions of sections 304(c) * * * of this code * * * may request, and the department, upon a showing by its records that such person has been convicted of one violation only of an offense which would be ground for such suspension, shall withdraw the requirement that proof be filed and shall issue a probationary license to such person subject to the provisions of this section."

The respondents take the position that the records of the department show that the appellant has been convicted of more than one offense which would be grounds for suspension, and hence that it cannot issue him a probationary license, or any license at all, until he files with the department proof of his ability to respond in damages, as provided in the Vehicle Code.

On the other hand, the appellant contends that since the court upon his second conviction placed him on probation, and since he fulfilled the conditions of his probation and the court permitted him to withdraw his plea of guilty and dismissed the accusation under the provisions of section 1203.4 of the Penal Code, that he is entitled to be released from all penalties resulting from the second conviction, including the penalty of being required to post proof of ability to respond in damages with the department of motor vehicles, and that he is entitled to have issued to him a probationary license as one who by the records of the department has been but once convicted of drunken driving.

[1, 2] We are unable to accept the view of the attorney-general that since there is no provision in the Vehicle Code for a department record of proceedings under section 1203.4 of the Penal Code, the department of motor vehicles is not bound

by an order made under said section. We are of the opinion that the failure of the legislature to except the crime of driving a motor vehicle, while intoxicated, from the provisions of said section, is an indication of an intent to leave said crime in the same category as every other penal offense. To say that the department mentioned is bound and governed solely by its own records, and not by the Penal Code section mentioned, would be tantamount to placing one department of the government above the law.

[3] We are in complete accord with the statement of the attorney-general that this crime is a serious one, and that the law enforcement officers and the department should not be unnecessarily hampered in attempting to curb it. The legislature, however, is solely responsible for the predicament in which the department now finds itself. The law formerly made all forms of this crime a felony. The lawmakers then proceeded to reduce the offense with exceptions to a misdemeanor. The law formerly gave the department the right to require proof of ability to respond in damages upon the commission of one of such offenses, before the convicted party would be permitted to drive again. This must have appeared to the members of the legislature to have been too stringent, and in 1937 they amended the law so that two offenses were required to give the department the right to require such proof as a prerequisite to further use of the highways. The legislative intent would therefore appear to have been in the direction of leniency in dealing with the offense. It may be that the legislature had in mind the question of expediency. In any event the criticism directed toward the situation arising in this case is one which calls for legislative, and not judicial, action. The provisions of the Penal Code mentioned above are plain and unambiguous, and must therefore be enforced.

[4] The second conviction having been rendered ineffective and obliterated by the order of the trial court mentioned above, appellant is only subject to the provisions of the law relating to one who has suffered one conviction. It is therefore the legal duty of the department of motor vehicles to issue a probationary license to him.

As the facts are undisputed, and only a question of law is involved in said action, and as it appears from the foregoing that

the trial court erred in sustaining the demurrer:

It is therefore ordered that judgment be reversed, and the trial court directed to issue the writ as prayed for.

We concur: THOMPSON, Acting P. J.; DEIRUP, Justice pro tem.



34 Cal.App.2d 603

PEOPLE v. PEPPERCORN et al.

Cr. 3235.

District Court of Appeal, Second District,
Division 2, California.

Sept. 20, 1939.

Hearing Denied Oct. 19, 1939.

1. Torts ⚖️10

Workmen have rights to strike and negotiate with employers for purpose of averting strike, but may not violate provisions of Penal Code in exercising such rights.

2. Conspiracy ⚖️43(6)

A count of indictment, charging conspiracy to obtain property by threatening to do unlawful injury to owners' persons and property by causing bodily harm to them and inflicting damage on their property, sufficiently charged extortion, though not stating express manner in which such harm and damage was to be brought about. Pen.Code, §§ 518, 519.

3. Threats ⚖️5

Counts of indictment, charging that defendants obtained or attempted to obtain checks from certain person and corporation by threatening to cause bodily harm to him and inflict damage on their property, unless he paid over and delivered such checks to employers' association for benefit of defendants and labor union, were not fatally defective because of allegation that checks were delivered to such association for defendants' benefit. Pen.Code, § 522.

Ben Peppercorn, Edward Hammer, and Jack Menzo were indicted for conspiracy to commit the crime of extortion, commission of such crime, and attempted extortion, and from an order sustaining their demurrers to a second amended indictment, the People appeal.

Reversed with directions.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

Julian H. Weiss, of Los Angeles, for respondent Jack Menzo.

Henry Haves, of Los Angeles, for respondents Ben Peppercorn and Edward Hammer.

WOOD, Acting Presiding Justice.

This is an appeal by the People from an order of the superior court sustaining the demurrers to the second amended indictment. Twelve counts are set forth in the indictment. In count I defendants are charged with the crime of conspiracy to violate section 518 of the Penal Code, in each of counts II to XI, inclusive, the defendants are charged with the crime of extortion and in count XII they are charged with attempted extortion.

In count I it is charged that defendants "did wilfully, unlawfully and feloniously conspire, combine, confederate and agree together and with divers other persons, whose true names are to the Grand Jury unknown, to obtain the property of other persons; namely, W. L. Keen, Golden State Tailor Service, a corporation, Samuel Schein, Edward Nober, Martin Reisner, Pacific Coast Clothing Co. Inc., a corporation, D. M. Levine, H. S. Salina, Steven Fusco, Paramount Tailors Inc., a corporation, Rose Liotta, Anthony Biley, Marblestones Inc., a corporation, J. Auster, and other persons whose true names are to the Grand Jury unknown; with the consent of the above mentioned persons, other than said conspirators, which was induced by the wrongful use of force and fear by them and there wilfully and feloniously threatening said persons other than said conspirators that unless they did then and there pay over and deliver to Local 278 of the Amalgamated Clothing Workers of America and the defendants herein, the sum of Three Hundred Dollars (\$300.00) or did then and there pay over to a proposed employers' association; which said proposed employers' association was being

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

formed at the instigation and demand of the defendants herein and was the agent of the defendants herein; for the benefit of these defendants and Local 278 of the Amalgamated Clothing Workers of America, the sum of One Hundred Fifty Dollars (\$150.00), that the aforesaid defendants and conspirators would do an unlawful injury to the persons and property of said persons above mentioned other than the defendants and conspirators herein, by then and there causing bodily harm to come to said persons and also by then and there causing injury and damage to be inflicted upon the property of said persons above mentioned, other than the defendants and conspirators herein."

[1] The rights of workmen to strike and to negotiate with employers for the purpose of averting a strike are not involved in this prosecution. It is conceded by the attorney-general that if the indictment contained nothing more than averments showing a labor dispute in which employers were required, in order to avert a strike, to enter into a contract with an association or proposed association to deposit a cash bond to secure the performance of their agreements, a public offense would not be alleged. But such averments are not the only ones contained in the indictment, for it is charged that defendants threatened that unless the cash deposit or bond be given they would do an unlawful injury to the parties named in the indictment by "causing bodily harm to come to said persons and also to then and there cause injury and damage to be inflicted" upon their property. The rights of workmen to strike and to negotiate with employers for the purpose of averting strikes is universally recognized but in exercising these rights they may not violate the provisions of the Penal Code.

[2] The charge contained in count I is conspiracy to commit the crime known as extortion, which is defined in section 518 of the Penal Code as follows: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." It is provided in section 519: "Fear, such as will constitute extortion, may be induced by a threat, either: 1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family;" It is clearly set forth in the indictment that defendants conspired to

commit extortion by threatening to do an unlawful injury which is specifically alleged to be the causing of bodily harm to others and injury to their property.

Manifestly it is an unlawful injury to cause bodily harm to others and to inflict damage upon their property. Defendants place reliance upon the case of *People v. Schmitz*, 7 Cal.App. 330, 94 P. 407, 419, 15 L.R.A., N.S., 717, but that case is easily distinguishable from the one now before us. In the *Schmitz* case, although the indictment used the words "unlawful injury", facts were set forth showing that the injury threatened was not in fact unlawful. In the case under review the facts set forth in the indictment show the injuries threatened to have been unlawful.

It was not necessary for the prosecution to set forth in the indictment the express manner in which bodily harm and damage to property was to be brought about by defendants. It was held in *People v. Sanders*, 188 Cal. 744, 749, 207 P. 380, 382, that a distinction is to be drawn between indictments which directly charge a defendant with a crime and those indictments which charge extortion through threats. In that case the defendant was charged with extortion by threatening to accuse the complainant of a crime, and in ruling that the exact crime threatened need not be set forth in the indictment the court said: "In the latter class of cases no such technical accusation is required as in the former for several obvious reasons, some of which are that the indictment or information cannot go beyond the terms of the threatened accusations, and the accusations need only be such as to put the intended victim of the extortion in fear of being accused of some crime. The more vague and general the terms of the accusation, the better it would subserve the purpose of the accuser in magnifying the fears of his victim, and the better also it would serve to protect him in the event of the failure to accomplish his extortion, and of a prosecution for his attempted crime." In *People v. Lavine*, 115 Cal.App. 289, 292, 1 P.2d 496, 497, the defendant was charged in the indictment with the crime of extortion in that he obtained the sum of \$75,000 by threatening "to expose certain secrets" concerning four persons named in the indictment. The indictment was held sufficient.

[3] In count II of the indictment it is charged that defendants "did wilfully, un-

lawfully and feloniously and by the wrongful use of force and fear, obtain a check for the sum of One Hundred Fifty Dollars (\$150.00) from one W. L. Keen and the Golden State Tailor Service, a corporation, by then and there wilfully and feloniously threatening the said W. L. Keen that unless he, the said W. L. Keen, did then and there pay over and deliver to a proposed employers' association; which said proposed employers' association was being formed at the instigation and request of the defendants herein and was the agent of the defendants herein; for the benefit of the defendants herein and Local 278 of the Amalgamated Clothing Workers of America, the said check for One Hundred Fifty Dollars (\$150.00), the aforesaid defendants would then and there do an unlawful injury to the person and property of the said W. L. Keen and the Golden State Tailor Service, a corporation, by then and there causing bodily harm to come to the said W. L. Keen, and also by then and there and thereafter causing injury and damage to be unlawfully inflicted upon the property of the said W. L. Keen and the said Golden State Tailor Service, a corporation, and the said W. L. Keen by reason of the threats so made and communicated to him, as aforesaid, by said defendants then and there was induced by fear to, and did make, execute and deliver to proposed employers' association, for the benefit of the defendants herein and Local 278 of the Amalgamated Clothing Workers of America, a check for the sum of One Hundred Fifty Dollars (\$150.00) drawn upon a bank within the City of Los Angeles, State of California, and there was at said time and place sufficient funds within said bank to pay the check upon presentation thereat for payment." Counts III to XI, inclusive, are similar except that in each of these counts a different party is named as having delivered a check for \$150.

The contention of defendants that counts II to XI are fatally defective because of the allegation that the checks were delivered to a proposed employers' association for

the benefit of defendants, cannot be sustained. Section 522 of the Penal Code is as follows: "Every person who, by any extortionate means, obtains from another his signature to any paper or instrument, whereby, if such signature were freely given, any property would be transferred, or any debt, demand, charge, or right of action created, is punishable in the same manner as if the actual delivery of such debt, demand, charge, or right of action were obtained." It is apparent that the indictment contains allegations that the signatures were obtained by extortionate means to checks which if freely given would result in the transfer of property to the association being formed for the benefit of defendants. Upon the formation of the association the payment of the checks, if freely given, could be enforced. In *State v. Barr*, 67 Wash. 87, 120 P. 509, 510, a check was delivered through extortionate means but the defendants were arrested before they had an opportunity to present it for payment. The cashier of the bank on which the check was drawn testified that he would not have cashed the check because of the apparent irregularity of the signature. In sustaining the ruling of the trial court striking out the testimony of the cashier the reviewing court held: "It is apparent that the statute above quoted does not require that the property thus obtained shall have actual cash value. The fact that the property obtained was a check or writing, by which a claim against the bank or the drawer could have been made, or a right charged or affected by an indorsee or holder, imported value, and therefore was sufficient under the statute."

The reasons above set forth are applicable to the issues presented by the demurrers to count XII, in which the charge is attempted extortion.

The orders appealed from are reversed and the superior court is directed to overrule the demurrers.

I concur: McCOMB, J.

**PROVIDENT LAND CORPORATION v.
PROVIDENT IRR. DIST. et al.
(MOUTREY et al., Interveners).**

Civ. 5858.

District Court of Appeal, Third District,
California.

Sept. 22, 1939.

Hearing Granted Nov. 20, 1939.

1. Waters and water courses Ⓒ231

Irrigation district's "publication" of delinquent list and notice of sale of land for nonpayment of assessments once each week for three successive weeks, the last time being on August 3, was effective "publication" within statute requiring that "publication" shall not be before 1st of July, but must be made on or before 1st of August, since term "publication" is used in ordinary sense as against contention that notice must appear the required number of times before August 1. St.1927, p. 614, § 41c, as amended by St. 1935, p. 361.

[Ed. Note.—For other definitions of "Publication," see Words & Phrases.]

2. Waters and water courses Ⓒ231

Delayed publication of irrigation district's delinquent list and notice of sale of land for nonpayment of assessments does not of itself invalidate the sale or deed based thereon. St.1927, p. 614, § 41c, as amended by St.1935, p. 361.

3. Waters and water courses Ⓒ231

Where statute provided that "lawful money" was to be medium of payment of irrigation district's bonds, attempt to redeem property sold for nonpayment of irrigation district's assessments with matured bonds and coupons of the district was not a valid redemption, since payment of bonds was not made in medium specified by law. St.1933, p. 532, § 52a.

[Ed. Note.—For other definitions of "Lawful Money," see Words & Phrases.]

4. Mandamus Ⓒ97

Where property was sold for nonpayment of assessments by irrigation district and attempted redemption was invalid, no discretion remained in directors of district and mandamus would lie to compel them to execute and deliver to district a collector's deed to the property.

5. Constitutional law Ⓒ115

There is no exception to the constitutional provision that no law impairing the

obligation of contracts shall ever be passed. Const. art. 1, § 16.

6. Constitutional law Ⓒ38

Statutes Ⓒ63

A statute which conflicts either with the federal or state Constitution, or which deprives a person of a constitutional right, is to that extent void, and is not a law and is in legal contemplation as inoperative as though it had never been passed.

7. Statutes Ⓒ63

An act duly passed and approved has the force of law to protect citizens dealing with public officers under its provisions up to the time that it is declared unconstitutional.

8. Constitutional law Ⓒ143

An irrigation district's bonds payable in lawful money were contracts between the landowners and the bondholders as well as between the district and the bondholders which could not be impaired by statute permitting matured bonds and coupons of district irrespective of their order of presentation and registration to be accepted in redemption of delinquent taxes, where such payment would affect contractual rights of remaining bondholders, in that, if redemptions were paid in cash, money would be applied to the payment of the bonds in the order of their presentation. St.1933, p. 532, § 52a; Const. art. 1, § 16.

9. Waters and water courses Ⓒ231

Where two directors of irrigation district and secretary, assessor, and collector thereof made purported redemptions of property sold for nonpayment of irrigation district's assessments with matured bonds and coupons of the district after statute permitting such redemption was held unconstitutional but while the matter was pending upon rehearing, district's officers did not act in good faith as respects right of purchaser to collector's deed. St.1933, p. 532, § 52a.

Appeal from Superior Court, Glenn County; Warren Steel, Judge.

On rehearing.

Former opinion adhered to.

For former opinion, see 90 P.2d 138.

Louis Bartlett, of San Francisco, for appellant.

George R. Freeman, of Willows, for respondents.

Elmer Laine, of Willows, for interveners and respondents.

PER CURIAM.

Subsequent to the filing of our opinion of May 4, 1939, interveners and respondents asked that the matter be again reopened that they might submit further authorities dealing with the effect of redemption in good faith under section 52a of the Irrigation District Act (Stats. 1933, p. 532) prior to the time that section was declared unconstitutional. A rehearing was granted and the matter is again before us.

We readopt the opinion heretofore given, together with certain additions, as follows:

This action was instituted by Provident Land Corporation to compel, by mandate, the collector of the Provident Irrigation District to execute and deliver to the district a deed of conveyance of some 900 acres of land. Originally some 5400 acres were involved, but by order of the superior court a writ of mandate was directed to issue as to some 4500 acres, but excepted the 900 acres herein involved, upon which there had been an attempt to pay the irrigation district assessment with bonds and coupons under section 52a of the Irrigation District Act as added in 1933, before this section had been declared unconstitutional, in the case of *Shouse v. Quinley*, 3 Cal.2d 357, 45 P.2d 701.

Upon a prior hearing upon this matter, this court, basing its holding upon the invalid sale in 1931, held that the petition for the writ of mandate upon its face showed want of jurisdiction on the part of the court to issue any such writ. This rehearing was granted when it was called to our attention that a subsequent sale had been made to the district for nonpayment of assessments in 1932.

An examination of the sale held in 1932 convinces us that the publication therein was in compliance with the statute and that the sale was valid. Respondents contend that the 1932 sale was invalid for two reasons, first, that the publication of the delinquent list and notice of sale was not made as provided by section 41c of the California Irrigation District Laws in that said publication was not made on or before the first day of August; and, secondly, that the alleged sale to the district was contrary to the provisions of section 44 of the Irrigation District Laws (St.1929, p. 1171), in that said sale was made on the

first day that the property was offered for sale.

[1,2] In regard to the publication of the delinquent notice, the court found in substance that the notice was published three times, to-wit: once a week for three successive weeks in certain newspapers on the 20th and 27th days of July, and on the 3d day of August, 1932. Section 41c of the Irrigation District Act as it read at the time in question provided as follows: "* * * the publication of the delinquent list provided for in this act, shall not be made before the first day of July, but must be made on or before the first day of August * * *." (Stats.1927, p. 614.) By "publication", according to the theory of respondents, is meant the appearance of the notice the required number of times, and therefore the publication of the delinquent list was not complete until the 3d of August, 1932, three days later than required by the statute, thus rendering the sale void. With this construction we are not in accord. Publication is here used in its ordinary sense. In 1935, section 41c of the Irrigation District Act was amended (St.1935, p. 361) to read: "* * the first publication thereof must be made on or before the first day of August". This change in phraseology does not indicate necessarily an intention to change the meaning of the provision but was to remove any "uncertainty and ambiguity * * * by expressing the point involved * * * in language that cannot be misunderstood". *McNutt v. City of Los Angeles*, 187 Cal. 245, 201 P. 592, 595. Furthermore a delayed publication of a tax list does not of itself invalidate the tax sale or a deed based thereon. *Adams v. Slee*, 92 Cal.App. 708, 268 P. 959.

We believe that the foregoing disposes of the objection to the validity of the 1932 sale. The 1932 sale being valid, the next question for determination is whether or not redemptions from tax sales with matured bonds and coupons of the district, under section 52a of the Irrigation District Act, constitute a valid redemption. In 1935 the Supreme Court in *Shouse v. Quinley*, supra, held that the attempt to abrogate the order of payment of irrigation bonds (sec. 52a of the act) was unconstitutional, and that it impaired the constitutional rights of bondholders.

[3,4] In *Islais v. Matheson*, 3 Cal.2d 657, 45 P.2d 326, a statute which amended section 3480 of the Political Code, by

reducing the penalties in effect at the time the district's bonds were issued, was held unconstitutional. It was there determined that the law in effect at the time the contract was made fixed the rights of all parties thereto. When these irrigation district bonds were issued in 1918 and 1921, the Irrigation District Act provided gold and silver coin as the mode of payment, which medium was by later amendment fixed as lawful money. The attempt therefore to redeem the property here in question from the 1931 and 1932 assessments with matured bonds and coupons of the district, under section 52a of the act did not constitute a valid redemption from said sales, as payment was not made in the medium specified in the act creating the bonds. No discretion remained in the directors of the district, and they were in duty bound to direct the execution of the deed.

In *Hershey v. Cole*, 130 Cal.App. 683, 20 P.2d 972, bonds issued by an irrigation district were held to be contracts between the district and the bondholders; and in *Rivers Farm Co. v. Gibson*, 4 Cal.App.2d 731, 42 P.2d 95, such bonds were held also to be contracts between the landowner and the bondholder. One of the provisions of such bonds was that they were payable in lawful money in the order of registration after default (*Bates v. McHenry*, 123 Cal.App. 81, 10 P.2d 1038), and as held in *Shouse v. Quinley*, supra, the payment of irrigation district taxes with bonds and coupons impairs the obligation of the contract with the other bondholders.

[5] Article I, section 16, of our state Constitution declares: "No * * * law impairing the obligations of contracts shall ever be passed." There is no exception to this rule. The state, by virtue of its police power, can override a contract, as may be done by the railroad commission under its power to regulate rates, for example, but the exercise of such power is not an impairment of a contract, as all contracts are entered into subject to the right of the state, through the exercise of its police power, to abrogate them.

Another rule, more broad in scope, covering not only the impairment of a contract, but also a statute, is thus stated in 5 California Jurisprudence 641:

[6] "A statute which conflicts with either the federal or the state Constitution, or which deprives a person of a constitutional right, is to that extent void. A

void act is not a law. * * * It is, in legal contemplation, as inoperative as though it had never been passed."

[7] It is to be observed that the rule stated in the Constitution concerning a law impairing the obligation of a contract is subject to no exception. As to the second rule, concerning a statute in conflict with a constitutional provision one exception, at least, is recognized, that is, that an act duly passed and approved has the force of law to protect citizens dealing with public officers under its provisions up to the time that it is declared unconstitutional.

Nowhere among the authorities cited by respondent do they cite a case involving the impairment of the obligation of a contract between the governing body and a third person, nor have we been able to find one. *Miller v. Dunn*, 72 Cal. 462, 14 P. 27, 1 Am.St.Rep. 67; *Cooley v. County of Calaveras*, 121 Cal. 482, 53 P. 1075; *Wingerter v. City and County of San Francisco*, 134 Cal. 547, 66 P. 730, 86 Am.St. Rep. 294.

Where a taxpayer has paid taxes to a municipality (not an irrigation district) under a law subsequently declared unconstitutional, the status created by the payment of these taxes was confirmed. *Philadelphia v. Ridge Ave. Ry. Co.*, 142 Pa. 484, 21 A. 982, 24 Am.St.Rep. 512; *Estate of Knowles*, 295 Pa. 571, 145 A. 797, 63 A.L.R. 1086; see, also, 61 C.J. 1288; *Darrow v. Union County*, 87 Iowa 164, 54 N.W. 149.

[8] From the foregoing the distinction becomes clear that in the case of a municipality there is no contract between a bond creditor of the city and the taxpayer. The contract is with the city only. In an irrigation district, on the other hand, the district bonds are contracts between the landowners and the bondholders (*Rivers Farm Co. v. Gibson*, supra), as well as between the district and the bondholders. In the case of the city no contract with third parties is impaired by legislation changing for instance the salary of any of its officials or providing for payment of work done without sufficient authority, but in the case of an irrigation district a change in the order of payment of bonds by permitting any bonds, irrespective of their order of presentation and registration, to be accepted in redemption of delinquent taxes does affect the contractual rights of the remaining bondholders, in that if the redemptions were paid in cash, such money could be applied to the payment of the bonds in the

order of presentation. *Shouse v. Quinley*, supra.

[9] An examination of the record shows that interveners, two being directors of the district and the other the secretary, assessor and collector thereof, made the purported redemptions with bonds and coupons after the Supreme Court had held that redemptions so made under section 52a of the Irrigation District Act were invalid, but while the matter was pending upon rehearing. Their official connection with the irrigation district and their opportune presentation of the bonds and coupons for redemption make it quite apparent they were acting with knowledge of the legal status of the issue then before the court. It cannot be held they acted in good faith.

The judgment is reversed.



34 Cal.App.2d 636

**FRESNO CITY HIGH SCHOOL DIST. v.
DILLON.**
Civ. 2349.

District Court of Appeal, Fourth District,
California.
Sept. 22, 1939.

1. Pleading ⇨312

Allegations concerning a letter, copy of which was attached to pleadings, could not contradict the language of the letter.

2. Judgment ⇨181

A judgment on the pleadings on motion of plaintiff cannot be entered when the answer raises a material issue or states a substantial defense.

3. Judgment ⇨181

In school district's action for permission to dismiss permanent teacher on grounds that teacher was engaging in outside employment in violation of school board's rule and that teacher failed to inform himself of school board's rules, where teacher's answer denied that he was conducting a music conservatory and that he had failed to inform himself of school board's rules, trial court

was not justified in granting judgment for plaintiff on pleadings, unless there were factors in the case permitting trial court to disregard such denials in the answer. School Code, § 5.542.

4. Judgment ⇨181

In school district's action for permission to dismiss permanent teacher, a letter written by school teacher to superintendent, containing statement that teacher could not comply with rules of school board forbidding outside employment because of his financial condition, but not containing statement that he would not comply with rules was not a refusal to comply with board's rules, and did not justify judgment on pleadings on ground that the letter, a copy of which was attached to the pleadings, was an admission of the charge of refusal to comply with the rules. School Code, § 5.542; Code Civ.Proc. § 448.

5. Judgment ⇨181

In school district's action for permission to dismiss permanent teacher, a statement in letter written by teacher to superintendent that "All teachers were doing private work when I entered the system and the rule had been disregarded for many years. I knew nothing of it," was not an admission that teacher had failed to familiarize himself with rules of school board as required by statute, but was only an admission that he knew nothing of rule when he entered school system, and did not justify judgment on pleadings on ground that the letter, a copy of which was attached to the pleadings, was an admission of the charge of failure to familiarize himself with the rules. School Code, § 5.542.

6. Pleading ⇨129(5)

The failure to deny the genuineness and due execution of an exhibit to a pleading only admits that the copy is a true copy of the original instrument which is a genuine document, signed by the party whose signature it bears, and that it was delivered in the manner prescribed by law, and it does not necessarily admit truth of every fact mentioned in it, so that other conflicting facts may not be proved by other proper evidence at trial. Code Civ.Proc. § 448.

7. Judgment ⇨181

In school district's action for permission to dismiss permanent teacher on ground that teacher was engaging in outside employment in violation of school board's rules, even if

teacher's letter to superintendent dated February 22, 1938, was binding admission that he was conducting music conservatory in February, such admission would not preclude teacher from introducing evidence that he had discontinued such business before notice of dismissal which was dated March 24, 1938, and filing of complaint on April 29, 1938, and hence the fact that genuineness and due execution of letter was not denied could not of itself support judgment for district on the pleadings. School Code, § 5.542.

8. Stipulations ⇐6

Where the making of an oral stipulation, executory in effect, which has neither been reduced to writing and filed with the clerk, nor entered in the minutes, is denied by one of the parties, the court will refuse to try a collateral issue for purpose of determining whether any agreement had been made. Code Civ.Proc. § 283.

9. Stipulations ⇐9

Courts will generally recognize oral stipulations, not entered on the minutes, that have been executed and that cannot be nullified without doing an injustice to one party, but where an attorney by an oral stipulation not entered on the minutes attempts to stipulate away his client's cause of action or defense, the statutory rule requiring that agreement be filed with clerk or entered upon minutes of the court will be applied. Code Civ.Proc. § 283.

10. Attorney and client ⇐101(1)

An attorney cannot, by virtue of his general authority, bind his client by any act which amounts to a surrender in whole or in part of any substantial right.

11. Schools and school districts ⇐141(5)

A school district's action for permission to dismiss permanent teacher on grounds that teacher was engaging in outside employment in violation of school board's rule, and that teacher failed to inform himself on subject of school board's rules and regulations, was prematurely brought, where no notice to correct such violations within 90 days was given teacher, since violations were "correctable faults" within statute requiring notice. School Code, § 5.652.

12. Attorney and client ⇐86 Stipulations ⇐9

In school district's action for permission to dismiss permanent teacher on grounds that teacher was engaging in outside employ-

ment in violation of school board's rule, and that teacher failed to inform himself on subject of school board's rules and regulations, purported stipulation by teacher's counsel that only issue to be decided was whether board's rules were reasonable and nondiscriminatory would not prevent teacher from presenting defense that action was prematurely brought, where stipulation was not reduced to writing and filed with the clerk nor entered on the minutes of the court, and the consent of the teacher to the stipulation did not appear. School Code, §§ 5.542, 5.652; Code Civ.Proc. § 283.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by the Fresno City High School District against Earl Dillon for permission to dismiss defendant as a permanent teacher in such district. From a judgment for the plaintiff, following granting of plaintiff's motion for judgment on the pleadings, the defendant appeals.

Judgment reversed, with directions.

Claude L. Rowe, of Fresno, for appellant.

Dan F. Conway, Dist. Atty., and W. C. Tupper, Asst. Dist. Atty., both of Fresno, for respondent.

MARKS, Acting Presiding Justice.

This is an appeal from a judgment authorizing the dismissal and discharge of Earl Dillon from his employment as a permanent teacher of the Fresno City High School District. The judgment was rendered after a demurrer to defendant's answer to the first cause of action in the complaint had been sustained and a motion for judgment on the pleadings on the first cause of action had been granted. Nothing seems to have been done as to a second cause of action contained in the complaint. From the view we take of the case, it will not be necessary to give this portion of the pleading any further attention. For brevity we will hereafter refer to the first cause of action as the complaint.

We may thus summarize the allegations of the complaint. It alleges the formation and legal existence of the Fresno City High School District and states the names of its board of education; that defendant was classified as a permanent teacher in May, 1936. It further alleges:

"That plaintiff is informed and believes, and on such information and belief, alleges that defendant for a considerable time prior to, and on the 17th day of February, 1938, was maintaining and conducting a private conservatory of music at number 2983 Tulare Street in the City of Fresno, and gave private instructions in music for compensation in said conservatory, and ever since has been and now is maintaining and conducting said conservatory of music and giving private instructions in music therein."

It is also alleged that on February 17, 1938, plaintiff notified defendant in writing to discontinue his conservatory of music; that on February 22, 1938, "defendant notified plaintiff in writing that he would not comply with said demand"; that on March 24, 1938, plaintiff formulated, filed and served on defendant written charges against him, including a notice of its intention to dismiss defendant; that within thirty days defendant served on plaintiff a written demand for a hearing on the charges.

Violation of two rules and regulations (subd. 10 of rule IXa, and subd. 1 of rule IXa) were charged. The first rule provides:

"All teachers employed by the Board of Education on full time salary schedule are expected to devote their entire time and energy to the work of the Fresno City Schools, except that: a. Teachers in the day schools may teach as much as two nights per week in night school classes, and teachers handling classes in Naturalization and English for adult beginners may teach as many as three nights per week, provided such service does not constitute more than four and one-half (4½) hours of teaching in any one week. b. Teachers may be employed in choirs and as organists of churches, subject to the approval of the Board. Teachers shall not engage in any other outside employment except by special permission of the Board."

The second rule is as follows:

"All teachers are required to make themselves familiar with the rules that relate to their school duties, with the provision of the State Law, and rules of the board governing the duties of pupils."

In his answer defendant denied that on February 17, 1938, or prior or subsequent thereto "or ever since has been and/or now is conducting such conservatory of

music". He also denied that he had violated any of the provisions of subdivision 1 of rule IXa of the rules and regulations of the board of education.

[1] Defendant denied that he notified plaintiff that "he would not comply" with the demand to close his conservatory of music but admitted writing the letter which formed the foundation for this allegation in the complaint. As a copy of this letter is attached to the pleadings the allegations concerning it become unimportant as they cannot contradict the language of the letter.

The charges against defendant, omitting the portions on which the second cause of action is based, are as follows:

"Notice of Intention to Dismiss
Employee.

"To Major Earl Dillon:

"You are hereby notified that the Board of Education of the Fresno High School District charges that there exists the following causes for your dismissal as an employee of said district, to-wit:

"1) That in violation of subdivision 1 of Section IXa of the rules and regulations of the Board of Education, you have failed to familiarize yourself with the same, particularly Subdivision 10 of said Section IXa which forbids an employee engaging in outside employment.

"2) That in violation of Subdivision 10 of said Section IXa you have established, and, are conducting, carrying on, and teaching in, a conservatory of music at 2983 Tulare Avenue in the City of Fresno.

"a) That you have admitted such act on your part.

"b) That you have notified the Board of Education that you will not comply with said rule and that you intend to continue to conduct said school and disregard said rule. * * *

"4) That for the causes above stated and for the reason that you refuse to obey a reasonable rule and regulation adopted for the benefit of the pupils of the district you are not a proper person to be in charge of pupils.

"The rule above referred to has been adopted for the protection of the teachers as well as the pupils. If a teacher engages in outside employment it tends to dissipate his energy and make him less efficient. The work of a teacher is a very exacting task and requires his full time and energy. He should, so far as his work will permit,

go to his classes each morning refreshed and prepared to give the pupils thorough and efficient instruction. Some teachers may be able to do excellent work and engage in limited outside employment, but the great majority of teachers can not do so, and it is for that reason the rule has been adopted. The first consideration is the welfare of the pupils. The very great majority of teachers recognize the rule is for the betterment of the schools and gladly accept and obey the same. The California School Code, section 5.542, requires you to obey and enforce reasonable rules and regulations of the Board and not to disregard and disobey them.

"Wherefore, you are hereby notified that for the causes and reasons, above stated and set forth, the undersigned intend to dismiss you at the expiration of 30 days from the service of this notice.

"Dated this 24th day of March, 1938."

[2, 3] It is apparent from our analysis of the pleadings that the answer contained denials of two material allegations of the complaint, namely, (1) that defendant is conducting a conservatory of music and (2) that he had failed to inform himself on the subject of the rules and regulations adopted by the school board. These denials go to the essence of the charges against him and unless there are other factors in the case permitting the trial judge to disregard these denials in the answer, it is clear that the judgment must be reversed. It is elementary that a judgment on the pleadings on motion of plaintiff cannot be entered when the answer raises a material issue or states a substantial defense. 21 Cal.Jur., p. 235, sec. 164 et seq.

[4] Plaintiff first relies on a letter dated February 22, 1938, written by defendant to Homer C. Wilson, superintendent of schools of Fresno. It is argued that this letter is in effect an admission of the charge that defendant was and is conducting a conservatory of music and that he had failed to inform himself on the rules and regulations adopted by the school board; that it amounts to a flat refusal on the part of defendant to discontinue his conservatory of music; that the genuineness and due execution, not being denied, are admitted.

We do not so construe this letter. It opens with the statement that "I realize * * * it is necessary that you carry out your rules as laid down by your board."

Then follows a rather detailed statement of the financial conditions of defendant under which his immediate insolvency would follow if he were required to discontinue his teaching of music outside of school hours. In this portion of his letter defendant states: "I regret that I cannot obey the rule of the board, but conditions have made it utterly impossible." This is followed by a statement that defendant wishes to continue teaching until he reaches retirement age. In closing, he suggests three alternatives as a compromise of his difficulties: (1) that he be permitted to teach undisturbed until the end of the 1937-1938 school year; (2) that he be appointed to continue as a part time teacher of music which would permit outside employment under the rules; and (3) that the rules be modified.

While the letter contained a rather strong statement that defendant "could not" comply with the rules of the board because of his financial condition, there is nowhere any statement that he would not comply with them. Taken as a whole and fairly construed, we are of the opinion that the letter is not a refusal to comply with the board rules, but rather a plea by a greatly disturbed teacher that he be shown consideration and that some way be found out of his difficulties. The only reply to this letter was the notice of intention to dismiss defendant.

[5] The argument that the letter admitted the charge that he had failed to familiarize himself with the rules and regulations of the board is based on the following sentences: "All teachers were doing private work when I entered the system and the rule had been disregarded for many years. I knew nothing of it" (the rule against outside employment). Clearly, this is only an admission that he knew nothing of the rule when he entered the Fresno school system. It is not an admission that he did not thereafter familiarize himself with the rules.

[6] Furthermore, the failure to deny the genuineness and due execution of an exhibit to a pleading only admits "that the copy is a true copy of the original instrument which is a genuine document, signed by the party whose signature it bears, and that it was delivered in the manner prescribed by law". *Stoneman v. Fritz*, Cal.App., 92 P.2d 1035, 1036; sec. 448, Code Civ.Proc. It does not necessarily and

conclusively admit the truth of every fact mentioned in it so that other conflicting facts may not be proved by other proper evidence at the trial.

[7] It should also be observed that the letter was dated February 22, 1938; that the notice of dismissal was dated March 24, 1938; that the complaint was filed April 29, 1938. If we should assume that the letter contained a binding admission that defendant was conducting a conservatory of music in February, that assumption would not preclude defendant from introducing evidence that he had discontinued such business after February 22, in support of the denials of his answer which we have already outlined. Therefore, the fact that the genuineness and due execution of the letter was not denied does not of itself destroy the effect of the issues tendered in the answer and cannot of itself support the judgment on the pleadings.

Plaintiff maintains that the judgment on the pleadings is supported by the following stipulation set forth in the judgment:

"And the plaintiff and defendant having further stipulated at the oral argument that the only question to be decided by the court was whether or not the rules and regulations adopted by plaintiff were reasonable and nondiscriminatory, or whether the same were unreasonable or discriminatory and in the event the court should hold said rules to be reasonable and non-discriminatory, judgment should be entered for the plaintiff upon said demurrer and said motion; but that if said court should hold said rules to be unreasonable or discriminatory, plaintiff's demurrer should be overruled and said motion for judgment upon the pleadings should be denied, * * *."

Counsel for defendant vigorously and positively denies making any such stipulation. He has produced a reporter's transcript of the proceedings had on June 14, 1938, which contains no reference to or mention of such stipulation. However, the demurrer to the answer and motion for judgment on the pleadings were also argued on June 10, 1938. There is no reporter's transcript of those proceedings. The minutes of the court contain no reference to nor mention of any such stipulation. The agreement was not reduced to writing and filed with the clerk of the court.

Section 283 of the Code of Civil Procedure provides in part as follows:

"An attorney and counselor shall have authority:

"1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise."

The following cases have construed and applied the quoted portion of the section: *Borkheim v. North British etc. Co.*, 38 Cal. 623; *Preston v. Hill*, 50 Cal. 43, 19 Am. Rep. 647; *Merritt v. Wilcox*, 52 Cal. 238; *Smith v. Whittier*, 95 Cal. 279, 30 P. 529; *McLaughlin v. Clausen*, 116 Cal. 487, 48 P. 487; *Ephraim v. Pacific Bank*, 149 Cal. 222, 86 P. 507; *Webster v. Webster*, 216 Cal. 485, 14 P.2d 522; *McClellan v. State of California*, 119 Cal.App. 535, 6 P.2d 994; *Jones v. Noble*, 3 Cal.App.2d 316, 39 P.2d 486; *Skoglund v. Moore Dry-Dock Co.*, 11 Cal.App.2d 287, 53 P.2d 1001; *Price v. McComish*, 22 Cal.App.2d 92, 70 P.2d 978; *Beckett v. City of Paris Dry Goods Co.*, 26 Cal.App.2d 295, 79 P.2d 178.

It should not be necessary to review in detail each of the foregoing cases and others that might be cited on the same subject. It should be sufficient to state that while the strict construction of the code section found in some of the earlier cases has been somewhat relaxed by later decisions, two rules pertinent here seem to be firmly established and to have remained unquestioned.

[8] The first is that where the making of an oral stipulation, executory in effect, which has neither been reduced to writing and filed with the clerk nor entered in the minutes, is denied by one of the parties, the courts will not inquire into the matter but will apply the rule of section 283 of the Code of Civil Procedure. In *Smith v. Whittier*, supra, the Supreme Court said [95 Cal. 279, 30 P. 531]:

"If, however, the terms of the verbal agreement are disputed, courts refuse to settle such disputes, or to try a collateral issue for the purpose of determining whether any agreement had been made."

[9, 10] The second rule is that while the courts will generally recognize oral stipulations, not entered on the minutes, that have been executed and that cannot be nullified without doing an injustice to one party, still where an attorney by an oral stipulation not entered on the minutes attempts to stipulate away his client's cause of action or defense, the code rule will be applied

and authority from the client to make the stipulation must appear. In *Price v. McComish*, supra, the court said [22 Cal.App. 2d 92, 70 P.2d 980]:

"At page 386 of volume I of *Thornton on Attorneys at Law* it is said: 'An attorney certainly cannot bind his client by any unauthorized act which amounts to a total or partial surrender of a substantial right.'

"And with respect thereto, as is attested in 3 California Jurisprudence 667, the general rule within this state is that 'an attorney cannot, by virtue of his general authority, bind his client by any act which amounts to a surrender in whole or in part of any substantial right. In harmony with this rule, it has been held in California that an attorney cannot stipulate to pass his client's rights or title to land which is the subject-matter of the litigation. Similarly, it primarily rests with the client and not his attorneys to decide whether or not an amount tendered by the adverse party should be accepted in full satisfaction of a claim for money due.'

"The principal issue involved in the appeal in the case of *Merritt v. Wilcox*, 52 Cal. 238, was whether, as against the allegations in the answer to the complaint, an attorney could bind his client, who was the defendant in the action, by his oral stipulation, not entered in the minutes of the court, to the effect that if the plaintiff should recover judgment, it would be payable in gold coin. The ruling made by the Supreme Court was directly against the proposition that the attorney had any such authority. After quoting section 283 of the Code of Civil Procedure, wherein, in part, it is provided that the authority of an attorney includes that of binding his client 'in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise'; and conceding that in purely procedural matters in the course of the trial of an action the client might be bound by an oral stipulation of his counsel, the court said:

"'But however this may be, the alleged agreement in controversy here is not one of the character supposed, nor one as to which there is any conceivable reason for a relaxation of the statute. While it did not purport to let judgment go for the plaintiff, it, nevertheless, conceded to him, in case of success, a judgment more favorable, more valuable, and, in effect, for a greater sum of money, than he might otherwise ob-

tain. It also operated, by necessary consequence, a substantial amendment of the pleadings; it practically deprived the defendant of the benefit of an important defense interposed by him, and upon which, upon the record, and except for the supposed stipulation, he was entitled to rely. The actual rights of the parties cannot be thus made to rest on the mere verbal agreements of counsel, casually made, and not entered of record. To do so would be to abrogate the statute entirely.'

"To the same effect, see *Bare v. Parker*, 51 Cal.App. 106, 196 P. 280, wherein on the trial of the action the principal issue was whether the subject-matter of the litigation was community property. It appears that: 'Nearing the close of trial, counsel for intervenor proposed several stipulations that were assented to by counsel for plaintiff. One was that "the property * * * was * * * held by (husband and wife) as tenants in common." Undoubtedly assent was unwittingly given to this stipulation. It negatives the theory of plaintiff's case, and would have stipulated him out of court. The trial court appreciated the situation, and properly refused to permit an inadvertence or want of attention on the part of counsel to work what he conceived to be an injustice. "A trial court does not sit as a mere referee in a contest of wits between counsel in the case, but that it is not only within his province, but is his duty, to see that as nearly as possible the issues shall be disposed of on their merits. * * *"' *Farrar v. Farrar*, 41 Cal.App. (452) 182 P. 989.'

"Nor does the fact that an admission or stipulation was made in open court by an attorney in the presence of his client necessarily vary the rule. In the case of *Davidson v. Gifford* (1888) 100 N.C. 18, 6 S.E. 718, 721, it was said:

"'Merely casual, hasty, inconsiderate admissions of counsel in the course of a trial do not bind the client. They are not intended to have such effect, nor does the nature of the relation of attorney and client produce such result. And this is so, although the client be present when such inconsiderate admissions are made. It would be rude, indecorous, disorderly, and confusing if the client should interpose to correct his counsel, and disclaim his authority to make such admissions. Neither the court, counsel, nor any intelligent person expects him to do so. And for the like

reason, the client, if examined as a witness, is not required to disclaim such admissions of his attorney, unless he shall be examined by the opposing party for that purpose.'

"From a consideration of the foregoing precedents and authorities, it becomes manifest that even conceding the fact that in the instant case the attorney who represented plaintiff made the statement, in effect, that his client would be satisfied with a 'nominal' judgment in his favor, such stipulation (if it may be so considered) was unauthorized, was not 'filed with the clerk,' nor 'entered upon the minutes of the court,' and consequently was not binding on plaintiff."

[11, 12] It cannot be doubted that the stipulation, if made in the precise form it appears in the record, stipulated away a defense that if sustained by the evidence, would have resulted in a judgment for defendant.

It must be admitted that the violations of the two rules were correctable faults. No notice to correct them within ninety days was given defendant as required by section 5.652 of the School Code. We have held in a quite similar case where no such notice was given, that the action was prematurely brought. *Fresno City High School District v. De Caristo*, Cal.App., 92 P.2d 668.

We therefore conclude that as the purported stipulation stipulated away the very essence of the defense which on the face of the record appears valid; that as the stipulation was not reduced to writing and filed with the clerk nor entered on the minutes of the court; and that as the consent of defendant to the stipulation does not appear, it must be disregarded. It follows that as the answer put in issue material facts, which denials were not waived in the manner provided by law, the motion for judgment on the pleadings should have been denied.

Counsel for defendant has argued a number of constitutional questions in his brief. We have considered them and are not greatly impressed with any of them. It is unnecessary to consider any of them in detail here.

The judgment is reversed with directions to the trial court to deny the motion for judgment on the pleadings and to give defendant a reasonable time within which to amend his answer.

I concur: GRIFFIN, J.

JONES v. BLANKENBURG et al.

Civ. 2334.

District Court of Appeal, Fourth District, California.

Sept. 19, 1939.

Hearing Granted Nov. 16, 1939.

1. Adoption ⇨25

In absence of provisions, settling forth special terms and conditions of inheritance by adopted child from adoptive parent, in petition for, consent to, and decree of, adoption, such child has only natural child's right of inheritance under Nebraska statutes. *Comp.St.Neb.1922*, §§ 1568, 1569, 1571, 1572.

2. Adoption ⇨25

Where petition for, consent to, and decree of, adoption of child in Nebraska did not refer to or include terms of contract between adoptive and natural fathers as to child's right to inherit all of adoptive father's property, California court can give no force or effect to any of such terms, and such child has only natural child's right of inheritance from adoptive father. *Comp.St.Neb.1922*, §§ 1568, 1569, 1571, 1572.

3. Wills ⇨82

A parent may disinherit his natural child by will. *Probate Code*, § 20.

4. Adoption ⇨25

In Nebraska, adoption proceedings are judicial in their nature. *Comp.St.Neb. 1922*, §§ 1568, 1569, 1571, 1572.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by John Conklin Jones against Albert F. Blankenburg, executor of the last will and testament of Owen Jones, deceased, and another to establish plaintiff's right to property of the estate. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Gray, Cary, Ames & Driscoll, of San Diego, for appellant.

Marie M. Herney and M. Luther Ward, Jr., both of San Diego, for respondents.

MARKS, Justice.

Plaintiff brought this action to establish his right to the property of the estate of Owen Jones, deceased. A general and special demurrer to the complaint was sus-

tained by the Hon. L. N. Turrentine, who granted time in which to amend. No amended complaint having been filed, the formal judgment of dismissal was signed by the Hon. Lloyd E. Griffin, then a judge of the superior court of San Diego county, Judge Turrentine being then absent from San Diego.

The complaint alleges that Owen Jones, a resident of San Diego county, died there on January 6, 1937, leaving his last will which was executed the day before; that the will was admitted to probate and Albert F. Blankenburg was appointed and qualified as executor; that plaintiff was born in Nebraska on March 5, 1897, the son of Elijah Conklin; that plaintiff's mother died on March 6, 1897; that "on or about the 20th day of April, 1901, in the County of Lincoln, State of Nebraska, the plaintiff's father, Elijah Conklin, made and entered into an oral agreement with Owen Jones, the above-named decedent, wherein and whereby the said Elijah Conklin promised to surrender the plaintiff to the custody and control of the said Owen Jones, and promised to relinquish all rights which he, the said Elijah Conklin, might have to the custody and control of the said plaintiff, and wherein and whereby the said Owen Jones, in consideration of the aforesaid promises of Elijah Conklin, and the performance of them, agreed to adopt the said plaintiff and agreed further that said plaintiff would have and receive all of the property of which the said Owen Jones should be the owner at the time of his death."

The complaint further alleges that on April 20, 1901, pursuant to and in performance of the foregoing agreement, Elijah Conklin gave and surrendered plaintiff to Owen Jones and relinquished all his rights of custody and control of plaintiff; that Owen Jones and Bridget Jones, his wife, duly and legally adopted plaintiff as their son through proceedings had in the county court of Lincoln county, Nebraska; that in those proceedings plaintiff was given the name of John Conklin Jones, by which he has been known ever since; that plaintiff was taken into the family of Owen and Bridget Jones as their son and was thereafter treated by them and conducted himself as such; that the estate of Owen Jones is of the value of about \$9,444.75; that the will of Owen Jones left plaintiff \$1 instead of all his property.

It is evident that the general demurrer was sustained because the complaint was

deemed insufficient because it contained no allegation to the effect that the petition for adoption, the consent to adoption and the decree of adoption set forth the terms and conditions of the special contract between Owen Jones and Elijah Conklin, providing that plaintiff would inherit all of the estate of Owen Jones. See Nebraska Stats. 1897, chap. 94, § 1 et seq.; Compiled Stats. of Nebraska, 1922, §§ 1568, 1569, 1571, 1572.

These statutes were considered and construed in *In re Enyart's Estate*, 116 Neb. 450, 218 N.W. 89, 90. The primary question there involved was whether or not the natural father of Logan Enyart, deceased, was his heir at law after the adoption of Logan Enyart by Katherine Enyart with the consent of her husband. The court said:

"Our statute relating to adoption of minor children provides that an adult person, under certain conditions, may adopt a minor child. If the parents of such child are living, their consent in writing must be obtained, and, if the adopting person is married and living with his or her spouse, the consent of such spouse to the adoption must be also obtained. The statute contemplates that the person desiring to adopt shall file in the county court a petition, and therein set forth the terms and conditions on which the adoption is desired to be made. Before a decree, the parents or persons having legal control of such minor child are required to file a written consent, wherein they voluntarily relinquish all right to the custody of and power and control over said minor child and all claim and interest in and to his or her services and wages. Thereafter, a time is appointed by the county court for a hearing, and a notice must be given of the time and place thereof; and, if upon such hearing the court shall find that the adoption is for the best interests of said minor child, a decree shall be entered in accordance with the terms and conditions of said petition and consent. It is further provided by section 1572, Comp.St.1922:

"Unless the terms and conditions in such consent and petition otherwise provide, the person or persons adopting, and the child adopted shall after adoption, sustain toward each other the usual relation [and the adopted child shall have bestowed upon him or her equal rights, privileges and immunities of children born in lawful wedlock], of parent and child, and shall have all the right and be subject to

all the duties of that relation, and the parents of such adopted child shall, thereafter stand relieved of all parental duties toward, and all responsibility for, said minor child and shall have no right over it.'

"The brackets do not appear in the statute. The reason for the interpolation will appear later.

"At common law, adoption of heirs or children was unknown. For some time after the enactment of adoption statutes the courts were inclined to their strict construction because they were said to be in derogation of the common law. Later, the humanitarian aspects and purposes of such statutes were recognized, and the courts generally evinced a disposition to give them a liberal rather than a strict construction. This court has adopted the rule of liberal construction. *Ferguson v. Herr*, 64 Neb. [649] 659, 90 N.W. 625, 94 N.W. 542. It is evident that our statute contemplates two kinds of adoption; one is restricted by the terms and conditions contained in the petition for and consent to the adoption; and the other is an unrestricted adoption. If no terms and conditions are contained in the petition and consent, the adoption is without restriction and is subject to and governed by the terms of said section 1572.

"The petition for adoption, involved in this action, contained no restrictions or conditions relative to the rights and privileges of the adopting parent or adopted child. The first 12 words of section 1572, Comp.St.1922, therefore have no application to the facts herein involved. The decree in the adoption proceedings found that, in the manner required by law, the natural parents of Logan E. Koser had voluntarily relinquished all right to the custody of and control over said minor and to his services and wages, and that it was for the best interests of said minor child that he should be so adopted. Following the findings, the court decreed that:

"The right to the custody of and power and control over said Logan E. Koser and its services and wages by its father and mother, George S. Koser and Hazel K. Koser, shall and do cease and determine from this date, and that said Logan E. Koser shall be the adopted child of said Katherine Enyart upon the conditions of the sworn statements made herein, and shall take the surname of said Katherine Enyart, and be known as Logan Enyart, and be subject to her exclusive custody

and control, and shall possess all the rights, privileges and immunities of children born in lawful wedlock.'

"Neither the petition, consent nor decree of adoption contains any restriction or conditions limiting the right of the adopted child to inherit from the adoptive parent, nor the right of the adoptive parent to inherit from the adopted child. The respective rights of the adopted child and the adoptive parent to inherit, one from the other, if they exist, must be found by virtue of the provisions of section 1572, Comp.St.1922.

"From a careful examination of section 1572, supra, it seems clear that what the Legislature meant to say, concerning the mutual relations of the adoptive parents and the adopted child, may be better understood by omitting the words included in the brackets, as set out above. It would then read:

"The person or persons adopting, and the child adopted shall after adoption, sustain toward each other the usual relation of parent and child, and shall have all the right and be subject to all the duties of that relation.'

"This statute therefore defines and fixes the relationship existing between the adoptive parent and the adopted child. Pursuant to this statute, the decree of adoption created, in law, between the adoptive parent and adopted child, the relation of parent and child, and further provided that after adoption they shall have all the right and be subject to all the duties of that relation. Under our statute of descent, as it then existed and now exists, one of the rights of the child was to inherit from its parents, if they died intestate. It was likewise one of the rights of the parent to inherit from the child, if the latter died intestate, leaving surviving no widow or issue.

"The right of inheritance is created by statute. It is within the power of the Legislature to determine what persons or whether any person shall inherit from one who dies intestate, and to determine what proportion of the decedent's estate shall descend to any particular person or class of persons. The Legislature creates and may take away the right to inherit. It is within the power of the Legislature to confer the right of inheritance upon adopted children or adoptive parents, as well as upon natural children and parents. If there are no restrictions, limitations or condi-

tions in the adoption, our statute of adoption creates the legal relation of parent and child and gives to the adoptive parent and the adopted child all of the rights that pertain to that relation by virtue of the statute of descent."

The case of *In re Grinnell's Estate*, 117 Neb. 332, 220 N.W. 583, 586, is persuasive and the application of the principles it announces to the facts of the instant case leads us to the conclusion that the judgment in the instant case must be affirmed.

The following facts appear in that opinion: Jennie Grinnell and Albert Grinnell were husband and wife. Albert died on March 9, 1924, and Jennie died intestate on May 19, 1925. George Wixon was the natural son of Jennie Grinnell by a former marriage. On September 20, 1884, Jennie and Albert had regularly adopted John B. Grinnell and Joseph B. Redfield, who were taken into their home and in every particular treated as their natural children. The petition for adoption, the consent to adoption and the decree of adoption contained no special terms and conditions concerning the rights of the adopted children to inherit from their adoptive parents.

The adoption statutes of Nebraska in effect in 1884 (Gen.Stats.1873, chap. 57, §§ 796 to 801) provided in effect that the petition for adoption, the consent to adoption and the decree of adoption must show affirmatively an intention to permit the adopted child to inherit from the adoptive parents before any such right would be created.

The supreme court of Nebraska was of the opinion that the statutes of adoption of 1897, *supra*, were amendatory of the statutes of adoption of 1873, *supra*; that as both the right of adoption and the right of inheritance were creatures of statute the right of inheritance could be changed by statute at any time before the death of the ancestor; that therefore the amendments of 1897 were applicable to the case and determined the rights of inheritance of John B. Grinnell and Joseph B. Redfield.

After quoting at length from *In re Enyart's Estate*, *supra*, the court stated its conclusions as follows: "We are of the opinion that the act of 1897, providing for the adoption of minor children, of which section 1572, Comp.St.1922, is a part, preserved the adoption of children theretofore adopted and gave the right to inherit from their adoptive parents to such adopted children as were not precluded from inherit-

ance by the terms and conditions of the proceedings by which they were adopted."

The instant case presents a situation exactly converse to that decided in *In re Grinnell's Estate*, *supra*. There the right to inherit as natural children was upheld because the petition for adoption, the consent to adoption and the decree of adoption failed to set forth any special terms and conditions concerning their rights of inheritance from their adoptive parents. In the instant case the trial court refused to recognize a prior contract giving the adopted child a special right of inheritance from the adoptive parent because the petition for adoption, the consent to adoption and decree of adoption were silent on the question of the contract.

[1-3] It is clear from the two cases from which we have quoted that in the absence of any provisions setting forth special terms and conditions of inheritance in the three documents, concerning the right of the adopted child to inherit from the adoptive parent, such child has the right of inheritance of a natural child and no more. It follows that as the petition for adoption, the consent to adoption and the decree of adoption of plaintiff failed to refer to and did not include any of the terms or conditions of the contract between Owen Jones and Elijah Conklin giving plaintiff the right to inherit all of the property of Owen Jones, we can give no force or effect to any of the terms of that contract. Plaintiff has only the right of inheritance from Owen Jones that he would have had had he been his natural child. See, also, *Ferguson v. Herr*, 64 Neb. 649, 90 N.W. 625, 94 N.W. 542. In both California and Nebraska a parent may by his will disinherit his natural child. Section 20, Prob.Code; *Estate of Hayne*, 165 Cal. 568, 133 P. 277, Ann.Cas.1915A, 926; *Pohle v. Nelson*, 108 Neb. 220, 187 N.W. 772.

[4] It is settled in Nebraska that proceedings in adoption are judicial in their nature. In speaking on a question similar to the one before us, the supreme court of Mississippi said: "In our opinion the rights of the appellees are governed, controlled, and limited by the petition and decree, and that all antecedent agreements were merged in the agreement therein. If the articles of adoption did not contain the real agreements, it would have been necessary for the minors to have brought a bill in the nature of a bill of review within 2 years after attaining their majority,

and made a direct attack upon the adoption proceedings." *McLean v. McAllum*, 131 Miss. 234, 95 So. 309, 311.

The judgment is affirmed.

I concur: BARNARD, P. J.

GRIFFIN, J., being disqualified, does not participate herein.



37 Cal.App.2d Supp. 742

LAYPORT v. RIEDER.

Civ. A 4362.

Appellate Department, Superior Court,
Los Angeles County, California.

Sept. 21, 1939.

1. Statutes ⇨142, 158

Repeals and amendments by implication are not favored in the law.

2. Criminal law ⇨13

Penalties ⇨2

Crimes and penalties are not to be established by implication.

3. Usury ⇨136

The statute authorizing contracts for interest at a rate not exceeding 12 per cent. per annum and permitting recovery of treble the amount of interest paid in excess of 12 per cent. was not amended by subsequent constitutional provision prohibiting charging of interest rates in excess of 10 per cent., and one cannot recover treble the amount of interest paid unless such interest exceeds 12 per cent. *Usury Law*, § 3, St.1919, p. lxxxiii; *Const. art. 20, § 22*, added in 1934.

4. Usury ⇨42

Under constitutional provision prohibiting charging of interest rates in excess of 10 per cent., a contract for interest at 12 per cent. is void and lender cannot recover interest in action on contract. *Const. art. 20, § 22*, added in 1934; *Civ.Code, § 1667*.

5. Usury ⇨102(1)

Under constitutional provision prohibiting payment of interest in excess of 10 per cent., if borrower pays interest at an usurious rate, he may recover the amount so paid

in an action brought for that purpose. *Const. art. 20, § 22*, added in 1934; *Civ. Code, § 1667*.

6. Usury ⇨142(5)

Where, in action to recover treble amount of interest paid on a note bearing 12 per cent. interest, complaint alleged facts showing common law right, under Constitution limiting rate of interest to 10 per cent., to recover actual amount of interest paid, and defendant failed to show a defense to such right, plaintiff could recover amount of interest paid on note with interest at 7 per cent. on such amount from date of payment. *Civ.Code, § 1667; Const. art. 20, § 22*, added in 1934.

7. Appeal and error ⇨1171(4)

Where the difference between the allegations of parties as to date of payment of usurious interest sought to be recovered involved only eight cents, the difference was too trifling to be considered as a ground for requiring a trial and the date as stated by defendant would be taken as correct. *Civ.Code, § 1667; Const. art. 20, § 22*, added in 1934.

Appeal from Municipal Court of City of Los Angeles; Frank G. Tyrrell, Judge.

Action by Lee N. Layport against Michael Rieder to recover treble the amount of interest paid to defendant on a note. From a summary judgment for the plaintiff, the defendant appeals.

Reversed, with directions.

Arthur Wm. Green, of Los Angeles, for appellant.

E. O. Leake and J. J. Leake, both of Los Angeles, for respondent.

SHAW, Presiding Judge.

Plaintiff seeks to recover, and by proceedings under section 437c, C.C.P., he obtained summary judgment for, treble the amount of interest paid by him to defendant on a note. The note provided for interest at the rate of 12 per cent per annum, and plaintiff paid interest at this rate, in the sum of \$144.22. The note was given by plaintiff to defendant after the addition to the Constitution, in 1934, of section 22 of Article XX, limiting the rate of interest to 10 per cent, and defendant was not in any of the classes of money lenders exempted by that section from its operation. The note was therefore in contravention

of that section and the interest paid by plaintiff was usurious.

But the constitutional section above mentioned makes no provision for the remedy to be allowed one who has paid usurious interest. The only possible authority for the recovery of treble the interest paid is section 3 of the Usury Law of 1918, St. 1919, p. lxxxiii. It was held in *Penziner v. West American Fin. Co.*, 1937, 10 Cal. 2d 160, 173, 74 P.2d 252, that this law was not repealed by the adoption of the constitutional provision above mentioned, in so far as it applies to lenders not exempt from the constitutional restrictions. But it does not follow from this holding that section 3 of the usury law may be applied here. Sections 1 and 2 of the usury law (*Deering's Gen.Laws*, 1937 ed., Act 3757) authorize contracts for interest at a rate not exceeding 12 per cent per annum and make invalid any agreement to pay interest at a greater rate than that, and section 3 provides that "Every person * * * who for any loan * * * of money * * * shall have paid * * * any greater sum * * * than is allowed to be received under the preceding sections, one and two, may * * * recover * * * treble the amount of the money so paid". This plainly means that a recovery may be had if the interest paid was at a rate in excess of 12 per cent, and authorizes nothing more. Here there was no interest paid in excess of that rate.

[1,2] It is true, the Supreme Court, in reaching its conclusion in *Penziner v. West American Fin. Co.*, supra, said: "Aside from reducing the maximum permissible rate from 12 per cent. to 10 per cent. there is nothing in the constitutional provision to indicate that it was intended thereby to affect the applicability of the Usury Law provisions at least in so far as they apply to the nonexempt classes of lenders" (10 Cal.2d p. 173, 74 P.2d page 258), and "in so far as the constitutional amendment changes the maximum permissible rate of interest from 12 per cent. to 10 per cent. for all practical purposes, it constitutes an amendment of sections 1 and 2 of the Usury Law." 10 Cal.2d p. 174, 74 P.2d page 258. But in that decision the court was dealing with no such question as we have here. The loan there involved had been made and the interest thereon in excess of 12 per cent and in violation of the usury law had been paid long before the adoption of the constitutional amendment, and the

argument which the court was meeting was a contention of the defendant there that the usury law, under which the plaintiff there claimed a recovery of treble interest, had been repealed by the amendment. The statement first above quoted is directly applicable to that contention, and suggests nothing about the applicability of the usury law in any other form than that in which it is written. The basis for the second quoted statement had been laid in previous declarations that two paragraphs of the constitutional amendment in which the rate of 10 per cent was mentioned were, except for the reduction of the permissible rate from 12 per cent to 10 per cent, "substantially similar" to section 1 and to the first part of section 2 of the usury law 10 Cal.2d page 172, 74 P.2d 252. The whole purpose of the discussion was merely to show that there was no such inconsistency between the usury law and the constitutional amendment that the former could not stand after the adoption of the latter. But the constitutional amendment did not purport to change any of the words of the usury law, nor do we believe that the court meant by any of the language above quoted to declare that it had that effect. As already suggested, such a declaration would have been obiter dictum, and all the remarks of the court can be otherwise explained. Repeals by implication are not favored, as the court declared in the *Penziner* case, 10 Cal.2d at page 176, 74 P.2d 252, and the same is true of amendments by implication. See 59 *Corpus Juris* 857, sec. 434; *Scheafer v. Herman*, 1916, 172 Cal. 338, 343, 344, 155 P. 1084. Particularly should this be so here, where to construe the new constitutional provision as effecting an actual amendment by implication of sections 1 and 2 of the usury law would result in the building up by the same implication of a penalty (the treble recovery, here involved, of interest paid), and even of a crime (by reason of the provision of section 3 of the usury law making it a misdemeanor to violate "sections one and two of this act"). Crimes and penalties are not to be so built up. *Ex parte McNulty*, 1888, 77 Cal. 164, 168, 19 P. 237, 11 Am.St.Rep. 257; *People v. Zimbrolt*, 1939, Cal.Super., 91 P.2d 252.

[3] When stating the effect of the *Penziner* decision in a case decided a few days later, the court said the holding was that "the usury law of 1918 had not been repealed, but that all the provisions of

said usury law not in conflict with the provisions of said constitutional amendment were in full force and effect." *Nuckolls v. Bank of California*, 1937, 10 Cal.2d 266, 277, 74 P.2d 264, 270, 114 A.L.R. 708; to same effect, *Nuckolls v. Bank of California*, 1937, 10 Cal.2d 278, 282, 74 P.2d 271. If the usury law is not repealed and is "in full force and effect," it stands as written, and the effect is that while an agreement for interest on a loan at a rate greater than 10 per cent is illegal—made so by the constitution—it does not subject the lender to the punishment for a misdemeanor or the penalty of repaying treble the amount of the interest he receives unless the rate exceeds 12 per cent. Such an application of the constitution and the law is not without reason, and finds its analogue in provisions of the criminal law which either fix a heavier punishment for a second offense or a higher degree of the offense, or graduate the punishment according to the consequences of the forbidden act. For examples of the latter see Sections 500, 501, 502, and 505 of the Vehicle Code, St.1935, pp. 173-175.

[4,5] While the constitutional provision does not expressly provide a remedy or a penalty for its violation, and the usury law as written does not cover cases where the rate of interest is more than 10 per cent but not more than 12 per cent, yet the constitutional provision is not without sanctions even in the cases just mentioned. Being contrary to the constitutional prohibition, a contract for interest at 12 per cent is void and the lender could not recover the interest in an action on the contract. C.C. § 1667; *Firpo v. Murphy*, 1925, 72 Cal.App. 249, 253, 254, 236 P. 968; *Herkner v. Rubin*, 1932, 126 Cal. App. 677, 681, 14 P.2d 1043. Furthermore, if the borrower actually pays interest at an usurious rate he may, independent of the statute, recover the amount so paid in an action brought for that purpose. *Taylor v. Budd*, 1933, 217 Cal. 262, 266, 267, 18 P.2d 333, and cases there cited.

[6,7] This is a proper case for the application of the rule laid down in the case last cited. While the complaint contains a prayer for treble interest, it clearly alleges all the facts from which plaintiff's common law right of action to recover the actual amount of interest paid by him arises, and those same facts appear in plaintiff's affidavit in support of his motion for summary judgment. These facts

are not disputed in the affidavit filed by defendant in opposition to the motion, but the affidavit for defendant states that the date of payment was January 25, 1939, instead of January 22, 1939, as stated by plaintiff, and that the payment was made by plaintiff's attorney to defendant's attorney, instead of between the parties personally; variances in the facts which would not impair plaintiff's right to recover the payment. Assuming that the maker of a note who, when about to pay it off, computes the interest due at the request of the holder and informs the latter that a certain sum constitutes interest on the note at 10 per cent, or some other lawful rate, might, after that sum had been accepted by the holder in reliance on such computation, be estopped to claim that such sum was in fact in excess of lawful interest and constituted usury, the only showing tending toward such a state of affairs which is made in the affidavit for defendant relates to a different note from that upon which plaintiff paid the interest which he seeks to recover. As to the last mentioned note, the statement in the affidavit is that the affiant, defendant's attorney, "caused the interest upon said promissory note to be computed at the rate therein specified"—which was 12 per cent. Plaintiff has shown his right to recover the interest paid by him, with interest on the amount thereof at 7 per cent from the date of payment, and this right is not defeated by his prayer for other relief to which he was not entitled. While there is a difference of three days in the respective statements of the date of payment, interest on the amount paid for this period, 8 cents, is too trifling to be considered as ground for requiring a trial, and the date as stated by defendant may be taken as correct. *De minimis non curat lex*. Defendant has shown no defense to this demand of the plaintiff, and plaintiff should have judgment therefor.

The judgment is reversed and the cause is remanded to the municipal court with directions to render a summary judgment for plaintiff, on his motion therefor, for the sum of \$144.22 together with interest thereon at the rate of seven per cent per annum from January 25, 1939 to date of judgment and for costs, defendant to recover from plaintiff his costs of this appeal.

We concur: BISHOP, J.; SCHAUER, J.

14 Cal.2d 338

**CARPENTER, Insurance Commissioner, v.
GLENN-COLUSA IRR. DIST.**

Sac. 5193.

Supreme Court of California.

Sept. 27, 1939.

1. Waters and water courses ⇨230(8)

The holder of matured bonds and coupons of irrigation district, after presentment and refusal of payment thereof, was not entitled to recover money judgment, since entry of judgment against district would not give bondholders any additional remedies in seeking to enforce payment. St.1919, p. 667, § 52.

2. Appeal and error ⇨839(1)

District Court of Appeal need not consider matters which are outside the issues of the case.

3. Action ⇨6

Waters and water courses ⇨230(8)

Determination of whether defendant irrigation district was liable on bonds issued by district which was consolidated with and became part of defendant district, and whether its liability on any of bonds had become barred by limitation, would involve granting of declaratory relief, and hence such questions were not matters which could be determined in action by bondholder against district, where only prayer was for money judgment.

4. Appeal and error ⇨840(1)

District Court of Appeal would not determine rights of holder of matured bonds and coupons of irrigation district on coupons presented for payment but not stamped by treasurer of district, where district conceded that the presentation was all that was required to give bonds and coupons the benefit of registration under statute and question was outside issues. St.1919, p. 667, § 52.

In Bank.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as Conservator of Great Republic Life Insurance Company, against Glenn-Colusa Irrigation District, to recover judgment on matured bonds and coupons issued by the Williams Irrigation District, which was consolidated with and

became a part of defendant. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Prior opinion, 87 P.2d 61.

W. Coburn Cook, of Turlock, for appellant.

Hankins & Hankins, and P. J. Minasian, all of San Francisco, for respondent.

PER CURIAM.

This is an action by the holder of bonds of an irrigation district to recover a money judgment against the successor of the district.

Glenn-Colusa Irrigation District, defendant herein, was organized in 1920. In 1924 a plan was proposed for its consolidation with Williams Irrigation District, a smaller district. This plan was carried out by an election called for the purpose, and thereby the Williams Irrigation District became a part of defendant.

Plaintiff is the holder of unpaid bond interest coupons of the old Williams District which matured after the consolidation, in the sum of \$18,000. He brought this action, alleging his ownership and that the coupons were presented to the treasurer of defendant district with demand for payment, which was refused. The prayer was for a money judgment against the district. A general demurrer was sustained without leave to amend, and judgment for defendant followed. Plaintiff appealed.

[1] This case is controlled by *Moody v. Provident Irrigation District*, 12 Cal.2d 389, 85 P.2d 128. It was therein pointed out that under section 52 of the California Irrigation District Act, St.1919, p. 667, registration of unpaid bonds or coupons amounts to a new agreement, in which the interest rate rises from 6 per cent to 7 per cent, and the statute of limitations is tolled, until such time as money becomes available to pay the obligations. It followed, therefore, that no additional right would be gained by the entering of a money judgment, which would be an idle and unnecessary act. Accordingly it was held that an action to recover such a judgment was improper.

Plaintiff necessarily concedes the force of the above decision, but suggests exceptions to the rule by reason of certain asserted differences in the facts of the present case.

[2, 3] The first point urged is that this action seeks to establish the liability of the defendant, Glenn-Colusa Irrigation District, for the old obligations of the Williams Irrigation District. Plaintiff relies on certain general observations in *Jordan v. Williams Irrigation District*, 13 Cal.App. 2d 465, 57 P.2d 566, to the effect that when a public corporation or district takes over the property of another district, there is an implied promise to pay the obligations of the district thus absorbed. Defendant replies by setting forth the asserted facts of consolidation, showing that the plan recommended by the state engineer and submitted to the voters called for the apportionment of the indebtedness of the Williams District to the lands of that district alone, and that assessments have been levied on the lands of the old Williams District annually for that purpose. However, we need not discuss these matters, for defendant's statement is mere argument in the briefs brought forth in connection with its contention that the point is outside the issues of the case. With this contention we agree.

Plaintiff, in effect, now asks for declaratory relief, a determination of the liability of the lands of defendant district for the obligations represented by certain bonds. But this was not a proceeding for declaratory relief, contains no pleadings appropriate thereto, and the complaint discloses an entirely different object. The sole relief sought, a money judgment, is inappropriate, whether defendant district is or is not liable on the bonds. Hence the lower court was warranted in sustaining the demurrer.

The next point made by plaintiff is that certain of his bond coupons were not presented within 4 years of their maturity, and, therefore, are on their face barred by the statute of limitations. But, he contends, the district has never made any provision for payment of these coupons during the last 10 years, and consequently should be estopped to set up the defense of the statute of limitations. Here again it seems that plaintiff wants a declaratory judgment in the appeal from the lower court's decision. We repeat that whether defendant is liable on the bonds owned by plaintiff, and whether the liability on any of them has become barred by limitations, are not matters which can be determined in an action for a money judgment against the district. If any basis for estoppel ex-

ists, and we express no opinion on the point, the denial of a money judgment in this case cannot deprive plaintiff of any rights he may have by virtue of such an estoppel.

[4] It is finally urged by plaintiff that it is necessary to decide what are his rights on coupons presented for payment but not stamped by the treasurer. Assuming that there are such coupons, it seems to be conceded by defendant that the presentation is all that is required to give bonds or coupons the benefits of registration under the statute, and we have no reason to question this concession. But this point, likewise, is outside the issues of the present proceeding, for the reasons stated above.

The judgment is affirmed.



14 Cal.2d 342

SCHILDWACHTER v. CITY OF COMPTON et al.
L. A. 15919.

Supreme Court of California.

Sept. 27, 1939.

1. Municipal corporations ⇐108

The statutory provision, prohibiting withdrawal of departments, officers or employees from operation of municipal civil service system without approval thereof by two-thirds vote of electors voting on proposition, does not deprive electors of power to repeal civil service ordinance by majority vote. Gen.Laws Supp.1935, Act 1401, § 2.

2. Municipal corporations ⇐108

A city council properly submitted question of repealing civil service ordinance to popular vote as a "proposition," instead of submitting repealing ordinance. Gen.Laws 1931, Act 3651, § 1.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Harry B. Schildwachter against the City of Compton and others to set aside a resolution of the City Coun-

cil repealing a civil service ordinance. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Superseding opinion, 87 P.2d 64.

A. N. Soliss, of Compton, for appellant.

Ralph K. Pierson, City Atty., of Compton, for respondents.

SHENK, Justice.

This is an action by a taxpayer and elector of defendant, City of Compton, to set aside a resolution of the city council declaring the repeal of its civil service ordinance following a popular vote.

On June 11, 1935, the city council adopted ordinance No. 368, establishing a civil service system. Thereafter a change in personnel of the council resulted in attempts to repeal and to amend the civil service ordinance, each of which was met by a referendum petition, following which the council repealed the repealing and amending ordinances.

On December 3, 1935, the council decided to submit the question of repeal of the civil service ordinance to a popular vote. A special election was called for January 17, 1936, and an affirmative vote of 1404 to 1310 was registered. Accordingly the council declared the original civil service ordinance repealed.

Plaintiff brought this action to have said determination declared a nullity, making two contentions: First, that a two-thirds vote was required for the repeal and the simple majority vote was consequently inadequate; second, that the matter was improperly submitted as a "proposition" instead of an ordinance. The lower court sustained a demurrer to the complaint without leave to amend, and dismissed the action. In our opinion, the court rightly concluded that plaintiff failed to successfully challenge the result of the election.

[1] In support of the first contention that a two-thirds vote was required for the repeal, plaintiff advances the following argument: Defendant city operates under a freeholders' charter which merely authorizes provision "for a Civil Service System subject to the terms of this charter" but is silent on the procedure for establishing it. The same charter declares that "where the general laws of the state provide a procedure for the carrying out and enforcement of any rights or powers belonging to the city, said procedure shall

control and be followed unless a different procedure shall have been provided in this charter or by ordinance". Section 16 of of the civil service ordinance provides that the "general laws of the State of California as they now or may hereafter exist, with reference to a Civil Service System in Municipalities, in so far as the same do not conflict with the provisions of this ordinance, or the Charter of the City of Compton, are hereby incorporated herein and made a part hereof". The Municipal Civil Service Act of 1935 (Deering's Gen. Laws, Act 1401) provides that the legislative body of any municipality which has established a civil service system "shall not have the authority to withdraw any departments, appointive officers or employees from the operation of such system unless and until the withdrawal thereof shall have been submitted to the qualified electors of said city at a special or regular municipal election held in said city and shall have been approved by not less than a two-thirds vote of the electors voting on such proposition". Section 2. The argument is in substance that the civil service ordinance incorporated by reference the above provisions of the Municipal Civil Service Act, and that since the charter is silent on the procedure of repeal of a civil service ordinance, there is no conflict nor interference with the paramount power of the municipality in its municipal affairs.

Defendant city vigorously attacks this reasoning, contending that under the charter the power to establish a civil service system resides in the city and that the Municipal Civil Service Act was not incorporated by the general language in the charter. It is further urged that the statute did not become effective until after the ordinance was adopted, and that the city could not validly incorporate such future legislation. Still further, it is contended that the attempt to enforce the said statutory provision for a two-thirds vote would be to directly violate the charter, because the charter expressly incorporates the provisions of the City Initiative and Referendum Law of 1911 (Deering's Gen. Laws, Act 3651), which, in connection with elections such as these, require only a majority vote. It is unnecessary, however, to further examine these contentions, for defendant has advanced a more conclusive answer to the theory of plaintiff. The very statutory provision relied upon by plaintiff has nothing to do with an election

called for the purpose of repealing a civil service ordinance. The provision (sec. 2 of Act 1401) states that the legislative body shall designate the departments, officers or employees which shall be placed under the civil service system; that it may from time to time, by ordinance, add additional departments, officers or employees to the list; and it then goes on to declare, as above quoted, that no departments, officers or employees may be withdrawn from the operation of the system without a two-thirds vote of the electors. The language of the section is free from ambiguity, and the intention seems quite clear. It was designed to discourage and make more difficult the exemption of departments or positions by members of the governing body of the municipality. This seems to be a salutary rule, but we are unable to perceive the manner in which it may be invoked to deprive the electors of their normal power to adopt legislation by a majority vote. The suggestion that repeal is simply another form of withdrawing positions from the operation of the system is without force. It is entirely reasonable that the council should have power by ordinance to establish or repeal a civil service system, and that the people should likewise have such power by majority vote, and it is not unreasonable that the council, by the requirement of a two-thirds vote to approve them, should be prevented from creating favored exemptions.

[2] The other contention of plaintiff is that assuming the election was governed by the provisions of the City Initiative and Referendum Law, the method of submission of the question to the voters was improper. He relies on general statements to the effect that an ordinance may be repealed only by an enactment of equal dignity, i. e., by another ordinance. See McQuillan, *Municipal Corporations*, 2d Ed., § 885; 18 Cal.Jur. 928, note 7. Here, instead of a repealing ordinance, there was submitted to the voters a "proposition" for repeal. But this is the very thing contemplated by the above-mentioned statute, which provides in part (sec. 1): "The legislative body of the city or town may submit to the people, without a petition therefor, a proposition for the repeal of any adopted ordinance, or for amendments thereto, or for the enactment of any new ordinance, to be voted upon at any succeeding regular or special municipal city or town election, and if such proposition so submitted receive a majority of the

votes cast thereon at such election, such ordinance shall be repealed, amended or enacted accordingly." This language clearly contemplates the submission of a "proposition" and does not necessarily require such proposition to be an "ordinance". In the next paragraph of the statute it is provided that "Whenever any ordinance or proposition is required by this statute to be submitted to the voters of a city or town at any election, the clerk of the legislative body shall cause the ordinance or proposition to be printed and he shall mail a copy thereof * * * to each voter * * *." Notice and full information are thus afforded the voters, and we are satisfied that the city council in the present case followed the proper procedure in the submission of the proposition for repeal.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; YORK, Justice pro tem.



14 Cal.2d 346

BRAUN v. BROWN et al. (ASSMANN, Intervener).

L. A. 16889.

Supreme Court of California.

Sept. 28, 1939.

Rehearing Denied Oct. 26, 1939.

1. Gifts ⇐85

In action against deceased's administrator to establish a gift causa mortis, trial court's finding that by delivery of key to deceased's safe deposit box to plaintiff deceased gave plaintiff, causa mortis, all his interest in property in controversy embodied a finding that deceased acted in contemplation of death. Civ.Code, §§ 1149, 1150.

2. Gifts ⇐62(6)

Evidence that approximately twenty days before his death deceased, a man 67 years old and ill in bed, in presence of witness delivered key to his safe deposit box to plaintiff, a close friend, and told plaintiff that everything in box belonged to her and that plaintiff took key and kept it until after deceased's death, established a val-

id "gift causa mortis" of property in safe deposit box. Civ.Code, §§ 1149, 1150.

[Ed. Note.—For other definitions of "Gift Causa Mortis," see Words & Phrases.]

3. Gifts ⇨80

In action to establish a gift causa mortis, the statutory presumption arising from statute providing that a gift made during last illness or under circumstances which would naturally impress one with expectation of speedy death is presumed to be a gift in view of death is evidence and is sufficient evidence to establish gift, unless rebutted. Civ.Code, § 1150.

4. Gifts ⇨59

The fear of impending death is not a sole essential element of a "gift causa mortis." Civ.Code, §§ 1149, 1150.

5. Gifts ⇨59

That donor entertains some hope of recovery when making gift does not preclude a valid "gift causa mortis." Civ.Code, §§ 1149, 1150.

6. Gifts ⇨82(2)

In action against decedent's administrator to establish a gift causa mortis, evidence supported trial court's finding that gift by deceased to plaintiff was made in contemplation of death and was a "gift causa mortis." Civ.Code, §§ 1149, 1150.

7. Gifts ⇨53

In order to effectuate a gift causa mortis, the donor is not bound to use grammatically correct words in expressing an intention to make a gift, but it is sufficient that appropriate words of gift are used.

8. Gifts ⇨82(2)

Evidence that deceased, a man 67 years old and ill in bed, in presence of witness delivered key to his safe deposit box to plaintiff, a close friend, and told plaintiff that everything in box belonged to her, was sufficient to support finding that deceased had a specific intent to give contents of box to plaintiff when delivering key to her. Civ. Code, §§ 1149, 1150.

9. Gifts ⇨83

In an action to establish a gift causa mortis, whether deceased intended a gift is question of fact to be determined by considering situation of parties, their relationship, circumstances surrounding transaction, apparent purpose of making gift, and words spoken at the time. Civ.Code, §§ 1149, 1150.

10. Gifts ⇨82(1)

That deceased, after delivering key to his safe deposit box to plaintiff, and telling plaintiff that everything in box belonged to her, had stated to others that everything that deceased had in box belonged to plaintiff, did not manifest a future contingency with respect to gift causa mortis. Civ.Code, §§ 1149, 1150.

11. Gifts ⇨53

That deceased, after having delivered key to his safe deposit box to plaintiff and telling her that everything in box belonged to her, had manifested a desire to sign a paper of some kind to confirm the gift, did not affect validity of gift causa mortis, where gift was otherwise established. Civ.Code, §§ 1149, 1150.

12. Appeal and error ⇨1008(1)

In action to establish a gift causa mortis, a finding by trial court, determined from all the evidence, with respect to intent of alleged donor, will not be disturbed by reviewing court.

13. Gifts ⇨62(6)

Deceased's delivery to donee of key to deceased's safe deposit box was a sufficient delivery for a valid gift, causa mortis, of personal property locked in box where box was not capable of manual delivery.

14. Gifts ⇨62(6)

Rules or regulations of a bank in which deceased had a safe deposit box did not affect validity of gift, causa mortis, of personal property in box.

15. Gifts ⇨62(6)

Where deceased delivered key to his safe deposit box to plaintiff with intent to make a gift, causa mortis, of personal property in box, that there was a second key to box was immaterial with respect to plaintiff's right to contents of box when second key was locked in box and accessible only to one who had control of key delivered to plaintiff.

16. Gifts ⇨63

A gift, causa mortis, of personal property locked in a safe deposit box by delivery of key to donee and statement that all property in box belonged to donee did not fail for lack of acceptance, although donee did not exercise authority over property by taking possession before deceased's death. Civ.Code, §§ 1149, 1150.

17. Gifts Ⓒ62(6)

That donee of gift, *causa mortis*, of personal property located in deceased's safe deposit box, upon refusal of bank to surrender possession of property, turned safe deposit box key over to deceased's administrator did not preclude donee from recovering in action against administrator to establish gift *causa mortis*.

18. Appeal and error Ⓒ482

A motion to recall writ of supersedeas would be dismissed by Supreme Court where motion had become *functus officio*.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas and Robert W. Kenny, Judges.

Action by Teresa A. Braun against Ben H. Brown, administrator of the estate of Julius H. Schmidt, deceased, and another, to establish a gift *causa mortis* by deceased to plaintiff of certain personal property and to quiet title thereto, wherein Raymond G. Assmann proposed intervention. From a judgment for plaintiff, the administrator and another and Raymond G. Assmann appeal, and a motion to recall a writ of supersedeas was made.

Affirmed.

See, also, 87 P.2d 1009.

J. H. O'Connor, County Counsel and Ernest Purdum, Deputy County Counsel, both of Los Angeles, for appellant.

C. M. Castruccio and Horace W. Danforth, both of Los Angeles, for intervener and appellant Raymond G. Assmann.

J. Marion Wright and Owen E. Kupfer, both of Los Angeles, for respondent Teresa A. Braun.

PULLEN, Justice pro tem.

Two matters, a motion to recall a writ of supersedeas and an appeal from a judgment, are before us. A determination of the appeal will make unnecessary any special consideration of the motion and we will, therefore, direct our attention first to the merits of the appeal.

The action was brought against the administrator of the Estate of Julius H. Schmidt, deceased, to establish a gift *causa mortis* by deceased to plaintiff of certain personal property, and to quiet title thereto. This personal property, consisting of stocks, bonds, promissory notes, a diamond

ring and bank deposit books during his lifetime belonged to Schmidt, and was kept in a safe deposit box in a bank in the city of Los Angeles. After the death of Schmidt, plaintiff attempted to take over the box and its contents, but upon refusal of the bank to surrender possession to her, she turned the key to the box over to defendant, who had previously obtained letters of administration in the Estate of Schmidt, and upon the refusal of the administrator to recognize her claim to the property brought this action to secure the same or its value.

The underlying facts as revealed by the record briefly are that some time in 1922 Schmidt met Teresa A. Braun, the plaintiff, at a church bazaar in Chicago. He was then a man about 52 years of age and unmarried. In 1924 plaintiff, then a young woman, came to California with her parents, who established their home in Los Angeles. The following year Schmidt, who had retired from business, also came to Los Angeles, and from that time until his last illness spent several hours almost every day in the company of plaintiff, either in her home or accompanying her to and from her place of employment or escorting her to church and places of entertainment. During that time she received from him notes and Easter cards addressed to her in terms of friendship and endearment, and on more than one occasion he proposed marriage, which proposals were neither accepted nor encouraged by plaintiff. In 1925 he attempted to make her a gift of a diamond engagement ring, which she refused, and in 1926 he purchased and offered her an automobile, which she also refused to accept. The relationship between the two, however, continued very friendly and apparently did not abate.

On January 6, 1937, Schmidt complained to the sexton of his church that he did not feel well, and later in the day he suffered a slight paralytic stroke. The next day he was confined to his room and a doctor was called to attend him. A few days later Mr. Assmann, a brother-in-law, came over from Long Beach, where he was spending the winter, and remained with him almost continuously until Schmidt was taken to a hospital on January 26th, where he remained until his death on February 11, 1937.

After Schmidt was confined to his room by reason of illness, Miss Braun called upon him almost daily. On January 21st she called as usual. After some conversation about what had occurred that day at her

place of employment Schmidt asked his brother-in-law, who was present, to bring to him his purse. He thereupon took from this purse a safe deposit key which he handed to plaintiff, saying, "Teresa, every thing in the box belongs to you," and, turning to Assmann, said, "Bernard, you hear, I want Teresa to have every thing in the box." He also told her that there was more than enough money in the box for her to live on and that she would not have to work any more. A day or so later Schmidt gave plaintiff a check for \$175, drawn from funds other than those in the safe deposit box, and gave it to plaintiff in order that she might pay his hotel and hospital bills. Plaintiff then took the key and kept it among her effects at her home until after the death of Schmidt, when, as stated above, she gave it to the administrator and, upon his refusal to redeliver the key, this action was commenced.

The trial court confirmed the gift to plaintiff and ordered that the property be delivered to her or, in the alternative, the value thereof. It is from that judgment that this appeal is taken.

Certain preliminary motions as to the right of Assmann to intervene have already been before this court and disposed of (*Braun v. Brown* etc., Cal.Sup., 87 P.2d 1009), leaving for consideration the basic question in controversy, that is, did Schmidt on the 21st day of January, 1937, entertain and express the specific intention then and there to give to plaintiff the property in the safe deposit box; and did he then and there effectuate that intention by the delivery of that property to her, divesting himself of dominion thereover, and was he actuated therein by the thought of death, and did plaintiff accept the same?

Section 1149 of the Civil Code defines a gift in view of death as "one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver", and by section 1150 of the Civil Code a gift is presumed to be in view of death when made during the last illness of the giver or under circumstances which would naturally impress him with an expectation of speedy death.

The court found it to be true that on the 21st day of January, 1937, Julius H. Schmidt was the sole owner and in the exclusive possession of all the property here involved; that the same was kept in a certain safe deposit box, and the sole

means of access thereto and the contents thereof was by one key kept in possession of Schmidt; that during his last illness he transferred, delivered and handed over to plaintiff this key and at the same time told her he was thereby making to her a gift of all the contents of said box; that by such delivery of the key and his statement he thereby made a gift and transfer *causa mortis* to plaintiff; and that plaintiff accepted said gift and delivery and that such gift was unrevoked and remained valid and binding at his death.

[1] Appellant contends that the failure of the court to specifically find that Schmidt acted in contemplation of death is reversible error. The finding recited that by the delivery of the key Schmidt gave to plaintiff, *causa mortis*, all his interest in the property. By the adverbial use of the words "*causa mortis*" there is embodied in the finding all the elements as to the influence of the thought of death connoted by such words, making the finding adequate.

[2] The evidence fairly establishes that the gift was made by Schmidt during his last illness, and there can be little doubt from the evidence that the circumstances surrounding such illness impressed him with the expectation of death, and, by the delivery of the key and his statement to plaintiff he intended to set over to plaintiff all his interest in the property.

[3] At the time of the making of the gift Schmidt was ill in bed in his hotel room; he had suffered a stroke and had told certain friends that he was not feeling well. He was arranging to go to a hospital and had made provision for plaintiff to pay his hotel and hospital bills. His brother-in-law, realizing the seriousness of his condition, had left his place of abode in Long Beach and had a cot moved into the room of Schmidt, so he could be near him all night; he was at times delirious; a doctor had examined him and advised hospital care. He was then about 67 years of age and had never theretofore been sick. He left the hotel January 26th and died 15 days later. Such circumstances could not but have caused even the most optimistic of men to contemplate to some degree at least the fact of death. Realizing, however, that under such circumstances any reference to or discussion of death is universally avoided by the patient, his friends and the doctor, section 1150 of the Civil Code declares that a gift made dur-

ing the last illness or under circumstances which would naturally impress one with an expectation of speedy death is presumed to be a gift in view of death. This presumption is evidence and is sufficient to establish the fact unless rebutted.

[4,5] But the fear of impending death is not a sole essential element of a gift causa mortis. The code predicates such a gift on either contemplation of death or peril of death; and as pointed out in *Donovan v. Hibernia Savings & Loan Society*, 90 Cal.App. 489, 265 P. 995, while one may make general statements to the effect that he is feeling fine, yet his condition may be known to him to be critical. One may realize himself to be in peril of death and yet not expect to die. He may still believe his chances to live are greater than his chances to die, yet prudently takes steps to adjust his affairs in case of death. In *Knight v. Tripp*, 121 Cal. 674, 54 P. 267, 268, Mrs. Cook was about to undergo an operation. She sent for her friend, the defendant, and by an instrument in writing attempted to convey to him various personal property. In considering whether there was a gift causa mortis, the court said:

"Mrs. Cook was an invalid, 54 years of age, and it must be assumed that she had at least a hope that she would come safely out of the surgical operation that she was about to undergo, and that her life would be prolonged thereby. * * * Her disposition of the property was evidently made in contemplation of her death under the surgical operation, but it was not necessary for her to state that fact as one of its terms. If the circumstances under which it was made were such as to authorize such conclusion, it will be treated the same as if it had been so stated by her."

[6] Both the circumstantial evidence and the presumption raised by the provisions of the code are sufficient to support the finding that the gift by Schmidt to respondent was made by him in contemplation of death and was a gift causa mortis.

It is next urged by appellant that there is no substantial evidence in the record to support the finding that Schmidt had the specific intent then and there to give to plaintiff the contents of the safe deposit box, or did anything to effectuate delivery, or that plaintiff accepted the same.

As to the intent, we find that when Schmidt handed the key to plaintiff he said, "Every thing in the box belongs to

you," and also said to plaintiff that she wouldn't have to work any more, there would be enough money there for her to live on, and, calling upon his brother-in-law as a witness, said, "Bernard, you hear, I want Teresa to have every thing in the box." Here are words of present donation, accompanied by the delivery into her hands of the means of access to the property in the presence of a witness particularly enjoined to act as such.

The mother of plaintiff in her broken English testified as to a conversation with Schmidt some five or six days after the delivery of the key, wherein Schmidt, according to her, said, "Yes, every thing what I have in the box belongs to Teresa; I told her that all the time," and also testified that at that time Schmidt "asked Bernard to make a paper out for that he want to sign it that every thing belongs to Teresa", to which Bernard replied, "We go to the hospital, then you can make out all the papers what you want." She also said Schmidt said, "Every thing was in the box—give to her."

[7-9] Appellant, analyzing this testimony, claims to find no express or direct words of gift or giving, nor any clear expression of intent that what had theretofore been the property of Schmidt then and there passed from him into the sole ownership of plaintiff. It cannot be fairly required that words spoken by one during one's last illness or in fear of death shall be as grammatically correct or as comprehensive as would be language used under different circumstances, nor should the words of one to whom the use of English is obviously an effort outweigh other circumstances in the case. All that is required is that appropriate words of gift be used, and such words are here found. Nor, as said in *Mellor v. Bank of Willows*, 173 Cal. 454, 160 P. 567, 568, need the intention to give be manifested solely by the particular words employed by the donor: "It is a question of fact to be determined like other questions of fact upon all the evidence in the case—the situation of the parties, their relationship, the circumstances surrounding the transaction, the apparent purpose in making the gift, the words spoken at the time, and the like. [Citing cases.] If the words accompanying the delivery of the thing can be said to be expressive of a gift, and, in the light of the circumstances, consistent with the intention to give, the execution of the gift is established."

[10,11] Appellant stresses the fact that on more than one occasion after saying to plaintiff, "Every thing in the box belongs to you," he repeated to others, among them the mother, "Every thing what I have in the box belongs to Teresa," as indicating some future contingency. With this we cannot agree. Schmidt knew that he had not actually handed to plaintiff the physical possession of the contents of the box. He knew that at some future time she would actually possess herself of them. It was, therefore, of that future event and not the gift itself upon which his mind dwelt. So, also, the desire of Schmidt to sign a paper of some kind to confirm the fact that he had made a gift to respondent in no way affects the validity of the gift. In *Crane v. Reardon*, 217 Cal. 531, 20 P.2d 49, 50, it was said, "The evidence, fairly considered, points to the conclusion that the donor intended to part with title at the time of manual delivery, and his expressed desire to 'sign it over' was simply for the purpose of facilitating the transfer, making it possible for the donee to have the same entered on the books of the corporation."

[12] Assuming, as appellant does, that the language used by Schmidt was ambiguous, and that some extrinsic evidence was necessary to clarify his intention, such is found in the relationship of plaintiff and the deceased; the proposals of marriage, the declaration of affection by donor, statements that he intended to give her his property and that she would not have to work, the absence of an immediate family or close relatives of Schmidt who might otherwise be natural objects of his bounty, his illness, all have force in explaining the acts of the donor, even if his words could be considered ambiguous. Furthermore, the intent with which an act is done is a question of fact to be determined from all the evidence in the case and a finding thereon by the trial court will not be disturbed. *Mutual Benefit Life Ins. Co. v. Clark*, 81 Cal.App. 546, 254 P. 306; *Union Mutual Life Ins. Co. v. Broderick*, 196 Cal. 497, 238 P. 1034. So, also, do we find some support for the claim of plaintiff that it was the intention of Schmidt then to make an immediate gift of the contents of the deposit box to her in the fact that at that time he did not direct her to pay his hotel and hospital bills out of any funds in the box, but had a clerk from a different bank call and make out a check for the \$175 necessary to care for his expenses.

[13-15] Appellant contends that plaintiff has failed to establish delivery. We are here dealing with personal property locked in a deposit box. The box was not capable of manual delivery, therefore, the well-recognized rule that a valid gift may be made under such circumstances by the transfer of the key thereto is applicable. *Estate of Escolle*, 134 Cal.App. 473, 25 P.2d 860. Nor can any rule or regulation of the depository affect the validity of the gift to plaintiff. *Donovan v. Hibernia etc. Soc.*, 90 Cal.App. 489, 265 P. 995. The court found that the sole means of access to the deposit box was one key which was in the possession of Schmidt; that during his last illness he handed over to plaintiff this key and at the time stated to her that he was thereby making a gift to her of all the contents of the box. With the evidence in the record supporting the finding, there can be no question as to the divestiture of dominion. Appellant makes some point of a second key. This key, however, was locked in the box and was accessible to the one alone who had control of the Schmidt key. This second key may, therefore, be dismissed from consideration.

[16,17] Lastly, appellant claims that because plaintiff did not exercise her authority by using the key and taking possession of the property before the death of Schmidt the gift never became effective and failed for lack of acceptance. In *Wilson v. Crocker First National Bank*, 12 Cal.App.2d 627, 55 P.2d 1208, it was contended but unsuccessfully that because a donee had not assumed dominion and withdrawn money from the bank prior to the death of the donor the gift was incomplete. In *Paddock v. Fonner*, 84 Cal.App. 652, 258 P. 423, although the gift failed because of lack of donative intent, the court held that the acceptance was sufficient if the donee received the bank book and order and took into his possession the means of obtaining the funds on deposit; and that he later offered to turn over to the administratrix of the estate the bank book for the purpose of adjudication of a dispute did not affect the validity of the gift as far as acceptance was concerned. To the same effect was the holding in *Estate of Elliott*, 312 Pa. 493, 167 A. 289, 90 A.L.R. 360, where the donee turned over the keys of the deposit box to the administratrix prior to suit.

[18] This cause has been very fully and diligently presented. All the points pre-

sented by appellant have not been commented upon, as what we have said makes further discussion unnecessary. The motion to recall the writ of supersedeas, having now become functus officio, is dismissed. The judgment should be affirmed and it is so ordered.

We concur: CURTIS, J.; EDMONDS, J.; SHENK, J.; KNIGHT, Justice pro tem.; SPENCE, Justice pro tem.



35 Cal.App.2d 14

PEOPLE v. TAGAWA.

Cr. 1681.

District Court of Appeal, Third District,
California.

Sept. 29, 1939.

1. Criminal law ☞1144(18)

In criminal proceedings where insufficiency of evidence is specified as grounds for a new trial, and order granting motion contains no specification of any particular ground for granting motion, reviewing court must presume that new trial was granted upon insufficiency of evidence, though trial judge in its opinion excluded that ground, and entire argument on hearing of motion was based on ground of newly discovered evidence.

2. Criminal law ☞1137(7)

Where a motion for a new trial was based on all statutory grounds but counsel for defendant argued motion solely on basis of newly discovered evidence and stated that he had nothing to present to the court on other grounds, defendant was not precluded from contending that an order for a new trial expressed in general terms was granted on grounds of insufficiency of evidence.

3. Criminal law ☞911, 1156(1)

As respects granting of a new trial in criminal proceedings, a motion for new trial is addressed to sound discretion of trial court, and its action will not be disturbed on appeal, except in an instance manifesting a clear and unmistakable abuse of such discretion.

4. Criminal law ☞1156(2)

Where a defendant was convicted of second degree murder on basis of conflicting evidence, trial court in granting motion for new trial on presumed ground of insufficiency of evidence did not abuse its discretion, although if a verdict had been allowed to stand, reviewing court would have been compelled to say that evidence supported verdict.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Criminal proceedings by the People of State of California against M. Tagawa. From an order granting defendant a new trial after his conviction of the crime of second degree murder, the People appeal.

Affirmed.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Edgar B. Hervey, of San Diego, and Walter T. Tsukamoto, of Sacramento, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an appeal taken by The People of the State of California, from an order granting a new trial after conviction of defendant of the crime of second degree murder.

The evidence shows that on December 30, 1927, the deceased, H. Arakawa, was in what was known as the Japanese Social Club, which was located upstairs above the premises known as 308 L street, Sacramento, California, between the hours of 11 and 11:30 p. m.; that at said time and place the defendant M. Tagawa was with other Japanese men in said club; that the deceased left the rear of the Japanese Social Club, descended some stairs to the rear yard of said premises, and that immediately thereafter the said defendant followed him with a Japanese known as Kanei or Kan. The evidence shows that after Arakawa had gotten down into the rear yard, two eye-witnesses, G. Tomita and Ben J. Nakada, saw the defendant fire two shots into the deceased, the man Kanei or Kan standing alongside of defendant, and that after the deceased had gone down, the defendant fired two more shots into him, which resulted in his death.

After the shots were fired the defendant and his companion Kan turned back

and ran through a chop suey house at 308 L street, located immediately under the said Japanese Social Club, where he and Mr. Kan were recognized by Mr. K. Matsumota, who conducted the chop suey house at that time.

A clearer case of murder would be hard to find. There were two eye-witnesses to the crime, and they positively identified defendant as the killer. Several other witnesses testified that defendant was at the scene of the crime. It was not, with these witnesses, the matter of a fleeting glance at defendant. These witnesses were in the same room of the Japanese Social Club with defendant, and had been there with him for some time. The murder was committed in typical gangster style. Deceased was seen leaving the rear door of the room, in company with defendant and two of his confederates. They all descended a stairway at the rear of the building. When the ground was reached, defendant proceeded with the execution. To insure success of the undertaking, he fired two additional shots into the prostrate body, according to the testimony of two eye-witnesses.

The record shows that while the motion for new trial was based upon all statutory grounds, including the insufficiency of the evidence, the only matter presented to the trial court was newly discovered evidence. No other point was argued or presented by defendant. He stated his position in the following language: "I do not propose to argue any other grounds, so I do not wish that to be taken as a waiver of it. I don't believe there are other grounds urged; however, I have nothing to present to the court on those other matters." He then proceeded to present the matter of newly discovered evidence.

At the conclusion of the argument the trial court granted the motion for new trial in general terms, and without any restrictions whatever as to the ground or grounds upon which the motion was granted.

[1,2] The State now contends that, by his conduct upon the hearing of the motion, as exemplified in the portion of the transcript quoted above, defendant is precluded from contending here that the motion was granted upon the ground of the insufficiency of the evidence, and that we may not assume here that the motion was granted upon that ground. The evidence is conflicting to the extent that defendant

testified that he was in Los Angeles at the time the crime was committed, and he testified that he did not kill decedent. The newly discovered evidence, in support of an alibi, was based upon affidavits of several Japanese, which may reasonably be construed as indicating that defendant was in Los Angeles at or about the time of the shooting. The law is contrary to the view of the State. Where the insufficiency of the evidence is specified as one of the grounds of new trial, and the order granting the motion for new trial is general in its terms, with no specification of any particular ground, we must presume that the new trial was granted upon the insufficiency of the evidence. This is the rule, even though the trial judge, in its opinion, excluded that ground (*People v. Ray*, 91 Cal.App. 781, 267 P. 593, where numerous cases are cited,—and even though the entire argument on the hearing of the motion is directed toward, and based upon the ground of newly discovered evidence. *Webster v. Suiter*, 15 Cal.App. 390, 114 P. 1007).

[3] "A motion for new trial is addressed to the sound legal discretion of the trial court, and its action will not be disturbed upon appeal except in an instance manifesting a clear and unmistakable abuse of such discretion." 8 Cal.Jur. p. 442, sec. 463.

[4] "If the verdict had been allowed to stand, we would have been compelled to say that it was amply supported by the evidence, as all the testimony offered by the State tended to show a deliberate effort on the part of the defendant to proceed in violation of the terms of the Corporate Securities Act. However, discretion has been reposed in the trial judge to pass upon the evidence, notwithstanding the verdict of the jury, and the rule has become fixed that, when the trial judge, having reviewed the evidence, reaches the determination that a miscarriage of justice has resulted, it is his province to grant a new trial. The function of an appellate court, on an appeal from an order granting a new trial in a criminal case, is stated in *People v. Brooks*, 90 Cal. 174, 27 P. 72, where the court said: 'And when one of the grounds upon which it (a new trial) is asked is that the verdict is contrary to the evidence given in the cause, the action of that court in granting the motion will not be reversed by this court, unless the record clearly shows that there was no

evidence which conflicted with that upon which the verdict rested.' The order is affirmed." *People v. Hebern*, 84 Cal.App. pages 661, 662, 663, 258 P. 432. The latter case is directly in point here. If this verdict had been allowed to stand, we would have been compelled to say, after an examination of the entire record, that it was amply supported by the evidence. Since, however, the evidence is conflicting, it cannot be said that the trial court abused its discretion.

We deem it unnecessary to discuss the question as to whether or not the order appealed from could be based upon the ground of newly discovered evidence. If the trial court, in its order, had specified that ground as the only one upon which said order was made, a more serious question would have been presented.

The order is affirmed.

We concur: THOMPSON, Acting P. J.; DEIRUP, Justice pro tem.



34 Cal.App.2d 706

In re **NEWMAN'S ESTATE.**

SMITH et al. v. NEWMAN et al.
Civ. 2462.

District Court of Appeal, Fourth District,
California.

Sept. 27, 1939.

1. Marriage ⇨40(11)

Where a marriage has been shown in evidence, the law raises a strong presumption of its legality and casts the burden of proof on the person attacking it, and he must show that it is illegal and void.

2. Marriage ⇨50(1)

In will contest based on allegations that testator's wife, whom he nominated as executrix and named as his sole beneficiary, was married and had a husband living when she married testator and that will and codicil were procured by her fraudulent representations that she was free to marry, evidence was sufficient to establish as a fact a ceremonial marriage between testator and his

wife and was insufficient to sustain burden of proving that the marriage was void.

3. Marriage ⇨50(1)

Proof of a prior marriage and the continued life of both spouses is not sufficient to make a prima facie case as against validity of a second ceremonial marriage, but there must be a further showing that the first marriage had not been set aside by judicial decree.

4. Death ⇨1

The presumption of law that one once shown to be alive continues alive until either his death is proved or the rule applies by which death is presumed to have occurred is received as conclusive in absence of any countervailing testimony. Code Civ.Proc. § 1963, subd. 26.

5. Evidence ⇨314(3)

Testimony of a 31 year old woman that her father died in 1908 when she was 17 months old, that she gained knowledge of that fact from certain documents shown to her by her mother as well as from letters written from the people her father was living with at the time speaking of his death, and that she heard the whole story from her mother, was not inadmissible as hearsay. Code Civ.Proc. § 1870, subd. 11.

6. Appeal and error ⇨1051(1)

The admission of documentary evidence, though objectionable, was not prejudicial where it tended only to corroborate a fact established by independent, competent evidence.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Proceeding in the matter of the estate of John William Newman, deceased, wherein Julia N. Smith and another filed a will contest against Catherine L. Newman, executrix, etc., and another. From a judgment of nonsuit, contestants appeal. Affirmed.

C. B. Conlin and E. R. Simon, both of Los Angeles, for appellants.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

GRIFFIN, Justice.

John William Newman died October 30, 1937, and left a will and codicil in which he referred to Catherine L. Newman, one of the respondents herein, as his wife.

nominated her as executrix and left her his entire estate. The will and codicil were duly admitted to probate on November 19, 1937. Thereafter the appellants herein, who were the sister and brother of the decedent, filed a contest of the will and codicil and alleged, in addition to other grounds which have been abandoned by the appellants, that the respondent Catherine L. Newman was married and had a husband living at the time she married the testator in September, 1922, and that the will and codicil were procured by fraudulent representations of Catherine L. Newman in that she was free to marry. The contestants and appellants alleged in their petition that the respondent, Catherine L. Newman, and John William Newman, the testator, entered into a pretended marriage ceremony in September, 1922, and at that time the respondent, Catherine L. Newman, then had a husband by a prior marriage who was living and respondent had never been granted a final judgment of divorce and was not free to marry the testator although she had continuously represented herself to the testator to be, and he believed that she was, his wife. The respondent, Catherine L. Newman, stipulated that she had married Herbert W. Smith in 1905, and that Ruth S. Whidden, the other respondent, was born in 1907 as a result of that marriage. The appellants did not endeavor to prove that Herbert W. Smith was alive in 1922 or at any time other than the dates covered by the stipulation, nor did they offer any proof that if he were living the prior marriage was not dissolved or annulled. For proof of the allegation of their complaint, they have the stipulation that a marriage was entered into with Herbert W. Smith in 1905, and the allegation of their petition that respondent entered into a pretended marriage ceremony. It was admitted by the answer that the respondent Catherine L. Newman and the testator had entered into a marriage ceremony and lived together thereafter as husband and wife. After proving the facts stated, they rested and the court granted a nonsuit. This appeal is based upon the ruling of the trial court in granting a nonsuit to two of the causes of action, and from the judgment that followed.

The evidence upon the question of the death of her father consisted in the testimony of Ruth S. Whidden, one of the respondents, who was called for cross-examination by the appellants under section 2055 of the Code of Civil Procedure. On

redirect examination by attorneys for respondents, Ruth S. Whidden testified that her father, Herbert W. Smith, had died in 1908, when she was 17 months old, and further testified, on further cross-examination by appellants' counsel, that her knowledge of her father's death was based mainly on certain documents received in evidence. Over the objections of attorneys for appellants, the respondents introduced, and the court received into evidence, these documents, which were a certificate of the coroner of the city and county of San Francisco, reciting an inquest held on the remains of one H. W. Smith, and a copy of the coroner's jury's verdict rendered as to the death of said H. W. Smith; a telegram dated August 14, 1908, to "Mrs. C. L. Smith, of Los Angeles," from said coroner; a letter written by the coroner on August 17, 1908, to a "Mrs. B. I. Strickland, of Los Angeles," and a letter written by one "Mrs. D. A. MacDonald" addressed to "Mrs. Catherine L. Smith, El Monte, California". The telegram and letters referred to the death of "H. W. Smith".

The testimony of Ruth S. Whidden was introduced over the persistent objections of counsel for petitioners that the questions propounded to said witness were not proper cross-examination and called for the opinion and conclusion of the witness and for hearsay, and the court refused to strike out the testimony of the witness.

Appellants argue that there was no testimony introduced to the effect that the said "H. W. Smith" referred to in the coroner's certificate and in the telegram and two letters was the same person as "Herbert W. Smith", the husband of the respondent Catherine L. Newman, and contend that under the legal evidence, the respondent Catherine L. Newman had a former husband living at the time of her marriage to the decedent, and that the will and the codicil to the will of the decedent were void. It is claimed that under the oral stipulation to the fact of marriage of the respondent Catherine L. Newman and one Herbert W. Smith in 1905, introduced in evidence at the trial, and paragraph 32, section 1963 of the Code of Civil Procedure, the presumption is raised that the said former husband was still living, and said presumption existed until it was disproven by legal evidence. Citing *Estate of Carson*, 184 Cal. 437, 194 P. 5, 17 A.L.R. 239, and *Bancroft v. Bancroft*, 9 Cal.App. 2d 464, 50 P.2d 465.

The next point claimed is that the coroner's certificate or report of a death, or the verdict of a coroner's jury, is not admissible in evidence to prove the death of a person named in the certificate or report or verdict. Citing *Mar Shee v. Maryland Assurance Corp.*, 190 Cal. 1, 4, 5, 210 P. 269; *Hollister v. Cordero*, 76 Cal. 649, 653, 18 P. 855; *Lusardi v. Prukop*, 116 Cal.App. 506, 509, 2 P.2d 870; *Rowe v. Such*, 134 Cal. 573, 576, 66 P. 862, 67 P. 760; *Estate of Dolbeer*, 149 Cal. 227, 246, 247, 86 P. 695, 9 Ann.Cas. 795.

For the same reasons and under the same authority, appellants charge that the ruling of the court admitting in evidence the telegrams and letters over objections was also erroneous and prejudicial.

Respondents maintain that the burden of proving that Herbert W. Smith was living in September, 1922, and that his marriage to the respondent Catherine L. Newman had not been terminated or annulled was upon appellants and that as the bill of exceptions contains no evidence of these facts that then the law presumes that the marriage of respondent Catherine L. Newman and the testator was valid, citing *Hunter v. Hunter*, 111 Cal. 261, 267, 43 P. 756, 757, 31 L.R.A. 411, 52 Am.St.Rep. 180, in which it was said: "This presumption of the continuation of life is, however, overcome by another. It is presumed that a person is innocent of crime or wrong. Code Civ.Proc. § 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years; or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative,—that the first marriage had not ended before the second marriage."

[1] In *Estate of Gertrude C. Pusey*, 173 Cal. 141, 159 P. 433, 434, this rule was laid down: "It is well settled in this state that when a marriage has been shown in evidence, the law raises a strong presumption of its legality, casting the burden of proof upon the person attacking it, and requiring him to show that it is illegal and

void. This burden was not met in the matters at bar."

It was also held in that case that the illegality of the marriage of the testatrix was not established by evidence merely showing a previous marriage of the man to another woman, and the invalidity of the decree purporting to divorce him therefrom, because there was no evidence tending to show whether or not such woman was alive at the date of the marriage to the testatrix. See, also, *Estate of Hughson*, 173 Cal. 448, 160 P. 548; *Wilcox v. Wilcox*, 171 Cal. 770, 155 P. 95; *Immel v. Dowd*, 6 Cal.App.2d 145, 44 P.2d 373; *Luckett v. La Tour*, 122 Cal.App. 271, 9 P.2d 886; *Marsh v. Marsh*, 79 Cal.App. 560, 250 P. 411; *Hamburgh v. Hys*, 22 Cal.App.2d 508, 71 P.2d 301; 77 A.L.R. 729; 34 A.L.R. 464.

In reference to the second marriage, we notice with interest the stipulation in reference to the two marriages, which was as follows: "By Mr. Simon: I have talked to Mr. Reinhaus, and I believe he will stipulate to one matter which will shorten the trial of the case, and that is this: I believe, Mr. Reinhaus, that you will stipulate that Catherine L. Newman, one of the respondents, prior to her marriage to John William Newman was married to a man by the name of Herbert W. Smith in 1905, and that Ruth Whidden, the other respondent, was born in 1907 as the result of that unity. Mr. Reinhaus: So stipulated."

[2, 3] We are firmly of the opinion that the evidence, pleadings, and stipulation above mentioned are sufficient to establish as a fact the second ceremonial marriage and bring the instant case within the rule laid down in *Immel v. Dowd*, supra (citing other cases), in which *McKibbin v. McKibbin*, 139 Cal. 448, 73 P. 143, is cited as holding that "proof of a prior marriage and the continued life of both spouses was not sufficient to make a prima facie case as against a second ceremonial marriage; that there must be further showing that the first marriage had not been set aside by judicial decree". [6 Cal.App.2d 145, 44 P.2d 375.] Appellants in the instant case, therefore, did not sustain the burden of proof cast upon them.

It affirmatively appears from the testimony that the respondent daughter, Ruth S. Whidden, at the time of trial, was of the age of 31 years and testified that her father, Herbert W. Smith, died in 1908, when she was 17 months old. In response

to a question by Mr. Simon: "Q. How do you know your father is dead?" she replied: "A. I have seen legal and definite evidence of that." She also testified that she gained knowledge of this fact from the documents above described, shown to her by her mother, as well as "letters written from the people he was living with at the time speaking of his death". She also talked to her mother about her father's death and she stated she "heard the whole story" from her.

In *Anderson v. Parker*, 6 Cal. 197, a case in which it was incumbent upon the plaintiff in ejectment to show the death of his ancestor, the court said: "We are of opinion that hearsay information of the death, derived from the immediate family of the deceased, is sufficient prima facie to establish the fact, and was properly admitted." See, also, *Estate of Paulsen*, 179 Cal. 528, 178 P. 143, 145, in which 1 Greenleaf on Evidence, 16th edition, section 114f, is cited as follows: "The term 'pedigree' embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened."

[4] Under section 1870, subdivision 11, of the Code of Civil Procedure, evidence may be given of "common reputation existing previous to the controversy * * * and in cases of pedigree * * *". See, also, *Benjamin v. District Grand Lodge*, etc., 171 Cal. 260, 152 P. 731; *People v. Ratz*, 115 Cal. 132, 46 P. 915. The law, of course, presumes that one once shown to be alive continues alive until either his death is proved or the rule applies by which death is presumed to have occurred. Sec. 1963, subd. 26, Code Civ.Proc; *Estate of Ross*, 140 Cal. 282, 73 P. 976. This presumption of life is received, in the absence of any countervailing testimony, as conclusive. One exception to its operation is when it conflicts with the presumption of innocence, in which case the latter prevails. *People v. Feilen*, 58 Cal. 218, 41 Am.Rep. 258.

[5,6] We are convinced that the testimony of the witness respecting the fact and date of death was not hearsay under the circumstances related. The admission of the documentary evidence, although objectionable, was not, under the circumstances, prejudicial. It tended only to corroborate a fact established by independent, competent evidence.

For the reasons stated, the judgment and order from which this appeal has been perfected are affirmed; respondents to recover costs on appeal.

I concur: MARKS, Acting P. J.



34 Cal.App.2d 660

GAPEN v. CITY OF LOS ANGELES.

Civ. 12134.

District Court of Appeal, Second District,
Division 2, California.

Sept. 26, 1939.

1. Appeal and error ⇨673(1)

In pedestrian's action against city of Los Angeles for injuries claimed to have been sustained in a fall while pedestrian was crossing street, trial court's finding that pedestrian had complied with provisions of statute concerning the filing of a claim with city could not be sustained when record did not contain proof to show compliance with such provisions. Gen.Laws 1931, Act 5149, § 1.

2. Appeal and error ⇨241

In personal injury action against city of Los Angeles, city did not, by failing to specify as one of the grounds in motion for nonsuit the failure of plaintiff to introduce evidence to show compliance with statute requiring filing of a claim with city, waive its rights to urge, on appeal, the insufficiency of evidence to sustain trial court's finding that plaintiff had complied with such statute, especially when judgment for plaintiff was on merits. Gen.Laws 1931, Act 5149, § 1.

3. Appeal and error ⇨237(4)

A motion for nonsuit specifying insufficiency of evidence on material issue as ground for such motion is not a prerequisite to the right to urge, on appeal, the insufficiency of evidence to sustain a material finding of trial court.

4. Appeal and error ⇨241

If a motion for nonsuit does not include insufficiency of evidence on a material issue

as one ground of motion, denial of such motion does not preclude aggrieved party from urging, before appellate court, the total failure of evidence to sustain a material finding of trial court.

5. Municipal corporations ~~C~~816(8)

Where plaintiff in action against city of Los Angeles for injuries claimed to have been received while crossing a street failed to allege and prove compliance with statute requiring the filing of a claim with city, a judgment for plaintiff was improper. Gen. Laws 1931, Act 5149, § 1.

Appeal from Superior Court, Los Angeles County; Georgia B. Bullock, Judge.

Action by Jessie Gapen against the City of Los Angeles (a municipal corporation) to recover damages for personal injuries alleged to have been received by plaintiff while crossing a street in defendant city. From a judgment for plaintiff, defendant appeals.

Reversed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Leonard Husar and Louis A. Babior, Deputy City Attys., all of Los Angeles, for appellant.

Jack Greenberg and C. S. Mauk, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for personal injuries defendant appeals.

These are the conceded facts:

January 8, 1937, plaintiff, desiring to cross from the north to the south side of Twelfth street in defendant city, stepped from the curb onto what appeared to be a dry spot but which actually was muddy, slimy, and dirty beneath the surface. As a result she slipped, fell, and received personal injuries. No evidence was introduced at the trial that plaintiff had filed a claim with the clerk or secretary of the legislative body of defendant as required by section 1, Act 5149, Statutes of 1931 (vol. II, Deering's Gen. Laws of California [1931] p. 2562).

At the close of plaintiff's case defendant made a motion for a nonsuit, which did not specify among its grounds the failure of plaintiff to prove that she had filed a

claim for damages as provided in section 1, Act 5149, supra. This motion was denied and thereafter the trial court entered a judgment in favor of plaintiff and made among others the following finding:

"III.

"That it is true that thereafter within 90 days from January 8, 1938, the plaintiff complied with the requirements of the Charter of the City of Los Angeles and Act number 5149 of the Acts of the Legislature of the State of California."

These are the questions presented for determination:

First: Was there substantial evidence to sustain the trial court's finding No. III set forth supra?

Second: By failing to specify as one of the grounds in its motion for a nonsuit the failure of plaintiff to introduce evidence to show compliance with section 1 of Act 5149 supra, did defendant waive its right to urge on appeal the insufficiency of the evidence to sustain the court's finding No. III set forth supra?

[1] The first question must be answered in the negative, as plaintiff concedes the absence of any proof in the record to show compliance with the provisions of section 1, Act 5149 supra.

[2-4] The second question must likewise be answered in the negative. The judgment in the instant case was on the merits and not as the result of the granting of a motion for a nonsuit. It is not a prerequisite to the urging on appeal insufficiency of the evidence to sustain a material finding of the trial court that there be a motion for a nonsuit specifying the insufficiency of the evidence on a material issue as a ground therefor, and, if a motion for a nonsuit is made which does not include the insufficiency of the evidence on a material issue as one of the grounds of the motion, its denial does not preclude the aggrieved party from urging before an appellate court the total failure of evidence to sustain a material finding of the trial court.

[5] Hence, since it was an essential part of plaintiff's cause of action to allege and prove compliance with the requirements of section 1, Act 5149 supra, and there was no evidence to sustain the trial court's finding No. III upon this subject, judgment should have been in favor of defendant. *Winter v. City of Niagara*

Falls, 190 N.Y. 198, 82 N.E. 1101, 1102, 123 Am.St.Rep. 540, 13 Ann.Cas. 486; Cooper v. County of Butte, 17 Cal.App.2d 43, 49, 50, 61 P.2d 516; Douglass v. City of Los Angeles, 5 Cal.2d 123, 128, 53 P.2d 353.

For the foregoing reasons the judgment is reversed.

I concur: WOOD, Acting P. J.



34 Cal.App.2d 691

PEOPLE v. KAY.

Cr. 1686.

District Court of Appeal, Third District,
California.

Sept. 27, 1939.

1. Embezzlement $\S$ 36

In prosecution for embezzlement of money intrusted to defendant as county clerk, the prosecution had the burden of proving as essential elements of the corpus delicti not only that defendant received in trust as county clerk the various sums he was charged with embezzling, but also that he wrongfully appropriated them to his own use.

2. Criminal law $\S$ 409

The corpus delicti may not be established by the extrajudicial admissions of an accused person only.

3. Criminal law $\S$ 409, 535(2)

To authorize the reception and consideration by the jury of evidence of an extrajudicial confession or admission of defendant, the people need not establish the corpus delicti by proof of the clear and convincing character required to support a conviction, but it is sufficient if there is some proof or prima facie proof or even slight proof of the corpus delicti.

4. Embezzlement $\S$ 44(1)

In prosecution for embezzlement of money intrusted to defendant as county clerk, evidence was sufficient to prove the corpus delicti independently of defendant's verified affidavits filed with county auditor which failed to account for money which de-

fendant was charged with embezzling. Pol. Code, $\S$ 4292-4294.

5. Embezzlement $\S$ 23, 48(1)

In prosecution for embezzlement of money intrusted to defendant as county clerk, instruction that, if defendant restored money after return of indictment and it was in county treasury at time of trial, he must be found not guilty, was properly refused, particularly where there was no evidence that defendant ever restored or offered to restore to county any part of money he was charged with embezzling. Pen.Code, $\S$ 512, 513.

6. Criminal law $\S$ 761(13)

In prosecution for embezzlement of money intrusted to defendant as county clerk, instruction that, if any evidence was admitted bearing on embezzlement by defendant of any money other than that mentioned in indictment, such evidence was to be considered only on question of defendant's intent concerning money charged in indictment as having been embezzled, was neither misleading nor erroneous as assuming that defendant was necessarily guilty of embezzlements charged in indictment.

7. Criminal law $\S$ 371(2)

For purpose of showing felonious intent with which county clerk appropriated to his own use and failed to account for money he was charged with embezzling, it was competent to prove other similar embezzlements in violation of his trust as county clerk directly associated with the ones for which he was being tried.

Appeal from Superior Court, Humboldt County; Ben V. Curler, Judge.

Fred M. Kay was convicted of embezzlement under section 504 of the Penal Code, and he appeals.

Affirmed.

Blaine McGowan, of Eureka, and Donald Drew, of Arcata, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Acting Presiding Justice THOMPSON delivered the opinion of the court.

The defendant was convicted under section 504 of the Penal Code on four counts of an indictment for embezzlement of separate specified sums of money entrusted to him as county clerk of Humboldt county.

It is contended the verdicts and judgment of conviction are not supported by the evidence for the reason that the corpus delicti was not established by competent proof independently of the defendant's extrajudicial admissions of failure to account for the moneys as shown by his verified affidavits filed with the county auditor as required by sections 4292-4294 of the Political Code. It is also asserted the trial court erred in giving to the jury and refusing to give certain instructions.

The first count of the indictment charged the defendant with embezzling \$4,141.52 received in fines and dog licenses, exclusive of commissions to which he was entitled by law, which sums were paid to him as county clerk between May 1, 1938, and March 13, 1939. The second, third and fourth counts charged him with embezzling separate sums of money, to-wit, \$940 on July 8, 1937; \$2,050 on July 17, 1937, and \$2,826 on August 22, 1937, paid to him as county clerk by the city of Eureka, as awards of damages in three different condemnation proceedings which were then pending in the superior court of that county. Verdicts were returned against the defendant on each count. A judgment was accordingly rendered against him. From that judgment and from the order denying motion for new trial this appeal was perfected.

[1-3] We assume the burden was on the prosecution to prove as essential elements of the corpus delicti, not only that the defendant received in trust as county clerk of Humboldt county the various sums of money he is charged with embezzling, but also that he wrongfully appropriated them to his own use. *People v. Fronk*, 82 Cal. App. 465, 471, 255 P. 777. It is settled law in this state that the corpus delicti may not be established by the extrajudicial admissions of an accused person only. *People v. Vertrees*, 169 Cal. 404, 146 P. 890; *People v. Ray*, 91 Cal.App. 781, 267 P. 593; 8 Cal. Jur. 167, sec. 248. But it is said in section 303, page 235, of the last-cited authority: "To authorize the reception and consideration by the jury of evidence of an extrajudicial confession or admission of a defendant, the people need not establish the corpus delicti by proof of the clear and convincing character required to support a conviction. It is sufficient if there is some proof, or prima facie proof, or even slight proof of the corpus delicti."

The preceding quotation is supported by numerous authorities. See *People v. Hud-*

son, 139 Cal.App. 543, 34 P.2d 741, in that regard.

The attorney-general suggests that the challenged instruments do not constitute extrajudicial admissions, since, in the nature of admissions on the part of the defendant that he appropriated to his own use the moneys in question by failing to account for them in the affidavits filed with the county auditor as required by section 4294 of the Political Code, the documents, which are public records, are prima facie evidence of the facts therein stated.

It is true that entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty especially enjoined by law, are prima facie evidence of facts therein stated. Sec. 1920, Code Civ.Proc.; *Westerman v. Cleland*, 12 Cal.App. 63, 69, 106 P. 606. It is also true that the county clerk is required by law to pay to the county treasurer on or before the fifth day of the succeeding month all fines, fees, license taxes and other money collected by him in his official capacity and belonging to the county. Secs. 4101a and 4292, Pol.Code. He must also keep a true record of all such collections and file with the county auditor on or before the fifth of the following month verified affidavits showing "all of the moneys, collected by him or under his control during the preceding month * * * handled by him in his official capacity". Secs. 4293, 4294, Pol.Code. The challenged affidavits which were filed by the defendant pursuant to the preceding two sections failed to account for any of the moneys collected by him in his official capacity which he was charged with embezzling.

There is ample evidence in this case of the wrongful appropriation by the defendant of the several sums of money which he is charged with embezzling, independently of the statements contained in the affidavits, and we therefore refrain from determining whether such public records constitute extrajudicial admissions.

[4] It is conceded there is ample competent proof that the defendant received the moneys in his official capacity as county clerk of Humboldt county which he is charged with embezzling at the times alleged in the indictment. He was paid the several sums of money designated in the last three counts as awards of damages in the pending condemnation suits. He was also paid in fines and for dog licenses the total

sum of \$6,954.50. He was authorized by ordinance number 190, section 8, of the county of Humboldt to retain from the dog licenses collected, twenty-five cents for each license, aggregating the sum of \$485.50. The evidence is undisputed that he paid to the county treasurer August 3, 1938, from the dog licenses collected, the sum of \$2,327.48, and no more. The money paid to the treasurer from that source, plus the commissions authorized to be retained by him, amounts to \$2,812.98. Deducting that amount from the total sum collected from fines and dog taxes leaves a balance of \$4,141.52 unaccounted for, which is the exact sum he was charged in the first count with embezzling.

Mr. Oscar Elliott, secretary of the hardware firm of H. H. Buhne Company of Eureka, testified that the clerk ordered and received from that firm during the months of April, July and August, 1938, 3500 metal dog licenses.

Mr. Arthur D. Elliott, a public accountant of Eureka, was employed by the grand jury of Humboldt county to audit the books of the county clerk and to examine other records for the period of time covered by the indictment. He did so, and testified that these metal tags were furnished by the clerk to owners of dogs at \$2 apiece; that the records of the county clerk's office disclosed the fact that \$6,809.50 had been collected by the clerk from dog licenses sold by him during that period of time, from which he was entitled to retain as commissions the sum of \$485.50; that the records show the total amount of that fund, including certain fines, unaccounted for by the defendant during that period of time was \$4,141.52. Mr. Dopplmaier, the county treasurer of Humboldt county, testified that the defendant deposited with the county treasurer from that fund only the sum of \$2,327.48. Mr. Elliott also testified that none of the license fees collected by the county clerk during the period of time which is involved in this case were entered as the law requires on his fee book.

Shirley Putnam, the city treasurer of Eureka, testified that the city warrants for the sums of \$940 and \$2,826, delivered to the county clerk in the condemnation suits, which he was charged in the second and third counts of the indictment with embezzling, were cashed by the defendant in July and August, 1937. Mr. J. R. Pederson, assistant cashier of the Bank of America at Eureka, testified that the warrant of the

city of Eureka for the sum of \$2,050, which the defendant was charged in the fourth count with embezzling, was cashed by him July 20, 1937. The county treasurer testified that no part of these sums was deposited in the county treasury. This furnishes ample evidence of the misappropriation of the several sums of money the defendant is charged with embezzling. The corpus delicti was therefore adequately proved independently of the challenged affidavits. They merely supplied cumulative evidence of the embezzlements.

[5] Defendant's proffered instruction marked "R" was properly refused. It is argumentative, misleading and erroneously directs the jury to acquit the defendant in the absence of positive proof beyond a reasonable doubt that the actual moneys described in the indictment are not *now* in the county treasury of Humboldt county. This instruction, in effect, charges the jury that if the defendant restored the money after the return of the indictment, and it was in the county treasury at the time of the trial, he must be found not guilty of the embezzlements. That is contrary to the terms of our statute. Secs. 512 and 513, Pen.Code; 10 Cal.Jur. 250, sec. 13; People v. Royce, 106 Cal. 173, 189, 37 P. 630, 39 P. 524; People v. Baker, 64 Cal.App. 336, 342, 221 P. 654. Under section 513 of the Penal Code, the actual voluntary restoration of embezzled money or property "prior to an information laid before a magistrate, or an indictment found by a grand jury" is declared to be "*not a ground of defense*, but it authorizes the court to mitigate punishment, in its discretion". Moreover, there is no evidence in the record that the defendant ever restored or offered to restore to Humboldt county any portion of the money he was charged with embezzling.

[6, 7] We are of the opinion instruction number 18 which was given to the jury was neither misleading nor erroneous. It reads: "You are instructed that if in this case any evidence was admitted bearing on the embezzlement by defendant of any money other than that mentioned in the indictment that such evidence is not to be considered by you for any purpose other than the question of defendant's intent concerning the money charged in the indictment as having been embezzled by him."

For the purpose of showing the felonious intent with which the defendant appropriated to his own use and failed to account for the moneys he was charged in the indict-

ment with embezzling, it was competent to prove other similar embezzlements in violation of his trust as county clerk directly associated with the ones for which he was being tried. *People v. Hatch*, 163 Cal. 368, 378, 125 P. 907; 10 Cal.Jur. 271, sec. 28; 10 McKinney's New Calif. Dig. 71, secs. 58, 59. In the foregoing instruction the jury was clearly told that if there was proof of any embezzlements of money by the defendant other than those with which he was charged in the indictment, that evidence was to be considered only for the purpose of determining his intent "concerning the money charged in the indictment as having been embezzled by him". It does not assume that the defendant was necessarily guilty of the embezzlements charged in the indictment. The instruction is unambiguous, clear and proper.

The jury was very fully and fairly instructed upon every essential element of the charges of embezzlement with which the defendant was charged, under the circumstances of this case.

The judgment and the order are affirmed.

We concur: DEIRUP, Justice pro tem.; TUTTLE, J.



34 Cal.App.2d 713

**WEAVER et al. v. SHELL CO. OF
CALIFORNIA et al.**
Civ. 10619.

District Court of Appeal, First District,
Division 1, California.

Sept. 29, 1939.

As Amended Oct. 25, 1939.

Rehearing Denied Oct. 28, 1939.

Hearing Denied Nov. 27, 1939.

1. Appeal and error ⇨1213

Where appellate court on appeal from judgment for plaintiffs in the fourth trial of death action reversed judgment but did not direct the entry of judgment for defendants, and decision was unqualified, the issue of the sufficiency of the evidence was properly presented to the jury in a fifth trial.

2. Appeal and error ⇨1099(7)

Unless the evidence in a fifth trial of death action was found to be substantially

different in a material respect from that of the fourth trial, the appellate court's decision on appeal from fourth trial was the "law of the case" on appeal from fifth trial with respect to the sufficiency of the evidence.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

3. Appeal and error ⇨1097(3)

When confined to the sufficiency of the evidence, the rule of the law of the case may not be extended to be an estoppel when new material facts or evidence or explanation of previous evidence appears in the subsequent trial.

4. Appeal and error ⇨1099(7)

In the determination of the question whether the proof in a case is substantially the same as embodied in the opinion, the decision of the appellate court is controlling as the "law of the case."

5. Appeal and error ⇨1099(7)

On question whether a decision of the appellate court is controlling as the law of the case on the matter of sufficiency of evidence, it must be assumed that the facts set forth in the opinion are correct.

6. Appeal and error ⇨1097(3)

In determining whether a decision of the appellate court is the law of the case on the matter of sufficiency of evidence, it is not necessary to compare the record of the two trials if evidence appears in the second trial that admittedly was not given in the first, and, if such evidence is on a material point, the evidence in the two trials is different on a substantial, material, factual issue, and the first decision ceases to be the "law of the case."

7. Appeal and error ⇨1097(3)

In action for death of filling station attendant caused by explosion which occurred during delivery of gasoline, where evidence on a fifth trial amplified and strengthened testimony given on fourth trial and justified inference that a static spark generated by gasoline running through hose caused fire, the appellate court's decision on appeal from fourth trial was not the "law of the case" on appeal from fifth trial.

8. Evidence ⇨472(1), 506

Generally, it is improper to receive opinion evidence on ultimate fact questions which should be decided by jury.

9. Evidence ⇐506

Technically objectionable questions requiring answers by expert witnesses relative to the propriety and safety of certain methods of delivering gasoline through a hose from a tank to a receptacle should not have been allowed in action for death of filling station attendant caused by an explosion, particularly where the same information could have been elicited by propounding questions in the usual and accepted hypothetical form.

10. Evidence ⇐506, 508

A qualified expert may not testify relative to the ultimate determination of the question of negligence, but only on matters requiring professional or scientific knowledge or skill not usually found within the knowledge of untrained minds.

11. Appeal and error ⇐1050(1)

The test in determining whether the admission of answers of expert witnesses to objectionable questions resulted in prejudicial error is whether the result would have been different had objections been sustained and answers excluded.

12. Appeal and error ⇐1050(1)

Error in admitting testimony of expert witnesses in answer to objectionable questions was not prejudicial, where information evoked appeared in unobjectionable questions and answers in further testimony of the same and other witnesses.

13. Evidence ⇐553(1)

A hypothetical question propounded to a witness may include the theories advanced by either side if the evidence supports those theories or they could reasonably be found as inferences drawn from the evidence introduced.

14. Evidence ⇐553(3)

In action for death of filling station attendant caused by explosion during delivery of gasoline, where evidence showed that when hose was lifted or an attempt was made to lift it from filling stem some gasoline was still flowing through it, trial court did not err in allowing expert witnesses to express opinions based on statements that gasoline was flowing when hose was taken out of filling stem and that gasoline was driven through hose after underground tank had been filled.

15. Appeal and error ⇐970(2)

Whether due diligence was exercised in searching for witness whose testimony on a

former trial was read, was a matter of discretion with trial court.

16. Trial ⇐295(1)

The giving of certain instructions, though improperly worded, could not be complained of on appeal where those instructions when read in connection with all of the instructions showed that jury was not misled and that appellants were not prejudiced in their defense.

17. Negligence ⇐105

The applicability of the doctrine of assumption of risk is based on the knowledge and appreciation of a danger and the voluntary occupation of a position of danger in disregard of the use of ordinary care, and the time, the place, the person, and the relationship of the parties must be considered.

18. Explosives ⇐10

In action for death of filling station attendant caused by explosion during delivery of gasoline by defendant's employee, an instruction that plaintiffs were not entitled to recover if accident resulted from any risk incident to attendant's employment was properly refused, where nothing had occurred during previous deliveries of gasoline by employee from which could be drawn a reasonable inference that he was negligent in the delivery on the day in question, and the attendant was not an employee of defendant.

19. Negligence ⇐105

An employee assumes only the risk of those dangers normally incident to the occupation in which he voluntarily engages, and does not assume the risk of such extraordinary dangers as may be created by the negligent acts of others unless he participates in them or knows or has reason to believe that they are being committed or are about to be committed.

20. Appeal and error ⇐1004(1)

The assessment of the amount of damages in a death action is for the trier of facts and should not be disturbed except where passion, prejudice, or undue influence is shown.

21. Death ⇐99(1)

Where death action was tried five times and on two of those trials juries returned verdicts of \$50,000 and \$35,000, respectively, a verdict of \$40,000 on fifth trial was not excessive.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Alice Weaver and others against the Shell Company of California and others to recover damages for the death of Lincoln Weaver, deceased. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Vincent W. Hallinan, of San Francisco, and James H. Gillard, of Oakland, for respondents.

WARD, Justice.

The defendants, Shell Company of California, a corporation, and Alfred H. Bodilly, appeal from a judgment upon a verdict awarding damages to plaintiffs, heirs at law of one Lincoln Weaver.

The decedent Weaver was an employee of the Pacific Gas and Electric Company in charge of a gasoline oil room or filling station servicing that company's cars. The storage gasoline for this station was kept in an underground tank, equipped with one valve inside of the station and another valve at the end of the tank outside of the station, extending under the south wall of the building. Appellant Bodilly was the driver and operator of an automobile truck, equipped with a tank, used to deliver gasoline to customers of the Shell Company. On the date of the accident, in making a delivery to the above filling station, Bodilly connected a hose from the tank on his truck to the outside filling stem of the underground tank and proceeded to fill the same. During the course of such delivery an explosion occurred, gasoline became ignited and Weaver received severe burns which resulted in his death.

The complaint alleged that the explosion and ignition occurred through the negligence of defendants in failing to equip the truck with proper devices to prevent the flowing gasoline from coming into contact with inflammatory substances, and further, that defendants failed and omitted to carefully estimate and control the flow of gasoline into the underground tank, thereby allowing the same to overflow and ignite. It was also alleged that defendants

failed to provide means for extinguishing the fire.

The appeal is from the fifth trial of this case. The first and third trials resulted in jury disagreement. In the second, fourth and fifth trials the jury returned a verdict in favor of plaintiffs. A new trial was granted following the first verdict for plaintiffs and the order granting the new trial was affirmed on appeal. *Weaver v. Shell Oil Company of California*, 129 Cal. App. 232, 18 P.2d 736. The judgment following the verdict on the fourth trial was reversed on appeal. *Weaver v. Shell Company of California*, 13 Cal.App.2d 643, 57 P.2d 571.

On each trial the vital issue was the cause of the fire. On the fourth trial plaintiffs relied upon the doctrine of *res ipsa loquitur*. On the present trial that doctrine was eliminated.

In *Weaver v. Shell Company of California*, 13 Cal.App.2d 643, 646, 57 P.2d 571, 572, the court, after stating the contentions of the respective litigants, said: "Further, they [defendants] claimed that the electric light wires and the wires connected with the heating stove, all of which were contained in the oil room controlled and operated by the Pacific Gas & Electric Company, were out of repair, and that they emitted the sparks that caused the fire. * * * Bodilly, the driver of the truck, testified to facts supporting the theory of the defendants. There were conflicts in his testimony. But no witness contradicted any material portion of his testimony. * * * Whether that flowing gasoline was blown out by the explosion or whether the defendant Bodilly spilled it, and later it was ignited, spread, and did the damage, was the real issue in the case. As stated, there was no direct evidence thereon. The proof, if any, rested on the indirect evidence. The question as to what rules regarding indirect evidence should be applied and followed by the jury therefore became of vital importance in the trial. The plaintiffs relied on the benefits of the *res ipsa loquitur* doctrine. Without the application of that doctrine to the case, we think it is clear from what we have said above that the judgment lacks evidentiary support, and, as will presently appear, we think that doctrine was inapplicable." The decision further stated that there had been misconduct on the part of plaintiffs' attorney and on account thereof "the rights of the defendants were

greatly prejudiced and that it cannot be said they had a fair trial". No claim of similar, or any, misconduct is presented upon this appeal.

[1] The decision of the appellate court on the appeal in the fourth trial did not direct the entry of a judgment for defendants, but was unqualified, and therefore the issue of the sufficiency of the evidence was properly presented to the fifth jury. *Ferran v. Mulcrevy*, 9 Cal.App.2d 129, 48 P.2d 984; *Gallichotte v. California Mutual Building & Loan Assn.*, 23 Cal.App.2d 570, 74 P.2d 73, 535.

[2, 3] As to the law of the case, we are confronted with the single question whether or not the decision by the appellate court on the appeal from the fourth trial is the law of the case on this appeal as to the sufficiency of the evidence. Unless the evidence in the present trial is found to be substantially different in a material respect from that of the fourth trial, we must hold that the scales tip in appellants' favor. *Sheets v. Southern Pacific Co.*, 1 Cal.2d 408, 35 P.2d 121; *Estate of Baird*, 193 Cal. 225, 223 P. 974; *Haase v. Central Union High School Dist.*, 27 Cal.App.2d 319, 80 P.2d 1044. When confined to the "sufficiency of the evidence", the rule of the law of the case may not be extended to be an estoppel when new material facts, or evidence, or explanation of previous evidence appears in the subsequent trial. *Hoffman v. Southern Pacific Co.*, 215 Cal. 454, 11 P.2d 387; *Erlin v. National Union Fire Ins. Co.*, 7 Cal.2d 547, 61 P.2d 756; *Mattingly v. Pennie*, 105 Cal. 514, 39 P. 200. In *Rasmussen v. Fresno Traction Co.*, 15 Cal.App.2d 356, 59 P.2d 617, 618, the court said: "Since the doctrine of the law of the case rests upon the existence of error, it is not favored and it rarely applies to matters of evidence."

On the fourth trial defendants presented evidence tending to show that the fire originated in the oil room and "flashed out"; that there was "no overflow" and that the "fault" was not due to either the defendant company or its employee Bodily. They concede that on the fifth trial respondents produced "additional, new and different evidence", but contend that such evidence was merely cumulative to evidence of the same class or purpose introduced on the fourth trial. To a large extent we find this to be true, but it appears that new evidence was also inserted in the record substantially different in a

material respect and tending to supply a deficiency in plaintiffs' evidence as previously presented. Six witnesses appeared in this case whose evidence was not presented upon the former trial and evidence was introduced tending to prove that the cause of the fire was scientifically demonstrable and that defendants negligently permitted the gasoline to overflow.

[4-6] In the determination of the question whether or not the proof in a case is substantially the same as embodied in the opinion, the decision of the appellate court is controlling as the law of the case. It must be assumed that the facts set forth in the opinion are correct. It is conceivable in some cases that it may be necessary to compare the record of the two trials, but this is not necessary if evidence appears in the second trial that admittedly was not given in the first. If such evidence is upon a material point, the evidence in the two trials is different upon a substantial, material, factual issue, in which event the first decision ceases to be the law of the case.

[7] Reference is made in *Weaver v. Shell Company of California*, 13 Cal.App. 2d 643, 57 P.2d 571, to the claim of defendants that the electric light wires and the wires connected with the heating stove, all of which were contained in the oil room controlled and operated by the Pacific Gas and Electric Company, were out of repair and that they emitted sparks that caused the fire. New evidence was introduced by plaintiffs upon the present trial that originally the electric wiring in the oil room had been inadequate to supply sufficient current to certain fixtures, but that prior to the time of the accident new wiring had been installed in vapor proof conduits. The extent to which the wiring, including the connections to the desk lamp and the water heater, was vapor proof, was a question of fact for the jury to weigh, but the evidence relative to the "vapor proof" wiring in the oil room was new and substantial evidence upon a material issue. In addition, the evidence on the fourth trial was strengthened by evidence on the fifth that the fire could not have been caused by electric wires connected with the water heater in the garage, or the machinery in the machine shop, or by overhead trolley wires on the street outside the building, or by automobiles being serviced by Weaver or around the premises, or by apparatus

used by decedent in making the immediately previous deliveries of gasoline. Other evidence on the fifth trial amplified and strengthened the testimony given on the fourth and justified the inference that a static spark generated by gasoline running through the hose was the cause of the fire. The evidence introduced was sufficient to sustain the present verdict. It was not identical with the evidence on the fourth trial and is of a degree sufficient to meet the test that it is not substantially the same, but on the contrary different in a material respect. *Estate of Baird*, supra; *Klauber v. San Diego Street Car Co.*, 98 Cal. 105, 32 P. 876; *Erlin v. National Union Fire Ins. Co.*, supra; *Timm v. McCartney*, 30 Cal.App.2d 241, 85 P.2d 920.

[8-12] It is the general rule that it is improper to receive opinion evidence upon ultimate questions of fact which should be decided by the jury. *Sim v. Weeks*, 7 Cal. App.2d 28, 45 P.2d 350. On the fifth trial two expert witnesses were introduced by plaintiffs to testify upon matters not ordinarily comprehended by lay minds unless special study has been made of the scientific characteristics of electricity, and of the volatile qualities of gasoline and its susceptibility to ignition by a static spark of electricity. During the present trial the attorney for the plaintiffs on many occasions propounded certain questions, which required answers by the expert witnesses, relative to the propriety and safety of certain methods of delivering gasoline through a hose from a tank to a receptacle. These questions were technically objectionable and should not have been allowed (*Inyo Chemical Co. v. City of Los Angeles*, 5 Cal. 2d 525, 55 P.2d 850; *Parkin v. Grayson-Owen Co.*, 157 Cal. 41, 106 P. 210), particularly in view of the fact that the same information could have been elicited by propounding questions in the usual and accepted hypothetical form. The method of propounding the questions was an infringement upon the rule that a qualified expert may not testify relative to the ultimate determination of the question of negligence, but only upon matters requiring professional or scientific knowledge or skill not usually found within the knowledge of untrained minds. However, in the determination of prejudicial error, the test is, would the result have been different had objections been sustained and the answers excluded? The information that the answers evoked appeared in unobjectionable questions and answers in further testi-

mony of the same or other witnesses. Under such circumstances, we cannot hold that the error was prejudicial. *Inyo Chemical Co. v. City of Los Angeles*, supra.

[13, 14] Appellant also complains that the trial court erred in allowing expert witnesses to express opinions based on statements of fact contrary to the evidence, namely, that the gasoline was flowing at the time the hose was taken out of the filling stem, and that gasoline was driven through the hose after the underground tank had been filled. A hypothetical question may include the theories advanced by either side if the evidence supports such theories or they could reasonably be found as inferences drawn from the evidence introduced. *Bickford v. Lawson*, 27 Cal. App.2d 416, 81 P.2d 216; *Graves v. Union Oil Co.*, 36 Cal.App. 766, 173 P. 618.

The evidence in the present case tended to prove that when the hose was lifted, or an attempt made to lift it from the filling stem, some amount of gasoline was still flowing through it. In other words, that if the controlling faucet had not been shut off, the gasoline would continue to flow. If it had, as appellant Bodilly claims, the remainder of the gasoline in the hose and pipe from the tank, beyond the cut-off, would still flow, and probably finally drip into the filling stem of the underground tank. In *Graves v. Union Oil Co.*, supra, 36 Cal.App. at page 770, 173 P. at page 619, the court said: "Where many facts and circumstances, as in this case, are made the basis of the question, the appellate court is justified in placing much reliance upon the decision of the trial court in passing upon the sufficiency of the facts narrated in the question."

[15] The testimony of George Fulton, a witness upon a former trial, was read. It was shown that this witness some six or seven months prior to the present trial had been in the state of Minnesota; that inquiry had been made at places in this state where he would probably have appeared had he returned to California and that none of the parties interviewed knew of his present whereabouts. Appellants objected to the introduction of this testimony on the ground that it had not been definitely ascertained that the witness Fulton was the same party for whom a search had been made, and that there was not a sufficient showing of diligence. The evidence sufficiently indicates that Fulton, witness on the former trial, and the Fulton for whom

search was made in connection with the present trial, were one and the same person. The question of due diligence was a matter of discretion with the trial court. In *Cameron v. Ah Quong*, 175 Cal. 377, 384, 165 P. 961, 964, the court said: "No absolute rule may be stated with reference to the sufficiency of the showing required to justify the introduction of a deposition or of testimony given at a former trial. 13 Cyc. 990." We are not prepared to say that such discretion was abused.

[16] Appellants object to certain instructions wherein the phrases "care commensurate with the dangerous agency"; "if he accidentally or negligently loses possession"; "proximately contributed"; "it is more probable"; contributory negligence "on the part of plaintiffs"; damages "by reason of the injuries or death complained of" appear. The wording of these instructions cannot be approved, but when read in connection with all of the instructions we are not convinced that the jury was misled or that defendants were prejudiced in their defense.

[17] An instruction upon the doctrine of assumption of risk was proposed by appellants. The applicability of the doctrine is based upon the knowledge and appreciation of a danger and the voluntary occupation of a position of danger in disregard to the use of ordinary care. In this connection the time, the place, the person, and the relationship of the parties, should be considered. It is conceivable that one person may occupy with perfect safety a position that would be dangerous to another.

In addition to cases involving the relationship of master and servant, the above doctrine has been invoked where some contractual obligation exists, such as the right upon payment of a fee to witness a performance or exhibition. Under such circumstances the doctrine is applicable to one who voluntarily assumes a position of danger (*Quinn v. Recreation Park Ass'n*, 3 Cal.2d 725, 46 P.2d 144); likewise to one who, without contract, knowingly participates in a hazardous undertaking such as riding on a fire engine making a test run (*Grassie v. American LaFrance Fire Engine Co.*, 95 Cal.App. 384, 272 P. 1073), or attempting to ride an unbroken mule. *Whalen v. Streshley*, 205 Cal. 78, 269 P. 928, 60 A.L.R. 445. But in all cases the party must have knowledge of the existing conditions and must or should appreciate under all the surrounding circum-

stances the possibility of the danger involved and of the hazardous position assumed. Appellant Bodilly, as an employee of appellant Shell company, had theretofore delivered gasoline under similar circumstances. Nothing had occurred from which could be drawn a reasonable inference that he would be negligent in the delivery on the day in question. Decedent was not an employee of the defendant Shell company, nor a fellow employee of the defendant Bodilly. In view of the legal doctrines above referred to, the trial court was justified in refusing to give the proposed instruction.

[18,19] In any event, the form of instruction here proposed by defendants was clearly objectionable under any theory of assumption of risk. It was apparently intended as a formula instruction based on the relationship of master and servant, the substance thereof being that plaintiffs were not entitled to recover damages if the accident resulted from "any risk" incident to the decedent's employment. However, in that class of cases wherein the doctrine of assumption of risk based on such relationship may be properly invoked, the rule is that an employee assumes only the risk of those dangers normally incident to the occupation in which he voluntarily engages, and does not assume the risk of such extraordinary dangers as may be created by the negligent acts of others, unless of course he participates in said negligent acts or knows or has reason to believe they are being or about to be committed. *King v. Schumacher*, Cal.App., 89 P.2d 466. For the same reason the proposed instruction was improper if it was intended to embody the doctrine or the so-called "hazardous risk or undertaking" cases above referred to, wherein the doctrine of master and servant does not exist.

[20,21] Appellants contend that the award assessed by the jury is excessive. In this respect our attention is called to the claim that the amount of \$40,000 in a death case has never met with the final approval of the appellate courts in this state. The closest approach seems to have been \$35,000. The answer to this contention is that the assessment of the amount of damages is with the trier of the facts and should not be disturbed except where passion, prejudice or undue influence is shown. This case has been tried five times. On two of those trials the juries returned verdicts of \$50,000 and \$35,000 respectively.

Under such circumstances we are not prepared to say that a \$40,000 verdict is excessive. *Albaugh v. Mt. Shasta Power Corp.*, 9 Cal.2d 751, 73 P.2d 217.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.



**PEOPLES STATE BANK v. IMPERIAL
IRR. DIST. et al.**

Civ. 2319.

District Court of Appeal, Fourth District,
California.

Oct. 6, 1939.

Hearing Granted Nov. 9, 1939.

Appeal from Superior Court, Imperial
County; Frank J. Macomber, Judge.

On rehearing.

Prior opinion, 93 P.2d 1015.

W. Coburn Cook, of Turlock, for appellant.

Harry W. Horton and George R. Kirk,
both of El Centro, for respondents.

PER CURIAM.

In denying appellant's petition for rehearing, for the purpose of clarity, we should add that in the decision we stated that [93 P.2d 1015, 1018]: "It also appears from the *record* that respondents have in fact filed proceedings in the federal court under the Bankruptcy Act, subsequent to the effective date of chapter 72, 1939 Statutes," etc. In using the word "*record*" we intended only to refer to respondents' supplemental brief, which directed our attention to this fact, and the record of the statement of counsel for appellant in open court on August 8, 1939, made in the presence of counsel for respondents, which reads in part as follows: "Now I might add that after the demurrer was sustained, after the new consenting statute was adopted, in April of this year, the Imperial Irrigation District did file in bankruptcy, and a trial has been had and the case is not completed * * *."

Petition for rehearing denied.

RICHARD R. ADAMS CO., Inc., v. PACIFIC STATES SAVINGS & LOAN CO. et al.
Civ. 11850.

District Court of Appeal, Second District,
Division 1, California.

Sept. 29, 1939.

Rehearing Denied Oct. 25, 1939.

Hearing Denied Nov. 27, 1939.

1. United States ⇐53

The Home Owners' Loan Act was intended solely for the benefit of home owners who were in financial difficulties, and any benefit to creditors of home owners is merely incidental. Home Owners' Loan Act 1933, as amended, 12 U.S.C.A. § 1463 et seq.

2. Contracts ⇐123(1)

Where savings and loan company agreed to accept Home Owners' Loan Corporation bonds in less amount than mortgage debt in settlement of company's claim against mortgaged property, but also required mortgagor to pay \$500 in cash and give a note for \$500, the transaction was void as violative of the basic public policy expressed in the Home Owners' Loan Act. Home Owners' Loan Act 1933, as amended, 12 U.S.C.A. § 1463 et seq.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by the Richard R. Adams Company, Inc., against the Pacific States Savings & Loan Company and another to recover as assignee of twenty-six separate assigned claims for money had and received. From a judgment for defendants, plaintiff appeals.

Reversed.

Hearing denied; HOUSER, J., not participating.

John C. Campbell and Franz R. Sachse, both of Los Angeles, for appellant.

Mace & Tuthill, of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal by plaintiff from a judgment in favor of the defendant and respondent, Pacific States Savings and Loan Company, a corporation.

Appellant sets forth generally, but completely, the status of the parties as follows: "Plaintiff brought the action as assignee of twenty-six separate assigned claims, plaintiff's assignors being hereinafter referred

to as the 'home owners'. The complaint alleges twenty-six separate causes of action which are plead as common counts for money had and received.

"The answer of the defendant Pacific States Savings and Loan Company is in the nature of a general denial.

"Each of plaintiff's several causes of action seeks to recover the amount of a money payment admittedly received by the respondent from an assignor home owner in connection with the refinancing of an obligation held by respondent and secured by an encumbrance upon the home of the home owner through recourse to the benefits of the Home Owners' Loan Act, enacted by the Congress in 1933, for the relief of distressed home owners. Home Owners' Loan Act of 1933 as amended, 12 U.S.C.A. § 1463 et seq., 48 Stats. 128.

"It was stipulated and agreed at the time of the trial that the determinative issue of law was whether or not the payments made by plaintiff's assignors were legally demanded and received by the defendant. It was agreed that if the payments were unlawfully exacted and received, plaintiff was entitled to a judgment for the recovery thereof.

"It was, and is, the theory of plaintiff and appellant that the payments so exacted by the respondent were taken and received wrongfully and in violation of the provisions and purposes of the Home Owners' Loan Act, involving, among other things, violations of provisions of said Act, carrying criminal penalties; further it was, and is, the theory of plaintiff that the payments so exacted from the home owners were and are without any legal consideration and that respondent, in receiving such wrongfully and illegally exacted payments, became, and now is, a constructive trustee thereof for the benefit of the home owners who made the payments.

"On the other hand, it was the theory of the defendant, which was followed by the trial court, that the Home Owners' Loan Act did not inhibit or make illegal such separate and collateral exactions of payments from the home owners, even though such exactions were incidental to refinancing under the procedure prescribed by the Home Owners' Loan Corporation which required the filing by the respondent, as mortgagee, of consents to take Home Owners' Loan Corporation bonds in specific designated amounts and in full satisfaction of its obligations, the precise amounts of

which were in all cases required to be represented to the H. O. L. C.

"It was the theory of respondent, which was adopted by the trial court, that, in the absence of proof of the elements of fraud and deceit by respondent against the home owners, the exacted payments were neither illegal nor recoverable. In other words, it was the theory of the court below that only upon the basis of fraud and deceit in the inducement could the exactions of the payments be held illegal.

"At the conclusion of the trial, the court below announced its decision expressly predicated upon the theory, as stated, that plaintiff could not recover in the absence of proof of the elements of fraud in the inducement or procurement of the exacted payments. Judgment was, therefore, ordered in favor of defendant Pacific States Savings and Loan Company, and it is from the judgment thereafter entered in favor of defendant that this appeal is taken, plaintiff's motion for a new trial having been regularly made and by the court below denied."

Inasmuch as each cause of action is based upon practically an identical state of facts, the following detailed example of one of the transactions, as recited in appellant's brief, is typical of all and is as follows: "Plaintiff's assignor, Mrs. Frances Bell, owned a home in Long Beach, California, which was encumbered with a deed of trust securing an obligation held by respondent Pacific States Savings and Loan Company. On the 26th day of May, 1934, the balance owing upon this obligation, according to respondent's statement as of that date, was \$12,603.61.

"Mrs. Bell was in default in her payments upon said obligation and respondent was threatening foreclosure proceedings. Accordingly, she made application to the H. O. L. C. for a refinancing loan. In connection with this application, and pursuant to the usual procedure of the H. O. L. C. in such cases, respondent filed its 'Demand' dated May 26, 1934. This 'Demand' itemized the amount due upon the obligation of Mrs. Bell, and, including principal, interest, taxes, costs, and all other charges, it totaled the sum of \$12,603.61.

"At the same time, respondent also filed with the H. O. L. C. its 'Mortgagee's Consent to Take Bonds', dated May 26, 1934, wherein respondent represented the unpaid balance upon Mrs. Bell's obligation to be in

the figure above mentioned, and wherein respondent expressed its agreement to accept H. O. L. C. bonds in the amount of its 'Demand' as stated.

"After making its appraisal, the H. O. L. C. advised the respondent that it would not loan to exceed approximately \$4,800 for the purpose of refinancing the obligation of Mrs. Bell, owing to respondent. In the latter part of July, or the first part of August, 1934, Mrs. Bell had a conversation in the office of the defendant company with Mr. F. A. Wright, an officer and director of the company. In this conversation, Mr. Wright informed Mrs. Bell that \$4,800 was all that the H. O. L. C. would provide for the purpose of refinancing her obligation; that respondent would not accept that amount; that she must raise an additional \$1,000 or they would reject the H. O. L. C. proposal and would proceed to foreclose their deed of trust upon her home.

"Mrs. Bell was finally told by Mr. Wright that if she would pay \$500 in cash and would give her note for \$500, respondent would accept the bonds of the H. O. L. C. in the amount offered. Accordingly, Mrs. Bell went out and borrowed \$500 for payment to respondent as demanded.

"Thereafter, and on or about August 3, 1934, and the next day or so after her first conversation with Mr. Wright, Mrs. Bell, having raised the necessary \$500, returned to the office of the respondent company and delivered the cash to Mr. Wright and at the same time signed a promissory note for an additional \$500. Mr. Wright thereupon gave Mrs. Bell the following receipt:

"Pacific States Savings and Loan Company—Established 1889

"August 3, 1934.

"Received of Frances Bell, her note in the principal sum of \$500.00 together with the sum of \$500.00 which represents a total of \$1,000 as full adjustment on her Home Owners' Loan application.

"If for any reason the Home Owners' Loan is not closed, this note and cash received will be returned to Mrs. Bell.

"Pacific States Savings and Loan Company

"(Signed) F. A. Wright,
"Vice-President."

"The \$500 cash so received by Mr. Wright from Mrs. Bell was placed in a separate account. It was not credited or applied upon Mrs. Bell's obligation. It was entered in a special ledger, referred

to at the trial as a 'conditional or provisional ledger'. It was not until after the H. O. L. C. financing was consummated, and after the receipt by respondent of its H. O. L. C. bonds, that this \$500 was transferred from the 'provisional' ledger account to the Central Loan Department for application to Mrs. Bell's account on the general books of the company.

"After receipt of the \$500 cash and the \$500 note from Mrs. Bell, respondent filed with the H. O. L. C. its further 'Mortgagee's Consent to Take Bonds', substantially the same in substance and form as that which appears in the case of *McAllister v. Drapeau*, Cal.App., 85 P.2d 523, December 15, 1938; *Id.*, Cal.Sup., 92 P.2d 911.

"It is particularly pointed out that the foregoing instrument did not disclose the receipt of either the \$500 cash or the \$500 note, nor were these payments in any wise reflected by any reduction in the statement of the balance asserted to be due and owing to respondent upon Mrs. Bell's obligation.

"Subsequently, respondent filed another 'Mortgagee's Consent to Take Bonds', bearing date the 10th day of September, 1934.

"The important feature of this last-filed 'Consent' is that it shows an increase in the balance due upon Mrs. Bell's obligation over that previously asserted; the increase resulting, evidently, from further accrual of interest. It does not reveal any reduction or credit on account of the payment of the \$500 cash, or the \$500 note theretofore received from Mrs. Bell. The essence of the last-filed 'Consent' was an agreement by respondent to accept a total of \$4,859.71 in H. O. L. C. bonds in full satisfaction of an obligation upon which respondent represented to be then due and owing the sum of \$12,817.95.

"This last-filed 'Consent' expressed respondent's agreement, provided the refunding could be consummated, 'to accept in full settlement of the claim of the undersigned the sum of \$4,859.71, less bonds, taxes and escrow expense'. It did not say that respondent would accept said sum in bonds, plus \$1,000 received from the applicant home owner in full settlement of its claim.

"On the same day to wit: September 10, 1934, there was delivered to respondent by the H. O. L. C. an instrument denominated 'Authorization for Delivery of Bonds of Home Owners' Loan Corporation'. This

instrument authorized delivery to respondent of H. O. L. C. bonds of a face value of \$4,825.

"Thereafter, on November 15, 1934, respondent received out of escrow the \$4,825 worth of H. O. L. C. bonds and cash, making a total in all of \$4,859.71.

"On the following day, to wit, November 16, 1934, respondent caused to be transferred to its Central Loan Department, for application and credit on Mrs. Bell's loan ledger card, the sum of \$500, representing the cash which respondent had received from her on August 3, 1934."

[1,2] The issues herein involved can be disposed of briefly. Since the trial of the within action, the Supreme Court of California has held, in a sweeping decision involving similar controversies, that "The obtaining of secret second liens by the creditor violates the basic public policy expressed in the act. The act was intended solely for the benefit of home owners who were in financial difficulties—no one else was eligible for its benefits. Any benefit to creditors was merely incidental. But if a creditor could lawfully exact a secret second lien from his debtor, in many cases this would confer the benefits of the act on the creditor rather than on the debtor." *McAllister v. Drapeau*, Cal.Sup., 92 P.2d 911, 915.

The issue of fraud was not involved in the *McAllister v. Drapeau* case nor is it involved in the instant case, nor was there any finding in either case that the "second mortgage" financing, or secondary obligation, was so arranged that the home owner would not have a reasonable probability of being able to carry his first mortgage to the H. O. L. C. and also the second mortgage indebtedness or obligation. Nor was the H. O. L. C. a party to the action in the *McAllister v. Drapeau* case, nor is such corporation a party to the action in the instant case. The Supreme Court in the *McAllister v. Drapeau* decision, however, holds, in disposing of the contention urged there as here that the H. O. L. C. is the only one that can raise the question of illegality, that "The corporation has presented its views in the action as an *amicus curiae*, and vigorously assails the legality of the transaction." Thus, the H. O. L. C. has become a party to the within action indirectly and by inference.

In an action involving similar issues disposed of by the District Court of Appeal, on the authority of the Supreme Court de-

cision in the *McAllister v. Drapeau* case, supra, the court declared "Under the authority just referred to it must be held that the transaction involved in the instant case was illegal and void." *Woods v. Kern County Mutual B. & L. Ass'n*, Sept. 5, 1939, Cal.App., 93 P.2d 837, 840.

By virtue of said Supreme Court decision the judgment of the trial court in the within action must be and is, therefore, reversed.

We concur: YORK, P. J.; WHITE, J.



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WELLS v. LLOYD et al.

Civ. 11835.

District Court of Appeal, Second District,
Division 1, California.

Sept. 29, 1939.

As Amended on Denial of Rehearing

Oct. 24, 1939.

Hearing Denied Nov. 27, 1939.

1. Appeal and error ⇨1213

Where evidence at second trial was practically the same as at first trial, Supreme Court's ruling on appeal from judgment for plaintiff in the first trial, that certain questions were for jury, became "law of the case," binding upon trial court and upon Court of Appeal in second appeal, and requiring reversal of judgment of nonsuit entered after second trial.

[Ed. Note.—For other definitions of "Law of the Case," see *Words & Phrases*.]

2. Appeal and error ⇨1195(1)

The doctrine of "law of the case" is not confined to that portion of appellate court's opinion which can be said to be strictly essential to the disposition made of the case.

3. Witnesses ⇨275(8)

One who had written a letter for corporate defendant, as its vice-president, was subject to cross-examination concerning such letter under statute governing examination of adverse parties, notwithstanding fact that he was no longer an officer. Code Civ.Proc. § 2055.

4. Witnesses ⇨275(8)

A corporate official cannot deprive the adverse party to a lawsuit of the right to invoke statute governing examination of ad-

verse party, by simply terminating his official connection with the corporation. Code Civ.Proc. § 2055.

5. Appeal and error ⇨1213

Ruling of Supreme Court in former appeal of action for fraud, that there was evidence upon which jury might have decided that defendant's conduct made it a party to a conspiracy and consequently liable for acts and declarations of coconspirators, was "law of the case" binding on the trial court in second trial and on subsequent appeal, and precluded court from striking out testimony concerning conduct of coconspirators on the theory that conspiracy had not been shown.

6. Appeal and error ⇨1213

Where Supreme Court had ruled in former appeal that evidence in action for fraud made jury question on whether defendant had entered into conspiracy, making it liable for acts and declarations of its coconspirators, the court on second trial should advise jury that if they found upon competent evidence that conspiracy existed and defendant was a party thereto, they could consider coconspirator's acts and declarations as admissible against all conspirators, but should otherwise disregard the testimony as hearsay.

7. Appeal and error ⇨927(7)

Where an appeal is taken from a judgment following a directed verdict, or nonsuit, the rule requires that the evidence shall be taken by the appellate tribunal in the most favorable light to the losing party in the court below.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Myron H. Wells, as trustee in bankruptcy for the estate of the Bay Cities Guaranty Building Loan Association, bankrupt, substituted as plaintiff in the place and stead of Bay Cities Guaranty Building Loan Association, against Ellwood Lloyd IV and others, for damages for fraud. From a judgment of nonsuit, plaintiff appeals.

Reversed and remanded.

Hearing denied; EDMONDS and HOUSER, JJ., dissenting.

Thurlow T. Taft and Tanner, Odell & Taft, all of Los Angeles, for appellant.

Freston & Files, Clarence M. Hanson, and Ralph E. Lewis, all of Los Angeles (Louis Ferrari, of San Francisco, and Edmund Nelson, of Los Angeles, of counsel), for respondents.

WHITE, Justice.

This is an appeal by the plaintiff from a judgment of nonsuit in an action prosecuted in the name of the trustee in bankruptcy of the estate of Bay Cities Guaranty Building Loan Association, a corporation, bankrupt, to recover damages alleged to have been suffered by the bankrupt corporation by reason of alleged fraudulent acts of the defendants. The action was brought by the corporation before bankruptcy, the trustee as such having thereafter been substituted as plaintiff. Before the trial involved in this appeal the action was dismissed as to all defendants except Merchants National Trust and Savings Bank of Los Angeles and its successor, Bank of America National Trust and Savings Association.

This is the second appeal in this action. On the first appeal a judgment for plaintiff against the bank was reversed by the Supreme Court upon the ground that other issues than the amount of damages should have been submitted to the jury for decision. *Wells v. Lloyd IV*, 6 Cal.2d 70, 56 P.2d 517. We will here forego a detailed statement of the factual background of this litigation, for the reason that a full and comprehensive statement thereof is found in the cited case, commencing at page 77, of 6 Cal.2d, 56 P.2d at page 517.

Appellant's main contention on this appeal is that by its decision in the former appeal the Supreme Court held that while as a matter of law it was not proper for the court in the first trial to direct a verdict for the plaintiff, there was nevertheless sufficient evidence upon the question of whether the bank participated in the fraud perpetrated on the Bay Cities Guaranty Building Loan Association to require that this issue should be submitted to the jury. If appellant's contention in this regard is correct, and if it be found that the evidence produced on the second trial was substantially the same as was offered at the first trial, then the decision upon the former appeal became the law of the case, and the trial court was without authority to grant a nonsuit upon the second trial, but was obliged, in accordance with the established law of the case, to submit the issues to the jury.

With reference to the participation by respondent bank in any wrongdoing which resulted in damage to appellant, the Supreme Court in the former appeal said [6

Cal.2d 70, 56 P.2d 522]: "With reference to the claim of the bank that there was no evidence of any wrongdoing on its part, we will point out briefly sufficient reasons why we must hold otherwise. The statement in the letter of the bank to the building and loan commissioner to the effect that a certificate of deposit had been issued in favor of the Lloyd Association was false. It was a positive assertion not warranted by the information of the vice president who signed the letter. It was a suppression of material facts of which the author of the letter had knowledge. The certificate of deposit never left the custody of the bank, but was at all times held as security for the Commagere note. Mr. Brown knew, when he wrote the letter, that the bank would never part with the possession of the certificate of deposit or any money thereon until funds were provided from some other source for the payment of the Commagere note. Therefore the statement that the certificate had been issued to the Lloyd Association was true only in a limited sense and not in the sense in which the statement would be understood, and was understood, by the building and loan commissioner. The representation regarding the certificate of deposit was made by the bank with the intention that it should be sent to the commissioner. Merchants National Bank, therefore, actively participated in the deceit practiced upon the building and loan commissioner as a result of which a permit was issued."

The only additional evidence elicited at the second trial in connection with the alleged deception practiced by the bank on the building and loan commissioner is contained in the testimony of Ellwood Lloyd IV, when he related: "I was in the commissioner's office in company with Mr. Rishell when this entire plan and all its details were discussed with him. The commissioner commented that the deposited bonds were certified for savings and that that satisfied him. I can't give you the exact date of this discussion with the commissioner about the bonds but it was just a day or two ahead of Thanksgiving."

However, it appears that this discussion with the commissioner of "this entire plan and all its details" occurred some three weeks after the commissioner had issued the permit, and could not therefore have influenced him in his action granting the permit, while it was in connection with the issuance or granting of the permit that the Supreme Court decision refers to the

allegedly deceptive letter written by the bank.

In the former appeal the Supreme Court, referring to the writing of the letter to the commissioner by the bank, points out that "this fact, alone, is not necessarily sufficient to fix responsibility on the bank for what transpired later", but that the responsibility of the bank for acts performed subsequent to the issuance of the permit is dependent upon the existence of a conspiracy in which the bank joined. Upon this point the decision on the former appeal reads: "We cannot say that the evidence establishes, to the exclusion of every other reasonable conclusion, that the bank conspired to perpetrate the fraud on Bay Cities, which was ultimately accomplished. That question, we think, should have been submitted to the jury." Further in the decision on the former appeal the Supreme Court proceeds to discuss the question of whether the bank's participation in the early stages of the negotiations leading up to the issuance of the permit to the Lloyd Association proximately contributed to the loss sustained by appellant, with reference to which on page 86 of 6 Cal.2d, 56 P.2d at page 525, the court says:

"The question of proximate cause is one for the jury in every case where there is room for a reasonable difference of opinion.

"Thus, where the facts of the particular case are disputable, and are of such character that different minds might reasonably draw different conclusions therefrom, a question of fact is presented properly determinable by the jury. * * * So where the rule of intervening efficient cause is relied on by the defendant, it is ordinarily a question for the jury whether there was such an intervening efficient cause as would prevent the negligent act or omission of the defendant from being the proximate cause of injury. * * * Where it is claimed that the defendant's act was not the proximate cause of injury because the result could not reasonably have been foreseen, it is ordinarily a question for the jury whether the result should reasonably have been foreseen." 22 R.C. L. 148-150.

"Where different conclusions may be drawn from the evidence as to whether the act is the proximate cause of injury or damage, the question should be left to the jury. *Mansfield v. Eagle Box & Mfg. Co.*, 136 Cal. 622, 69 P. 425; *Anderson v.*

Seropian, 147 Cal. 201, 81 P. 521; Elder v. Rose, 63 Cal.App. 545, 219 P. 74; Kreitzer v. Southern Pacific Co., 38 Cal.App. 654, 177 P. 477.

"We are of the opinion that it cannot be said, as a matter of law, that the loss was sustained as a natural and probable consequence of the representation joined in by the bank that Lloyd Association held a valid permit or the representation that it had in the bank \$120,000 at the time the permit was issued. There was sufficient evidence upon which the jury might have decided either that Bay Cities Association did, or that it did not, part with its property as the direct and proximate result of the representations made solely by and on behalf of the Lloyd Association. These were questions of fact which the jury should have been allowed to decide."

[1] The evidence upon the second trial being practically the same as that presented upon the first trial, we are impressed that the ruling of the Supreme Court upon the first appeal, that the questions of proximate cause and the existence or non-existence of a conspiracy, so far as the liability of the bank is concerned, were debatable questions upon which reasonable minds might disagree and should have been submitted to the jury, became the law of the case and therefore binding upon the trial court and conclusive of those questions upon appeal. In *Estate of Baird*, 193 Cal. 225, at page 236, 223 P. 974, at page 978, we find the following: "The evidence may be different, and yet unless it is substantially different in a material respect, the doctrine of the law of the case applies, and it applies notwithstanding the fact that in the previous decision evidence contained in the record is not quoted or cited in the opinion." See, also, *Young v. Southern Pacific Co.*, 189 Cal. 746, 749, 210 P. 259; *United Iron Works v. Standard Brass Casting Co.*, 98 Cal.App. 517, 519, 277 P. 183; *Westerfeld v. New York Life Ins. Co.*, 157 Cal. 339, 345, 107 P. 699.

[2] Nor is the doctrine of the law of the case confined to that portion of the opinion of the appellate court which can be said to be strictly essential to the disposition made of the case. *People's Lumber Co. v. Gillard*, 5 Cal.App. 435, 438, 90 P. 556.

The Supreme Court, in its opinion upon the former appeal having established the law of the case, the trial court was without

authority to reconsider these rulings, and should have denied respondents' motion for a nonsuit; and it was error to take the case from the jury.

Respondents contend that the ruling of the Supreme Court on the appeal in the first case was that there was sufficient evidence in favor of defendant bank to preclude a directed verdict for the plaintiff, but that such holding does not mean that there was evidence so favorable to plaintiff that had the action of the trial court been the opposite of what it was, that the case should still be given to the jury. With this contention we cannot agree, because the Supreme Court in the previous opinion in positive and unequivocal language directly states that the questions of proximate cause and the existence or non-existence of a conspiracy should have been submitted to the jury because the evidence in connection therewith presented debatable questions and left room for a reasonable difference of opinion.

[3, 4] Although the foregoing requires a reversal of the judgment herein, we nevertheless feel that we should, for the guidance of the court upon a retrial, give attention to rulings made in the last trial which are assigned by appellant as erroneous upon this appeal. During the trial a witness was called who was a vice-president of defendant Merchants National Trust and Savings Bank at the time of the transaction which formed the basis of this action, and which witness as such vice-president wrote the letter to the building and loan commissioner as hereinbefore narrated. When appellant undertook to cross-examine this witness under the provisions of section 2055 of the Code of Civil Procedure the court sustained an objection made on the ground that the witness was no longer an officer of the bank. The ruling of the trial court was erroneous. To us it seems incredible that a corporation could nullify the provisions and purpose of section 2055 of the Code of Civil Procedure by simply terminating or suspending the relationship existing between it and its officer prior to the trial of an action commenced against the corporation. The section was undoubtedly intended to provide for cross-examination of any officer whose official position with the corporation put him in possession of any matters material to the cause on trial. Such a corporate official cannot deprive the adverse party to a lawsuit of the right

to invoke the provisions of section 2055 of the Code of Civil Procedure by simply terminating his official connection with the corporation. To hold otherwise would enable a corporation to evade cross-examination under this section by the mere subterfuge of discharging an officer prior to the trial of a cause and then reinstating him at the conclusion of such proceeding. In the instant case the former vice-president called as a witness was the author of the letter addressed to the building and loan commissioner; and he having written such letter as an officer of the defendant bank, the plaintiff was entitled to invoke the provisions of section 2055, Code of Civil Procedure, against the corporate defendant by cross-examining defendant's officer and agent, even though the latter prior to the trial terminated his official connection with such corporation.

[5] The trial court also erred when at the close of the evidence on the part of the plaintiff it made the following ruling: "The evidence of various witnesses as to conversations outside the hearing or presence of any officer of the Merchants National Bank or the Bank of America was admitted subject to a motion to strike and upon the theory that evidence might be produced by the plaintiff to show that the bank did enter into some arrangement or conspiracy with the other parties originally named as defendants, due to the difficulty of proving conspiracy and because the court should extend a great deal of leeway for such purpose. There having been no showing that the bank entered into a conspiracy or that it had any agreement with any of the other defendants, of course the acts and declarations of those persons would not be binding on the bank, so the motion to strike all of that testimony is granted."

In the former appeal the Supreme Court said at page 86 of 6 Cal.2d, 56 P.2d at page 525: "There was sufficient evidence upon which the jury might have decided either that Bay Cities Association did, or that it did not, part with its property as the direct and proximate result of the representations made solely by and on behalf of the Lloyd Association. These were questions of fact which the jury should have been allowed to decide."

[6] The rulings of the Supreme Court in the former appeal that there was evidence upon which the jury might have

94 P.2d—24½

decided that the conduct of the defendant bank made it a party to an existing conspiracy to perpetrate a fraud on Bay Cities Association and consequently liable for the acts and declarations of its coconspirators, must be taken as binding on the trial court and also on this appeal, as the law of the case. The testimony last above referred to should not have been stricken; but the jury should have been advised by appropriate instructions that if they found upon competent evidence that a conspiracy did exist and that defendant was a party thereto, they were then entitled to consider the acts and declarations of a coconspirator relating to the conspiracy as admissible against all conspirators; but that unless they found that a conspiracy was proved and that the defendant bank was a party thereto, the jury should disregard the testimony in question as hearsay so far as the defendant bank was concerned.

[7] It should be understood that throughout this opinion we have followed the rule applicable to cases wherein the appeal is taken from a judgment following a directed verdict or non-suit, which rule requires that evidence shall be taken by the appellate tribunal in the most favorable light to the losing party in the court below. We are therefore expressing no opinion as to the weight of the evidence or its truth or falsity.

No other points raised demand our consideration.

For the reasons herein stated, the judgment is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.



34 Cal.App.2d 680

TAYLOR v. EDUCATIONAL BROADCASTING CORPORATION (STATION KROW).

Civ. 10986.

**District Court of Appeal, First District,
Division 2, California.**

Sept. 27, 1939.

Hearing Denied Nov. 22, 1939.

1. Brokers ⇐86(1)

In action by radio advertising sales agent against radio station to recover commissions on radio time sold to certain purchaser after expiration of employment contract on March 31, 1937, and for breach of

employment contract, evidence that contract made no provision for payment of commissions after March 31, 1937, and that prior to that time radio station informed agent that his services had been unsatisfactory and that it did not intend to renew contract, justified judgment for radio station.

2. Customs and usages ☞15(2)

In action by radio advertising sales agent against radio station to recover commission on radio time sold certain purchaser after expiration of employment contract on March 31, 1937, and for breach of employment contract, where agent sought to show that because he was employed to "resell and renew" contracts of 1934 and 1935 with purchaser, it must be inferred that he was also employed to "resell and renew" contract of 1936, admission of testimony by radio station's president to effect that there was no special meaning of the words "resell and renew" as used in radio circles from their general accepted meaning, was not error.

3. Customs and usages ☞15(2)

In action by radio advertising sales agent against radio station to recover commission on radio time sold to certain purchaser after expiration of employment contract on March 31, 1937, and for breach of employment contract, where agent sought to show that because he was employed to "resell and renew" contracts of 1934 and 1935 with purchaser, it must be inferred that he was also employed to "resell and renew" contract of 1936, refusal to admit testimony of agent on meaning of words "resell and renew" in radio circles was not error, where purpose of such testimony was to show a custom or usage contrary to express language of written contract.

4. Customs and usages ☞17

A written contract can not be varied by parol proof of a custom where the contract is certain in its terms.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by George Taylor against the Educational Broadcasting Corporation, and the Educational Broadcasting Corporation, doing business as and under the fictitious name and style of Radio Station KROW, to recover commissions on an alleged contract for personal services and to recover damages for the breach of such contract. From judgment for defendant, the plaintiff appeals.

A affirmed.

Henry C. Clausen, of San Francisco, for appellant.

J. W. O'Neill, of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued to recover commissions on an alleged contract for personal services, and to recover damages for the breach of such contract. The cause was tried without a jury and defendant had judgment.

Plaintiff was a radio advertising sales agent. Defendant was owner and operator of radio station KROW. In September, 1934, plaintiff and defendant executed a written contract whereby the former was employed as agent to negotiate with the Italian Daily News for the purchase of radio time over station KROW at a fixed commission to be paid as moneys would be paid by the News. A contract was thereafter executed with the News whereby the latter agreed to pay the radio station \$425 a month for a program of "entertainment and educational features in Italian and English with instrumental and vocal talent". Said contract was to run for a period of six months, with the option with the News to extend it for an additional six months. Thereafter the plaintiff complained to defendant that their agreement for payment of commissions was indefinite in the event the option to extend was exercised and the parties thereupon executed an addenda to the original contract of employment, which reads as follows: "KROW agrees to permit George Taylor to renew or resell the Italian Daily News on expiration of existing contract, providing George Taylor can personally contact, negotiate, and service account. On such renewals, KROW agrees to fulfill the commission terms as above stated."

On March 12, 1935, the contract with the Italian Daily News was supplanted by another contract covering the same broadcast hours at the same rate per month, and containing a proviso permitting the News to cancel the contract at the end of six months and to have the option to extend for an additional period of one year. In August of that year the plaintiff asked for and received a written statement from defendant reading as follows:

"We now hold a contract with the Italian Daily News dated March 12, 1935, payable \$425.00 per month for station time, this contract expires April 1, 1936—a commission of 15% on all such payments has

been assigned to you for your efforts in relation to this contract.

"In the event the Italian Daily News on or before April 1, 1936, should renew or extend this contract and such contract for renewal or extension is acceptable to the Educational Broadcasting Corporation, the Corporation agrees to continue to pay you on such renewal or extension beyond April 1, 1936, the commission of 15%."

On March 31, 1936, a new contract was executed by the radio station and the Italian Daily News which covered a different broadcasting time, at a higher rate of pay per month, and called for a different form of program. This contract did not contain any provision for extension or renewal. In December, 1936, the defendant informed plaintiff that he had failed to "service" the account as required by his contract of employment and that the defendant would deal with another agent after the expiration of his contract in March, 1937. Thereupon the plaintiff endeavored to persuade the Italian Daily News to breach its contract with defendant and to refuse to execute a new contract for the period following March, 1937. Notwithstanding this breach of plaintiffs, the defendant paid him his full commissions up to the expiration of the existing contract on March 31, 1937.

Prior to this expiration date the defendant notified the Italian Daily News that it would not renew its existing contract, and so notified plaintiff. After March 31, 1937, some broadcasting time was purchased by the Italian Daily News without a written contract. All these broadcasts were "serviced" by a news agency, which means that the daily script was checked, foreign language speeches were interpreted, analyzed, and checked, and relations maintained with the Federal Trade Commission. By his action the plaintiff seeks to recover commissions on the radio time sold after March 31, 1937, and, by a separate cause of action, seeks damages for a breach of contract of employment.

[1] Stripped of all the niceties of argument the real question on this appeal is whether, upon the foregoing statement of the evidence, the trial court was justified in making its finding adverse to the plaintiff. This question must be answered in the affirmative because there is not even a contradiction of the direct and positive evidence that the parties made no agreement for the payment of commissions after

March 31, 1937, that plaintiff's employment ended on that date, that his services theretofore had been unsatisfactory, and that defendant was justified in discharging him, if it might be assumed that there was a discharge in the mere refusal of defendant to reemploy plaintiff after the period of his employment had definitely ended. Plaintiff's case rests upon the untenable argument that, because he was employed to "resell and renew" the existing contracts of 1934 and 1935, the court should infer that he must have been employed to "resell and renew" the new contract of March, 1936. But the trial court drew the contrary inference from the facts proved, and, when the inference drawn is in accord with the facts proved, the function of the appellate court is ended.

[2-4] We find no prejudicial error in the rulings of the trial court in admitting testimony of respondents' president concerning the meaning of the words "resell and renew", or in rejecting appellant's offer of proof of the customary meaning of such words. The testimony admitted was to the effect that there was no special or peculiar meaning of these words as used in radio circles different from their general accepted meaning. The witness then gave the general accepted meaning, which would have been found in any dictionary. The line of inquiry in appellant's rejected offer of proof covered questions whether a special custom obtained in radio circles relating to payment of commissions on renewals or resales of contracts. The whole purpose of the inquiry was to show a custom or usage contrary to the express language of the written contract. The trial court's ruling was proper. The principle is stated in 10 California Jurisprudence, page 944, as follows: "The code provides that evidence may be given of 'usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation'. In accordance with the rule it has been held that it is not competent to vary a written contract by parol proof of a custom where the contract is certain in its terms."

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

54 Cal.App.2d 697

**HAYWARD LUMBER & INVESTMENT
CO. v. ORONDO MINES et al.**

Civ. 2447.

District Court of Appeal, Fourth District,
California.

Sept. 27, 1939.

1. Mechanics' Liens ⇨78

An owner's notice of nonresponsibility is a bar to the enforcement of lien for materials only if posted and recorded in proper time, and otherwise is not effective for any purpose. Code Civ.Proc. § 1192.

2. Mechanics' Liens ⇨78

An owner's knowledge of intended construction alone is not sufficient to constitute knowledge of actual construction, as regards question of timeliness of posting and recording of owner's notice of nonresponsibility. Code Civ.Proc. § 1192.

3. Mechanics' Liens ⇨281(1)

In action to enforce lien for materials furnished for mining claims, evidence held to authorize finding that owner knew of construction on the mining claim more than 10 days before posting and recording notice of nonresponsibility, and hence that notice did not protect owner from the lien. Code Civ. Proc. § 1192; Civ.Code, § 19.

4. Mechanics' Liens ⇨78

In order to have "knowledge" of improvements being made on their property, so as to make their interest subject to mechanic's lien unless notices of nonresponsibility were posted within ten days, owners need not actually see the work in progress. Code Civ.Proc. § 1192.

[Ed. Note.—For other definitions of "Knowledge," see Words & Phrases.]

5. Mechanics' Liens ⇨78

An owner of mining claim was charged with such knowledge of work being done on the claim, so as to make her interest subject to mechanic's lien therefor, in absence of timely posting and recording of notice of nonresponsibility, as would have been disclosed to her by reasonable inquiry into circumstances that were actually brought to her attention by terms of the leases. Code Civ.Proc. § 1192; Civ.Code, § 19.

6. Mechanics' Liens ⇨78

The "knowledge" of construction which subjects owner's interest to mechanic's lien,

in absence of posting and recording of notice of nonresponsibility, includes not only actual knowledge but "constructive knowledge," or notice of circumstances which would put a prudent man upon inquiry as to the fact in question. Code Civ.Proc. § 1192.

[Ed. Note.—For other definitions of "Constructive Knowledge," see Words & Phrases.]

7. Mechanics' Liens ⇨281(1)

In action to enforce mechanic's lien, evidence including original delivery tickets and testimony of witnesses held sufficient to show delivery of materials to and use in the mining property involved. Code Civ. Proc. § 1192.

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Action by the Hayward Lumber & Investment Company against Orondo Mines and others, to enforce lien for materials furnished on mining claims. From a judgment for plaintiff, defendant H. K. Pollock and another appeal.

Affirmed.

Russ Avery, of Los Angeles, for appellants.

Philip T. Lyons, of Los Angeles, for respondent.

GRIFFIN, Justice.

This action was instituted by respondent to enforce a lien for materials furnished on a group of mining claims in Inyo county. Respondent obtained judgment and the appellant owners have appealed.

On March 7, 1933, the defendants and appellants Alice H. McIntosh and H. K. Pollock, as owners and lessors, entered into an agreement with Horace H. Howard, as lessee, granting him a lease (with an option to buy) on certain mining claims situated in Inyo county. This lease was subsequently assigned to Gold Blossom Mining Co., which later changed its corporate name to Blue Bonnet Mining Co., and that company assigned the lease to Ivan Lewis Finkelberg. The owners posted notice of nonresponsibility on the property March 7, 1933, and recorded it June 24, 1933. It was *acknowledged* before a notary public instead of being verified, and its admission in evidence was refused. On March 1, 1934, the defendants and appellants, Alice H. McIntosh and H. K. Pollock entered into an

agreement, as owners and lessors, with Ivan Lewis Finkelberg, as lessee, concerning the same group of mining claims. It recited the previous lease to Howard, the assignment thereof to Gold Blossom Mining Co., and the assignment by that company to Finkelberg. It extended the so-called "construction period" 90 days from March 1, 1934. The agreement was signed and acknowledged by Mrs. McIntosh in San Bernardino March 2, 1934; by H. K. Pollock in Orange county, March 5, 1934; by Ivan L. Finkelberg in San Bernardino county on March 5, 1934, and was filed for record in the office of the county recorder of Inyo county March 12, 1934. Finkelberg assigned this lease to the Orondo Mines, a corporation (apparently without the knowledge of the appellants), by an instrument dated April 7, 1934, and acknowledged by him April 9, 1934. Mrs. McIntosh prepared a notice of nonresponsibility on her own typewriter, signed it, made some copies of it, dated it *March 1, 1934*, took them with her to the mine, and posted them in three conspicuous places on the mine on *April 2, 1934*. On April 9, 1934, she mailed the verified copy to the county recorder of Inyo county, which was filed for record in that office April 10, 1934.

The principal defense to the enforcement of the lien for materials furnished by respondent on this mining property was that the notice of nonresponsibility was sufficient in form and substance and was posted and recorded in due time and in proper manner and constituted a bar to the enforcement of respondent's lien. The trial court held otherwise and gave judgment for the whole amount claimed by respondent and denied a motion for new trial.

[1, 2] The issue presented bears on the question of the posting and recording of the notice of nonresponsibility under section 1192 of the Code of Civil Procedure, that is, was the notice posted on April 2, 1934, and recorded on April 10, 1934, within ten days after the owner *obtained knowledge of the construction*? If the notice of nonresponsibility was posted and recorded in proper time, it is a bar to the enforcement of the lien on appellants' property. Otherwise, such notice was not effective for any purpose. *Dixon v. Fredericks*, 129 Cal. App. 703, 706, 19 P.2d 272. Knowledge of *intended construction* alone is not sufficient to constitute knowledge of *actual construction*. *Whiting-Mead Commercial Co. v. Brown*, 44 Cal.App. 371, 374, 186 P. 386;

Hayward Lumber Company v. Ross, Cal. App., 90 P.2d 135.

[3] The evidence discloses that Alice McIntosh knew, as early as February 6, 1934, that some work was being done on the property by the lessees then in possession. Her testimony is as follows:

"I heard my husband testify here that he went to work for Mr. Finkelberg on February 6, 1934. I knew at the time that he went to work and knew they were doing some kind of work. I did not know what kind of work they were doing, just that they were doing some work. I did not know by what right of title or on what theory Mr. Finkelberg was in possession of the property on February 6, 1934, and did not make any inquiry. I just let the operations proceed. I do not now remember whether I had an idea at that time that he was proceeding by virtue of an assignment from the Blue Bonnet Company to him. I did not think that he was a trespasser. He was a stockholder in the Blue Bonnet Company. My husband did not tell me from time to time about work that was being done, nor did he tell me specially that any work was being done; in a general way I knew that some kind of work was being done."

On March 1, 1934, she prepared, on her own typewriter, the notice of nonresponsibility relied upon. In it she recited the fact that work was being done on the property. It provided:

"To Whom it May Concern:

"Notice is hereby given * * *

"That:—Ivan Lewis Finkelberg, is in possession of, *and working said mining claims* (italics ours) under a lease and agreement of sale; and that the said owners give notice to all whom it may concern that they will not be responsible, and that the said mining claims or property, will not be responsible or liable for any debts whatsoever incurred by said Ivan Lewis Finkelberg, his successors or assigns, for any work or labor performed upon said mining claims, or either of them, or for any material, supplies or machinery furnished or placed upon said mining claims or either of them; * * *."

[4] The notice of nonresponsibility was not posted until 30 days, and was not recorded until more than 40 days after its preparation. In order to have knowledge of actual improvements being made on appellants' property, it would not be neces-

sary that they actually see the work in progress. It is true that appellants had knowledge of the intended construction on the property. Mrs. McIntosh executed, as owner, each of the various leases on the properties, which not only authorized, but required, under the last lease certain work by the lessee to be done within 90 days (referred to as the "construction period") from March 1, 1934.

J. E. McIntosh, the husband of Alice H. McIntosh, went to work on the mine about February 6, 1934, and his work consisted in raising the shaft, laying pipe lines, and fixing the roads. He claims that he was employed by Finkelberg, the same as other employees, and that at no time was he agent for his wife to receive or give notice of the construction work.

Appellants claim that whatever knowledge the husband may have had of the construction work was not notice to the wife, citing *McCray v. Wotkyns*, 41 Cal. App. 449, 451, 182 P. 972. Appellants also claim that they had no knowledge of the *actual construction* until April 1, 1934, when Mrs. McIntosh went from her home in Arcadia to the mine and started to live there, and that on the following day, April 2, 1934, she posted the required notice and at that time there was no new lumber or materials visible on the ground. She further stated that Finkelberg was in actual possession before the agreement of March 1, 1934, was signed and that she did not have any actual notice herself of any assignment by Finkelberg to Orondo Mines, a corporation, on April 7, 1934, and that she never consented to the assignment of the lease by him.

The Orondo Mines was evidently formed by Finkelberg as a corporate agency to take over his mining lease and operate the property. He continued to exercise active management over it. Upon this evidence and under the circumstances related, the trial court has found that the appellants had obtained *actual knowledge* of the construction more than ten days prior to April 2, 1934, and therefore the notice was not effective.

The evidence shows, as indicated by a delivery slip signed by a Mr. Ernst, manager of the defendant mines corporation and of Dr. Finkelberg, the testimony of witnesses, and as found by the trial court, that a delivery of materials, consisting of 20 sacks of cement, was made by respondent company to the mining property on March 14, 1934. The trial court further

found that "on or prior to March 14th, 1934, the defendant The Orondo Mines, a corporation, being then in possession of said premises, as lessee, did, with the knowledge of all of the defendants having any proprietary interest in said premises, enter upon the making of certain improvements upon the premises hereinabove described and thereupon proceeded continuously therewith (without cessation of labor thereon) until the substantial completion thereof on or about November 1st, 1936", and "that on or prior to March 14th, 1934, plaintiff contracted with the defendant The Orondo Mines, a corporation, to furnish building materials required by it for use in the said work and improvement, and for which the said defendant The Orondo Mines, a corporation, agreed to pay", and "between March 14th, 1934, and October 16th, 1936, plaintiff did so furnish the said materials consisting of lumber, sash, doors, hardware and roofing of the current market price and reasonable value of six thousand seventy-five and 89/100 dollars (\$6,075.89) against which is credited ninety and 81/100 dollars (\$90.81) as the sale price of certain of said materials which were returned to plaintiff unused, leaving a balance of five thousand nine hundred eighty-five and 08/100 dollars (\$5,985.08); that all of said materials were actually used in making said improvements; that at the time of the filing of the claim of lien hereinafter referred to, no part of said sum had been paid except the sum of three thousand six hundred twenty-four and 05/100 dollars (\$3,624.05), leaving a balance of two thousand three hundred sixty-one and 03/100 dollars (\$2,361.03) justly due and owing plaintiff on account thereof after deducting all just credits and offsets; that no part thereof has since been paid except the sum of one hundred thirty-nine and 28/100 dollars (\$139.28) on December 18th, 1936, leaving a balance of two thousand two hundred twenty-one and 75/100 dollars (\$2,221.75) still due and owing plaintiff on account thereof".

[5] Appellants having provided in a lease for extensive work to be done on their property by the lessee, the fact that Mrs. McIntosh's husband was employed by the lessee, and was doing some work on the property, would immediately suggest to a prudent person that the work being done was the same work agreed upon in the lease. Appellant Mrs. McIntosh was charged with such knowledge as would

have been disclosed to her by reasonable inquiry into the circumstances which were actually brought to her attention by the terms of the various leases of the property. Sec. 19, Civ.Code; *Harmon Lumber Co. v. Brown*, 165 Cal. 193, 197, 131 P. 368, 369.

[6] The evidence is uncontradicted to the effect that appellant Mrs. McIntosh knew, as early as February 6, 1934, that some work was being done on the property by her lessees. In the contract dated March 1, 1934, she recited the fact that work was being done on the property. When the husband of appellant told her, on or about February 6, 1934, that he was working at the mine and that certain work was being done at that time, they were both talking about actual and not intended work. The rule is well stated in *Harmon Lumber Co. v. Brown*, supra, that: "The knowledge which will subject the owner to this burden is not alone actual knowledge. Constructive knowledge (i. e., notice of circumstances which would put a prudent man upon inquiry as to the fact in question [Civ. Code, § 19]), is equally potent to bind the owner." Citing *Santa Monica L. & M. Co. v. Hege*, 119 Cal. 376, 51 P. 555; *Evans v. Judson*, 120 Cal. 282, 52 P. 585; *Hines v. Miller*, 122 Cal. 517, 55 P. 401.

In each of the cases just cited the owner was, upon facts very similar to those appearing here, held to have had constructive notice of the contemplated improvements. These circumstances certainly required appellant, as a prudent person, to prosecute inquiry to ascertain whether her lessee was complying with his obligation to promptly construct improvements which were to inure to the benefit of the lessor. In view of the circumstances related, we are unable to disturb the finding of the trial court that appellants had *obtained knowledge of such construction*, work or labor, on or prior to March 14, 1934. It must follow, therefore, that the notice posted April 2, 1934, was ineffective as to respondent's lien. Sec. 1192, Code Civ.Proc.

[7] Appellant complains that the evidence does not support the finding of the trial court that materials of the reasonable value claimed in the complaint *were delivered on the property and used in the construction work on the property*. The documentary evidence on this subject consists of respondent's exhibits numbers 6, 7, and 8. Exhibit number 6 is an original ticket for the sale and delivery of 20 sacks of cement dated March 14, 1934, and which

was identified by the witness Nuckolls as indicating that the material was loaded by Mr. Tea, an employee of the plaintiff company. The receipt for the materials enumerated in that ticket was signed by Ray Ernst and Dick Robinson, both of whose signatures appear on the ticket. The signature of Mr. Ernst was identified by the witness Nuckolls, as follows: "I saw him sign his name on one occasion, I feel in my mind that this is his signature. I am able to identify it. He came in and placed an order to be charged this way and signed it before the order was filled. In this particular case the driver also signed; it was signed in our office." Exhibit No. 7 consisted of a group of fifty-one original delivery tickets which were introduced and received in evidence without objection. Exhibit No. 8 consisted of a group of 66 original delivery tickets for various materials. This particular group of tickets was received in evidence over the objection of appellants. These tickets were variously signed as loaded by Mr. Tea and other employees of the plaintiff company and were receipted for by several persons, all of whom were employees of defendant Orondo Mines. These various signatures were identified by the witness Shinbane. F. T. Taylor, a witness called on behalf of respondent, concerning the delivery of the materials enumerated in respondent's exhibit No. 7, testified: "All material on the tickets bearing my signature was picked up at San Bernardino yards and I delivered them to the Orondo Mines. Referring to the mine property during the time that I was up there, I helped unload various materials at the shaft and at the cookhouse. They were actually used on construction work to the best of my knowledge." He further testified:

"Q. By Mr. Lyons: Mr. Taylor, these other materials that you have testified about as being delivered by Mr. Smith, Mr. Simmons and Mr. Fuller, did you see these materials delivered on the job? A. Yes, I helped unload it. When not working on the truck I helped unload. * * *

"Q. Was that true also of that delivered by Mr. Coleman? A. Quite a bit of Mr. Coleman's."

Mr. Shinbane, an officer of defendant Orondo Mines, testified with respect to the use of the materials on the property in question as follows: "During the time that I was connected with the Orondo Mines I was present from time to time on the min-

ing properties in Inyo County. I checked materials at the time we purchased them. I did not check them as they were unloaded. Such materials as we ordered or purchased from Hayward Lumber & Investment Company were used in the mining operations on those properties that were called The Orondo Mines. They were used for timbering underground; they were used for putting up a cookhouse and dining room and for various other items that are used in mine operations."

The evidence was to the effect that there was a definite agreement between the respondent company and The Orondo Mines, that all payments made on the account would be applied first, on the old items of the account. The items about which the appellants complain that there is no competent proof of delivery to and use in the property were practically all of the earlier deliveries, and the balance remaining due on the account is almost entirely covered by the deliveries shown on the group of tickets marked plaintiff's exhibit 7, which were received in evidence at the trial without objection. All of the payments made on this account were made by The Orondo Mines. No part of the materials in question were paid for by the owners of the property upon which the lien is claimed.

The evidence also discloses that all of the purchases of lumber were made from respondent corporation. Charles Rosefelt testified as follows: "I believe it was about during the year 1934 that I first became connected with The Orondo Mines. I made quite a number of trips up there. I made some trips in 1934. When I went up there there were men on the property who were on the payroll, and there was a new hut being put up, accommodations for the men. I could see that. There was a whole row of bunkhouses, ten or twelve, possibly. There must have been lumber and other building materials being used in the construction work on the properties at that time. I know there were men employed there, and that they had a regular payroll. Just at that particular time when I went there they weren't building perhaps, but they had already been completed. * * * I know about the purchase of lumber and other building materials by the corporation from Hayward Lumber & Investment Company during 1934, and 1935 and 1936. I first knew of the purchase of materials by the corporation from the Hayward Lumber & Investment Company when we first entered into an agreement

with the Orondo. I saw the materials that were purchased from that company on the property many times, and saw them use it in the property."

Subsequent to the year 1936, appellants entered suit to declare the lease of the defendant corporation forfeited. We are of the opinion that there was ample evidence in the original delivery tickets and the testimony of the witnesses to show delivery of the materials to, and their use in, the mining property.

The judgment is affirmed.

I concur: MARKS, Acting P. J.



34 Cal.App.2d 588

KELLY v. KANE.

Civ. 10898.

District Court of Appeal, First District,
Division 2, California.

Sept. 19, 1939.

Hearing Denied Nov. 16, 1939.

1. Counties ⇐61

A purchasing agent for San Mateo county, appointed for 4 years pursuant to charter provisions, was not a "constitutional officer" holding a "constitutional office" so as to preclude termination of his tenure by consolidation of the office with that of county executive. St.1933, p. 2953; Const. art. 11, § 7½, subd. 6.

[Ed. Note.—For other definitions of "Constitutional Office or Officer," see Words & Phrases.]

2. Counties ⇐61, 67

"Suspension and removal" of county officers and "consolidation" of offices, within terms of San Mateo county charter, are quite different as respects type of procedure to be followed. St.1933, pp. 2957, 2966, art. 3, § 2(i); art. 6, § 11.

[Ed. Note.—For other definitions of "Consolidate; Consolidation" and "Suspend; Suspension," see Words & Phrases.]

3. Counties ⇐61

Under charter of San Mateo county authorizing board of supervisors to consoli-

date county offices, elective offices may be consolidated by ordinance providing that consolidation will take effect at the end of the term provided by law, but appointive offices may be consolidated by ordinance not so limited. St.1933, p. 2957, art. 3, § 2(i).

4. Statutes ☞215

A statute should be construed in the light of the history of the times and the conditions which prompted its enactment.

5. Counties ☞2

The constitutional amendment governing freeholders' charters for counties should be construed in the light of reasons for its adoption, as set forth in statement published by authority of law with the amendment, showing intent to authorize changes in the interest of efficiency and economy. Const. art. 11, § 7½.

6. Counties ☞61

A county's power to "consolidate" two offices does not imply power to abolish either office. St.1933, p. 2957, art. 3, § 2(i).

7. Counties ☞61

Where Legislature creates county offices, the Legislature and not the board of trustees has the power to abolish such offices, in the absence of clear legislative authority.

8. Counties ☞61, 74(1)

An ordinance of San Mateo county consolidating the appointive office of purchasing agent with that of county executive, effective immediately, was valid under charter provisions, and incumbent purchasing agent was not entitled to salary for the remainder of his 4-year term. St.1933, p. 2953; p. 2957, art. 3, § 2(i); Const. art. 11, § 7½, subd. 6.

Appeal from Superior Court, San Mateo County; Warren V. Tryon, Judge.

Petition by Stanley Kelly against Thomas J. Kane, substituted in place and stead of Edward M. Stack, as Controller of the County of San Mateo, State of California, for writ of mandate to compel defendant to draw salary warrant. From a judgment denying the writ, petitioner appeals.

Affirmed.

Bullock & Manders, of Redwood City, for appellant.

Gilbert D. Ferrell, Dist. Atty., and Daniel E. Sullivan, Asst. Dist. Atty., both of Redwood City, for respondent.

STURTEVANT, Justice.

The petitioner has appealed from a judgment denying him a writ of mandate. His application for a writ was based on his claim that the defendant, as auditor, should have drawn a warrant in his favor for a full month's salary as purchasing agent of San Mateo county for the month of December, 1937. The defendant answered that the office of purchasing agent had been consolidated with the office of county executive and the tenure of the petitioner had been terminated. The appeal presents therefore solely a question of law.

Heretofore San Mateo county was organized under a charter. Stats.1933, p. 2953. A county executive was promptly appointed and the petitioner was appointed purchasing agent on the 7th day of January, 1935. By the provisions of the charter the term of each was for four years. The petitioner duly qualified and entered upon the discharge of his duties. Thereafter the board of supervisors adopted ordinance No. 469 which by its terms provided for the consolidation of the office of purchasing agent with the office of county executive. That ordinance also provided that the compensation, powers, functions, and term of office of the purchasing agent should terminate on the date the ordinance took effect. Said ordinance took effect on the 30th day of December, 1937. The petitioner contends that since the last-mentioned date he has been illegally ousted therefrom.

It is the contention of the petitioner that as purchasing agent he was a constitutional officer holding a constitutional office and that before the expiration of his term he was in legal effect suspended and removed from his office. Neither contention, we think, has merit.

[1] The Constitution makes no direct reference to the position of purchasing agent, however, in article XI, section 7½, subdivision 6, it is provided: "6. * * * All charters framed under the authority given by this section, in addition to the matters hereinabove specified, may provide as follows: For offices other than those required by the Constitution and laws of the State * * *." Pursuant to said provision the charter created the office of purchasing agent, fixed the term at four years, and provided the manner in which said office might be filled. Under these circumstances in no proper sense may

it be said the office of purchasing agent was a constitutional office nor that the petitioner was a constitutional officer. 21 Cal.Jur. 828; see, also, *Wilkinson v. City of Birmingham*, 193 Ala. 139, 68 So. 999, 1000, 1001.

[2] As stated above the petitioner contends he was illegally ousted and in legal effect he claims he was suspended and removed. That contention tends to create a false issue. Article VI, section 11, of the charter of San Mateo county, provides the "Method of suspension and removal of appointive officers." There is not a word in the record showing or tending to show that any proceeding whatsoever was had under said section. However, the record shows that ordinance No. 469 was regular in all respects and was limited to the subject of consolidating the office of purchasing agent with the office of county executive. "Suspension and removal" and "consolidation" are quite different. *People ex rel. Smith v. Gunn*, 30 Cal.App. 114, 157 P. 619. Presumably the ordinance was adopted in the interest of efficiency and economy. Authority for its adoption by the board of supervisors was expressly conferred in article III, section 2, subdivision (i). It confers on the board authority "To provide for the consolidation of any county office with any other county office, and for the segregation of consolidated county offices, provided, that no county offices which shall be consolidated under a specific provision of this charter may later be segregated by the board of supervisors under this general provision."

[3] As we understand the parties, the proposition last stated is the crux of the controversy in the instant case. The petitioner asserts that the power to consolidate as expressed in subdivision (i) purports to authorize the consolidation of two elective county offices before the expiration of the terms provided by law and that such a power has been expressly denied. *People ex rel. Rynerson v. Kelsey*, 34 Cal. 470. To that assertion there are two sufficient answers. The record before us does not involve offices to be filled by election. If and when offices to be filled by election are to be consolidated, subdivision (h) can be given full force and effect by the enactment of an ordinance providing that the consolidation will take effect at the end of the term provided by law. When the offices to be filled by appointment are

to be consolidated, subdivision (i) can be given full force and effect by the enactment of an ordinance not so limited.

[4, 5] That the provisions of subdivision (i) have the meaning we have indicated, seems to us to be clear. But, if there were a doubt on the subject, we would be forced to resolve the doubt against the petitioner for the following reason. It is a fundamental rule that a statute should be construed in the light of the history of the times and the conditions which prompted its enactment. The history and conditions which prompted the enactment of article XI, section 7½, of the state Constitution were fully delineated by Senator Caminetti, who was the author. A short time before the constitutional amendment was to be voted on, October 10, 1911, it was published at length. The reasons why it should be adopted were set forth in an extended written statement signed by Senator Caminetti which, by authority of law, was published therewith. That statement shows the constitutional amendment was an attempt to authorize changes in the methods of county government in the interest of efficiency and economy. One sentence is a summary of the entire statement. The senator said: "A county should be governed by the same rules by which a discreet business man conducts his affairs." We assume the board of freeholders of San Mateo county had the sentence just quoted before it when it framed said charter.

[6, 7] The petitioner cites and earnestly relies on *Village of Lakewood v. Russell*, 163 Misc. 62, 296 N.Y.S. 331, 332. It is somewhat in point but contains a very material different element which no doubt prompted the conclusion. The village law, *Cahill's Consolidated Laws of New York* (1930), chapter 65, *McKinney's Consol. Laws*, c. 64, was involved. By the terms of section 43 such villages are authorized to have a treasurer and clerk, the terms of each being one year after the first Monday in April of each year. By section 58 each of those officers is required to execute an official bond or undertaking. By section 82 the duties of the clerk are specifically defined. By section 81 the duties of the treasurer are specifically defined. In section 42 it is provided: "* * * In any village of the second, third or fourth class, the board of trustees may, by resolution, consolidate the offices of clerk, treasurer and assessor or any

two of such offices." From the cited case we quote: "On April 5, 1937, the board of trustees adopted a resolution purporting to *abolish* the office of treasurer and consolidating that office with that of the clerk and attempted to transfer the powers and duties of the treasurer to the clerk. The trustees by further resolutions attempted to transfer all records of the treasurer to the clerk and increased the salary of the clerk." (Emphasis ours.) Manifestly power to consolidate two offices does not imply power to *abolish* either office. Furthermore, the legislature having created the said offices, with it, and not with the board of trustees, rested the power to abolish, in the absence of clear legislative authority. 43 C.J. 602. That rule obtains also in this state. *Marquis v. City of Santa Ana*, 103 Cal. 661, 666, 37 P. 650. But in the instant case the fact is two offices were *consolidated*—no office was abolished. *Hall v. Burks*, 96 Ga. 622, 24 S.E. 349, 350.

[8] Still pressing the foregoing contentions and not waiving any one of them, the petitioner claims the consolidation could not legally be made to take effect before the end of his four-year term. He cites no provision of the Constitution supporting that claim, therefore it may not be sustained. The same claim was made in *City of Wyandotte v. Drennan*, 46 Mich. 478, 9 N.W. 500. Judge Cooley, in rendering the decision, stated that the claim was frequently made and as frequently overruled. Again, the claim was made in *City of Jacksonville v. Smoot*, 83 Fla. 575, 92 So. 617. On page 620 of 92 So., the supreme court of Florida said: "It was within the power of the Legislature, therefore, to alter or amend the government of the city of Jacksonville, and if in doing so an office which existed under the old government was expressly or impliedly abolished, the incumbent cannot complain; because the power of removal from office is incident to the power of appointment, and an office created by the Legislature may be abolished by the Legislature, *even during the term for which the incumbent was elected or appointed*, without violating any of his constitutional rights, in the absence of any constitutional limitation on the subject. Even when an officer, by reason of having been appointed for a definite term or by special statutory provision, cannot be lawfully removed except for cause after a full hearing, his office may be summarily abolished when the proper

municipal authorities deem it advisable." (Emphasis ours.) In support of that statement the court cited authorities from many jurisdictions. To the same effect are: *Rogers v. Calumet Nat. Bank of Hammond*, 213 Ind. 576, 12 N.E.2d 261, 265; *City of Jacksonville v. Smoot*, *supra*; *Booth v. Board of Education of City of Owensboro*, 191 Ky. 147, 229 S.W. 84; *Hatfield v. Mingo County Court*, 80 W.Va. 165, 92 S.E. 245; *Throop on Public Offices*, section 19, and notes.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



34 Cal.App.2d 689

UNION OIL CO. OF CALIFORNIA v.
HANE.

Civ. 12251.

District Court of Appeal, Second District,
Division 2, California.

Sept. 27, 1939.

I. Appeal and error ⇐979(2)
New trial ⇐70

The trial court has a wide discretion in passing on a motion for new trial directed to the insufficiency of the evidence, and its ruling will not be disturbed on appeal where there is a conflict in the evidence, or there is substantial evidence which would support a judgment in favor of the party asking for a new trial.

2. New trial ⇐68
Trove and conversion ⇐40(1)

Evidence was sufficient to support a verdict for plaintiff in action to recover for conversion of gasoline alleged to have been wrongfully taken by defendant by secretly tapping a pipe line, and the trial court did not abuse its discretion in granting plaintiff's motion for a new trial after a verdict had been rendered for defendant.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by the Union Oil Company of California against Frank H. E. Hane for

the conversion of a quantity of gasoline. There was a verdict for defendant, and from an order granting plaintiff's motion for a new trial, defendant appeals.

Affirmed.

Murray M. Chotiner, Albert Jack Chotiner, and Russell E. Parsons, all of Los Angeles, for appellant.

Paul M. Gregg, Jerry H. Powell, L. A. Gibbons, and Douglas C. Gregg, all of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff corporation commenced this action to recover for the conversion of a quantity of gasoline alleged to have been wrongfully taken by defendant in the months of August, September and October of 1936. A first trial was held before the court without a jury and judgment was entered in favor of plaintiff for the sum of \$13,702.50 as compensatory damages and the further sum of \$13,702.50 as punitive damages. From this judgment an appeal was taken by defendant and the judgment was reversed on the sole ground that defendant had been improperly denied a jury trial. *Union Oil Co. of California v. Frank H. E. Hane*, 27 Cal.App.2d 106, 80 P.2d 516. Upon the going down of the remittitur a jury trial was conducted, resulting in a verdict for defendant. Thereafter the trial court granted a motion for a new trial "upon the grounds of insufficiency of the evidence to support the verdict". The present appeal is from the court's order granting plaintiff's motion for a new trial.

From the evidence presented by plaintiff the following facts appear: Plaintiff was the owner of a 10-inch gasoline pipe line at Wilmington, California. This pipe line was tapped by a secret underground $\frac{3}{4}$ -inch pipe and a large quantity of gasoline was thereby removed to a 10,000-gallon underground tank at 1320 B street, Wilmington, at which point a gasoline service station had been erected. The smaller line ran from the 10-inch line through the service station building except that there was a missing link of pipe 40 feet in length just outside of the service station grounds. When the secret tap was discovered the station was raided and excavation immediately disclosed that the missing link had been so recently removed that the ground underneath still had a strong odor of gasoline. The threads from which the

missing link had been disconnected were bright and shiny and gave no indication of corrosion but indicated that the missing portion had been disconnected within 24 hours from the time of the raid. During the three months in which defendant was alleged to have converted the gasoline the tank was filled two or three times a week by turning a valve on the $\frac{3}{4}$ -inch pipe where it passed through a locked room in the service station building on its way to the 10,000-gallon tank. During the same period defendant took directly from the tank two or three loads of gasoline each week, totaling 30 loads of 3150 gallons each, and delivered the gasoline to his own service stations. No evidence was presented showing that any gasoline entered the tank except through the $\frac{3}{4}$ -inch pipe. When the station was raided samples of gasoline taken from the tank showed it to be identical with the gasoline that was being transported through plaintiff's 10-inch pipe line.

The ownership of the gasoline in plaintiff and its value were established by competent evidence. Defendant admitted that he removed the gasoline from the underground tank but claimed that he had purchased it in good faith from another party.

[1,2] The rule governing the trial court in granting a new trial upon the ground of insufficiency of the evidence to justify the verdict is well established. The trial court has a wide discretion in passing on a motion when directed to the insufficiency of the evidence and its ruling in the premises will not be disturbed on appeal where there is a conflict in the evidence or where there is substantial evidence which would support a judgment in favor of the party asking for a new trial. *Roma Wine Company, Inc., v. Hardware Mutual Fire Insurance Co. of Minnesota*, 31 Cal.App.2d 455, 88 P.2d 260; *Wendling, etc., v. Glenwood Lumber Co.*, 153 Cal. 411, 95 P. 1029; *Buck v. Borchers*, 203 Cal. 210, 263 P. 226. The evidence presented by plaintiff is amply sufficient to support a verdict in its favor if such a verdict had been returned. We find no abuse of discretion in the action of the trial court in granting the motion for a new trial. The appeal is devoid of merit.

The order is affirmed.

We concur: MOORE, P. J., McCOMB, J.

34 Cal.App.2d 656

**PURDY v. SWIFT & CO. et al. (INDUS-
TRIAL INDEMNITY EXCHANGE,
Intervener).
Civ. 11127.**

District Court of Appeal, First District,
Division 2, California.

Sept. 26, 1939.

1. Damages ⇐30, 32

In arriving at amount of plaintiff's damages in personal injury action, jury could consider, in addition to loss of earning capacity, inconvenience and annoyance of permanent loss of sense of smell, impairment of sense of taste, loss of memory and mental alertness, and other mental and personality changes and pain and suffering immediately following injury.

2. Damages ⇐132(3)

\$20,000 for injuries received by 49-year-old licensed contractor earning \$200 per month when injured was not so excessive as to show passion and prejudice by jury, where injuries consisted of cut on forehead, fractured little finger, fractured bones in face and jaw, and a brain concussion, plus complete loss of sense of smell, partial loss of sense of taste, and impairment of memory.

Appeal from Superior Court, San Mateo County; Stanley Murray, Judge.

Action by Milton A. Purdy against Swift & Company and another for personal injuries received by plaintiff in an automobile collision, wherein the Industrial Indemnity Exchange intervened. From a judgment for plaintiff for \$20,000, the named defendant and another appeal.

Affirmed.

George M. Naus and Donald Seibert, both of San Francisco, for appellants.

Glensor & Schofield, H. W. Glensor, and Pierce J. Deasy, all of San Francisco, for respondent.

DOOLING, Justice pro tem.

Plaintiff and respondent after a jury trial recovered damages of \$20,000 from defendant and appellant for personal injuries received in an automobile collision. A motion for new trial was denied. The only question raised on the appeal is that the amount of the verdict is so excessive

as to demonstrate that it must have been given under the influence of passion or prejudice.

Respondent at the time of the collision was forty-nine years old and had a normal life expectancy of 21.63 years. He had been in a serious accident in Utah in 1935 which incapacitated him to a considerable extent until the middle of 1937. We will not enlarge further upon this than to say that lay witnesses who saw respondent in the latter part of 1937 testified that to all outward appearances and from his conduct and conversations he appeared to have fully recovered from the Utah accident, and that the evidence further shows that a month before the injuries involved in this action were received on January 6, 1938, he was employed by Hanrahan Company in temporary employment at \$200 per month. From this evidence the jury may be assumed to have found that respondent was completely recovered from the Utah accident at the time he received the injuries here in question.

As a result of the later collision respondent received a long cut on his forehead requiring twelve stitches, a fracture of the little finger, a fracture of the transverse sternum, a fracture of the upper jaw and of the cheek lobes (zygomatic bones), a fracture of the nasal bones and septum and a brain concussion. At the time of trial he was suffering from a complete loss of the sense of smell, a partial loss of the sense of taste, continuing headaches, facial pains around the nose and under the eyes, a constant distortion of the upper lip, a continual nasty taste in the mouth, dizziness and loss of balance and poor eyesight. In addition to the above his memory was impaired, he had become nervous and irascible, was no longer mentally alert, worked slowly, could not recall the details of jobs, had become despondent and seemed like an old man. There was medical testimony from which the jury was justified in finding that the loss of the sense of smell, the impairment of the sense of taste, dizziness, headaches, impairment of memory and of mental alertness, moroseness, depression and irascibility would all be permanent. The special damages for medical and surgical care and hospitalization totalled \$1,324.55.

[1] Respondent had been for many years a licensed contractor. His earnings before the Utah accident had been much larger than the \$200 per month at which

he was employed at the time he received his present injuries and the jury was entitled to find that but for those injuries his earnings would have been considerably increased over \$200 per month. A simple calculation will show that over the period of his normal expectancy the reduction of his earning capacity by so little as \$100 per month would total over \$25,000. Adjustment of this amount for interest would necessarily reduce it considerably, but in addition to the loss of earning capacity the jury were entitled to consider the inconvenience and annoyance of the permanent loss of the sense of smell, impairment of the sense of taste, loss of memory and mental alertness and the other mental and personality changes above enumerated, together with the pain and suffering immediately following the injury, much of which persisted to the time of trial.

[2] Applying the settled rule enough has been stated to show that this is not a case wherein the award is so disproportionate to the injuries as to indicate at first blush that it must have been the result of passion or prejudice.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



35 Cal.App.2d 1

PEOPLE v. LOEHR.

Cr. 3251.

District Court of Appeal, Second District,
Division 1, California.

Sept. 29, 1939.

Hearing Denied Oct. 26, 1939.

1. Criminal law ⇨1158(1)

Appellate courts cannot review evidence in a criminal case except where, on its face, the evidence may justly be held insufficient to support the ultimate issue involved, and in such case it is not a review of question of fact, but purely one of law.

2. Criminal law ⇨1159(2)

In order that evidence be improbable or unbelievable, so that a judgment of conviction based thereon will not be sustained by reviewing court, it must involve an as-

sertion that something was done which would not be possible under circumstances or involve conduct which only a person of seriously calentured mentality would be likely to do.

3. Criminal law ⇨1159(4)

In a criminal case, an appellate court can reject positive testimony of a witness only when such testimony is inherently improbable, and it is not sufficient that the testimony may disclose circumstances which are unusual.

4. Criminal law ⇨1159(4)

Where, in criminal case, defendant appeals and attacks verdict of conviction on ground that testimony of witnesses for state is inherently unbelievable and amounts to no evidence, defendant must show that such testimony is inherently improbable, or, for some other reason, was not legal evidence upon which jury could rely.

5. Infants ⇨20

Evidence sustained conviction under statute punishing crimes against children, as against contention that testimony offered by witnesses for state was so inherently unbelievable as to amount to no evidence. Pen. Code, § 288a.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Alfred H. Lochr was convicted of a violation of the statute concerning crimes against children, Pen.Code, § 288a, under an information charging a prior conviction of the same offense, and he appeals.

Affirmed.

George W. Perkins, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles county defendant was accused of a violation of section 288a of the Penal Code. The information also charged a prior conviction of the same crime together with penal servitude in punishment therefor. Defendant entered a plea of not guilty, admitted the prior conviction charged and also that he served a term of imprisonment upon such conviction in the state penitentiary. Following a jury trial defendant was found guilty. From the judgment on the verdict and

from the order denying his motion for a new trial defendant prosecutes this appeal.

A reversal is urged upon the single ground of the insufficiency of the evidence to justify the verdict. The victim of defendant's alleged felonious assault was a schoolboy of the age of fifteen years. No claim is made that the testimony of the boy, if capable of belief, is not alone sufficient to support the verdict, but in this behalf it is earnestly urged that the testimony of the complainant, when considered in the light of contradictions appearing therein, and alleged conflict with the testimony of other witnesses, must be held by this court to be so inherently unbelievable as to amount to no evidence at all.

Epitomized, the facts related by the complaining witness are that about 4 o'clock on the afternoon of February 6, 1939, he had occasion to visit the lavatory on the south side of the Coliseum in Los Angeles. He had not previously seen the appellant, nor did he observe him in the lavatory when he entered. When he entered, the boy testified, the appellant came up in back of him as he was walking toward the rear of the lavatory; that appellant grabbed him by the arm, held him, and then ripped open his trousers. The boy was carrying some schoolbooks in his left hand, and appellant grabbed him by the right arm. The victim then testified that the appellant pushed him in the corner of the lavatory and after ripping open his trousers committed the act charged in the information. The **victim** testified that appellant then released his grip, whereupon the boy ran out of the lavatory, at which time appellant called out, "I will see you later." On his way out the victim had not fastened his trousers, and some police officers, observing the boy and his demeanor, followed him, while another officer went into the lavatory and placed appellant under arrest.

From the testimony of the officer it appears that when he entered the lavatory after the exit of the boy appellant was sitting on the toilet coughing and spitting into the toilet bowl; that appellant then walked over to the wash basin, turned the drinking fountain on, and rinsed his mouth out with water two or three times, and finally wiped his mouth and hands with his handkerchief.

Appellant as a witness in his own behalf testified in substance that at no time did he commit the act with which he was charged; that he did not stop at any wash stand to

rinse out his mouth or to spit; that he entered the lavatory to relieve himself, entering the toilet designated as compartment No. 1; that he had been in there probably a minute or two, and he heard the door open and someone entered in a hurry; that "they just barged in where I was sitting". Appellant further testified that when he looked up the complainant was standing right in front of him; that he looked at the boy "kind of surprised" and gave him a push away from him, whereupon the boy went back in the rear and out of appellant's sight. That the door opened and someone came part way into the lavatory, appellant being unable to distinguish who it was, as they did not come back to where he was sitting. Appellant further testified that as the boy went out the door he "kind of glanced" at appellant and whoever was in there at the time went out behind the boy. Appellant stated that while arranging his clothing he heard the door open and close twice and heard someone walking; that as he turned to go out one of the officers took him into custody.

In his brief appellant assigns as inherently improbable the testimony of the victim as to how the crime was committed, upon grounds thus stated:

"1. That the defendant would seize a sixteen-year-old boy in the presence of a witness sitting in No. 1 toilet bowl compartment, and drag him several feet to the rear of the lavatory. * * *

"2. That the defendant, having previously suffered a conviction for the same offense and knowing the consequences if apprehended, would attempt to commit the act charged by force and violence, in a room where there was a likelihood of other people entering, and in fact while there were at least three other men in the lavatory—the police officers and one civilian. * * *

"3. That neither the defendant nor the complaining witness would go through such an experience without saying something to the other. * * *

"4. That a sixteen-year-old boy of ordinary size, if so frightened that he could not say a word should still continue to hold in his hands the books (one large one and four or five smaller ones) and not drop them during the entire time that he was struggling to release himself. * * *

"5. That although the complaining witness was terrified to an extent that he testified he was, and still could have an erec-

tion as soon as the defendant started to open complaining witness's trousers. * *

"6. That notwithstanding complaining witness's terrified state of mind, within from two to fifteen seconds after defendant opened complaining witness's pants and copulated his penis with defendant's mouth, that complaining witness had an emission. * * *

"7. That immediately upon leaving the lavatory, instead of complaining to the men standing just outside the door, he ran away from the scene and made no complaint (until) he had been questioned by police officers. * * *

"8. That the complaining witness, in passing out of the lavatory, could fail to observe police officer Blair, who testified that the boy walked right past him, and looked him right in the face in an apprehensive manner. * * *

"9. That all of the act could have happened in the space of one or two minutes and so quietly that the officers in the room would not have heard the struggle or the defendant yelling, 'I will see you later.' * * *

[1,2] While the alleged variances or claimed inconsistencies, as well as the contradictions, appearing in the boy's testimony undoubtedly afforded opportunity for a persuasive argument to the jury against the reliability of his testimony, we find nothing in them from which a reviewing court could justly conclude that his entire testimony is per se unbelievable and that it was therefore the jury's duty not only to disregard it but to accept the defendant's denial of any wrongdoing on the latter's part. Obviously, reviewing judges are in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. It is undoubtedly for such reasons that our Constitution provides that appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. *People v. Haydon*, 18 Cal.App. 543, 553, 123 P. 1102, 1108, 1114. With reference to when testimony may be stricken by an appellate court as unbelievable per se, it was said in the last-cited case: "A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve, we think, a claim that something has been done that it would not

seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do." Again, in regard to the power of the jury to minimize the value of appellant's testimony and the weight to be given it, we must remember that appellant was impeached through his admission of a prior felony conviction, which impeachment was made more effective by appellant's statement that his prior conviction was for the commission of the identical morals offense for which he was on trial.

[3,4] Appellant's claim that the testimony of the young victim was most unusual is answered by the following language used in *People v. Collier*, 111 Cal. App. 215, 226, 295 P. 898, 902: "* * * We understand that an appellate court can reject the positive testimony of a witness only when that testimony is 'inherently improbable'. *It is not sufficient that the testimony may disclose circumstances which are unusual.* Where the testimony is such that within the knowledge of reasonable men it cannot be true the appellate court might assume that knowledge and hold the testimony legally insufficient, but to do so the court must act on what is equivalent to judicial notice. * * * let it be said here that the appellate court does not sit as a jury to determine the issues of fact upon the credibility of the testimony of the witnesses but, when the attack is made on these grounds, it is necessary for the appellant to go further and show that the testimony which we are asked to reject is inherently improbable or that it was incompetent, or for some other reason, not legal evidence upon which the jury could rely." (Italics added.)

[5] Bearing in mind the foregoing principles, we are not directed to, nor do we find anything in the record to justify this court in concluding from all the facts and circumstances here present that there was not sufficient legal evidence upon which the jury could rely in determining that the offense charged was committed by the appellant. A reading of the entire record, instead of establishing an inherent improbability that the offense was committed, tends strongly to establish reasonable inferences of appellant's guilt.

The learned trial judge was extremely careful throughout the trial, both in his rulings and in questions propounded by him, to safeguard the rights of appellant to a

fair and impartial trial. That was all he was entitled to, and that he received. Appellant was fairly tried, and his conviction rests upon competent and legal evidence.

The judgment and the order by which the motion for a new trial was denied are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.



34 Cal.App.2d 672

SALOMON v. ELLIS et al.

Civ. 10889.

District Court of Appeal, First District,
Division 2, California.

Sept. 27, 1939.

1. Corporations ⇨123(1, 3)

A pledgor's execution of written instrument providing that stock in his account at brokerage firm should be collateral security for pledgee's guaranty of the account and of pledgor's note, and of order upon brokerage firm to deliver all the stock standing in pledgor's name to pledgee, constituted a valid pledge of the stock, though the securities were nonnegotiable and there was no manual delivery.

2. Corporations ⇨123(3)

Voting trust certificates representing cumulative common stock, though nonnegotiable, were incapable of manual delivery and hence might be pledged by written assignment.

3. Corporations ⇨123(12)

A pledgor's sale of pledged stock with pledgee's knowledge, purchase of other stock from pledgee, and sale of stock to pay off part of the indebtedness secured, after which remaining shares were delivered to pledgee, were not such exercise of dominion as would invalidate the pledge as against third person claiming an interest in the stock.

4. Estoppel ⇨75

Where owner of interest in securities permitted them to stand in an account under his associate's name, authorized associate to transfer them, and apparently knew

that guarantor of associate's account and other debt, to whom associate pledged the stock, claimed some interest therein, the statute prohibiting one who allows another to assume apparent ownership from setting up his own title was applicable and such owner could not assert title as against the pledgee. Civ.Code, §§ 2991, 3543.

5. Estoppel ⇨75

The enforceability of a pledge, as against owner of interest in the pledged property who permits another to assume apparent ownership of the property, rests upon owner's conduct, not upon owner's interest in the transaction out of which the pledge arose. Civ.Code, § 2991.

6. Corporations ⇨123(16)

In action to recover securities, evidence held to authorize judgment for pledgee of the securities on issue of existence of valid guaranty of debts of owner's associate, as security for which the pledge was made.

7. Appeal and error ⇨1071(5)

Where finding that owner of securities and pledgor of securities were partners was not essential to support of judgment enforcing the pledge, insufficiency of evidence to support such finding did not require reversal of the judgment.

8. Frauds, statute of ⇨125(3)

An oral guaranty was merely voidable and not void. Civ.Code, §§ 1624, 2793, 2794.

9. Frauds, statute of ⇨139(3)

Where pledge was made to secure pledgee's guaranty of pledgor's debts, and guaranty was fully executed, the fact that guaranty was voidable because merely oral did not affect enforceability of the pledge as against third person. Civ.Code, §§ 1624, 2793, 2794.

10. Appeal and error ⇨1071(5)

Where judgment for defendant and cross-complainant was proper under the facts even if plaintiff's cause of action was not barred, trial court's finding that plaintiff's cause of action was barred by limitations need not be considered on appeal. Code Civ.Proc. § 338, subd. 3.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Ben Salomon against A. I. Ellis and others to recover possession of

floating trust certificates, wherein defendant I. Zellerbach filed answer and cross-complaint asserting lien on the stock. From adverse portions of the judgment, plaintiff appeals upon a bill of exceptions.

Affirmed.

Ackerman, Wayland & Mathews, of San Francisco, for appellants.

Pillsbury, Madison & Sutro and Philip S. Ehrlich, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

This action was instituted by the plaintiff, Salomon, to recover possession of voting trust certificates representing 920 shares of the cumulative class A common stock of National Automotive Fibres, Inc., to recover \$345 allegedly received by defendants as dividends on said stock, and to recover damages caused by reason of the detention of said stock. Defendant Zellerbach filed an answer and cross-complaint in which he asserted a lien upon the stock for certain sums advanced at the request of Ellis, a codefendant. The trial court gave judgment that plaintiff take nothing by reason of his complaint; that defendant Zellerbach has a valid lien upon the voting trust certificates as collateral security for the repayment of the sum of \$31,326.44 with interest from June 1, 1936, and the further sum of \$17,578.27; that defendant and cross-complainant, Zellerbach recover judgment against cross-defendant Ellis but take nothing by reason of his cross-complaint against cross-defendant Salomon; and that an accounting be had between plaintiff, Salomon and cross-defendant Ellis. Plaintiff and cross-defendant Salomon has appealed upon a bill of exceptions from that portion of the judgment which is in favor of the defendant and cross-complainant Zellerbach.

In November, 1928, Salomon and Ellis opened an account with the brokerage firm of Manheim, Dibbern & Co. for the purpose of buying and selling securities on margin. The account was carried in the name of "A. I. Ellis and/or B. Salomon". Ellis also had three other accounts with said brokerage firm, one in his own name, one in his wife's name, and a third in his nephew's name. With respect to the "A. I. Ellis and/or B. Salomon" account, with which we are chiefly concerned, it was agreed that Ellis should have full control or disposition of all shares of stock in said account. Moreover, it was agreed that

checks from the brokerage firm should be made payable to Ellis, and checks for profits were so delivered to Ellis, who cashed them and gave his check for one-half to Salomon.

In September and October, 1929, Salomon and Ellis purchased on margin, voting trust certificates representing 1840 shares of the cumulative class "A" common stock of National Automotive Fibres, Inc., which were carried by Manheim, Dibbern & Co., in the "A. I. Ellis and/or B. Salomon" account. In October, 1929, approximately \$20,000 was needed to properly margin all of Ellis' accounts, including the one in which Salomon was interested. Neither Ellis nor Salomon was able to furnish this amount, and Ellis testified that, after leaving the broker's office, he told Salomon that he would try to borrow the necessary sum from defendant Zellerbach. This conversation was denied by Salomon when he testified. However, Ellis approached Zellerbach, who, although he refused to loan Ellis the money, agreed to guarantee Ellis' account with Manheim, Dibbern & Co. To that end, Zellerbach directed his son to telephone Manheim, Dibbern & Co. and so inform them. This was done and Manheim, Dibbern & Co. acknowledged in writing this guarantee. It should be pointed out that Zellerbach was not informed that Ellis had four accounts with said brokerage firm and was not informed that Salomon had an interest in any of the accounts. Zellerbach testified that he did not know of Salomon's interest in any of the accounts, did not know that Ellis had more than one account, and would not have guaranteed an account in which Salomon had an interest. Zellerbach's guarantee was unlimited in amount. Ellis testified that he informed Salomon of the guarantee by Zellerbach at the time it was made. Salomon denied that he was so informed.

In November of 1930, Manheim, Dibbern & Co. made a demand upon Zellerbach under his agreement to guarantee Ellis' account. Rather than pay the amount demanded, Zellerbach and Ellis agreed that the account should be transferred to J. Barth & Co., another brokerage firm with which Zellerbach did business. Prior to this transaction, all four of Ellis' accounts, including the "A. I. Ellis and/or B. Salomon" account, were incorporated into one account standing in the name of "A. I. Ellis". This account was transferred to

J. Barth & Co., who paid Manheim, Dibern & Co. in full. Zellerbach again guaranteed the account and deposited certain securities with J. Barth & Co. to secure his guarantee. At the time of this transaction, which was approximately November 13, 1930, Ellis executed two written instruments, the first providing that the stock in his account at J. Barth & Co. should be collateral security for Zellerbach's guarantee of the account and for Zellerbach's guarantee of Ellis' note in the sum of \$23,500 payable to the Wells Fargo Bank & Union Trust Co., and the second being an order upon Barth & Co. to deliver to Zellerbach all the stock standing in Ellis' name on its books.

While the A. I. Ellis' account, including the 1840 shares of National Automotive Fibres stock, existed at J. Barth & Co. the following transactions occurred: In response to a call for margin on March 30, 1932, Zellerbach paid J. Barth & Co. \$15,000. Shortly before this call was made, Ellis sold 220 shares of National Automotive Fibres stock and bought 145 shares of California Cotton Mills stock. A further call for margin was made June 6, 1932, and Zellerbach paid \$11,000. In August, 1935, Ellis sold 620 shares of National Automotive Fibres, Inc., stock and the proceeds were used to completely liquidate the debit balance of the A. I. Ellis account. There remained in the account 1000 shares of National Automotive Fibres which were then delivered by J. Barth & Co. to Zellerbach.

Salomon knew in January, 1931, that the account had been transferred to J. Barth & Co., and, in response to his request, Ellis wrote him a letter, dated January 29, 1931, in which Ellis acknowledged that Salomon owned a one-half interest in 1840 shares of National Automotive Fibres. Beginning in 1933 Salomon made repeated demands upon Ellis for the delivery of the stock. But he made no inquiries at J. Barth & Co., and Zellerbach did not learn of any claim made by Salomon until some time in 1934, when Salomon made certain demands upon Ehrlich, attorney for Zellerbach.

The judgment gives Zellerbach a lien upon the voting trust certificates to secure the repayment of the sum of \$31,326.44 representing the balance owed Zellerbach by reason of his advances made pursuant to his guarantee. It further accords him a lien to secure the sum of \$17,578.27 representing the balance due upon a note executed by Ellis in favor of the Wells

Fargo Bank & Union Trust Co. This indebtedness was incurred by Ellis early in the year 1928 in connection with the acquisition of a second mortgage upon an apartment house in Los Angeles. This indebtedness had also been guaranteed by Zellerbach. By means of the pledge agreement whereby Ellis pledged the shares of stock in the account to secure Zellerbach on the sums advanced under his guarantee of the account, the shares of stock were also pledged as security for this guaranty by Zellerbach.

[1-3] We are of the opinion that there was a valid pledge of the securities to Zellerbach at the time of the transfer from Manheim, Dibern & Co. to J. Barth & Co. Appellant contends that the securities were nonnegotiable and must be treated as personal property. Conceding this to be true, appellant's other contentions, namely, that there was no delivery of the securities and that Ellis exercised full dominion over them, remain without merit. The securities were of such a nature as to be incapable of manual delivery and therefore might be pledged by written assignment. *Joint Pole Ass'n v. Steele*, 213 Cal. 233, 2 P.2d 335; *Hall v. Cayot*, 141 Cal. 13, 74 P. 299; *Brewster v. Hartley*, 37 Cal. 15, 99 Am.Dec. 237; *Goldstein v. Hort*, 30 Cal. 372; *Ahern v. Tulare Lake Canal Co.*, 115 Cal.App. 93, 1 P.2d 490; 21 Cal.Jur., p. 313; 6 Cal.Jur., p. 816. It was therefore not essential that the shares be delivered to Zellerbach. The record discloses only two acts of dominion in respect to the property pledged. On December 18, 1930, Ellis sold 220 shares of National Automotive Fibres stock and purchased 145 shares of California Cotton Mills stock. Far from being without the consent of Zellerbach, it appears that he knew of the transaction and in fact, the shares of California Cotton Mills stock were purchased directly from him. The only other sale of shares occurred in August, 1935, when 620 shares of National Automotive Fibres stock were sold to pay off the indebtedness owed J. Barth & Co. After this transaction occurred, the remaining shares were delivered to Zellerbach. It is apparent that there was no such exercise of dominion by Ellis as would invalidate the pledge.

[4] In our opinion, the rights of the parties are governed by section 2991 of the Civil Code which provides: "One who has allowed another to assume the apparent ownership of property for the purpose of

making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value." See, also, *Grange v. Judah Boas Co.*, 60 Cal.App. 484, 492, 213 P. 712; *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, 700, 227 P. 723; *Lynch v. International Banking Corp.*, 68 Cal.App. 432, 229 P. 968; *Spellacy v. Young*, 44 Cal.App. 174, 186 P. 368; Civ.Code, sec. 3543. The record discloses that Salomon permitted the shares to stand in an account under Ellis' name, and that he authorized Ellis to transfer them. It shows that Ellis had full authority to make all sales and purchases in regard to the account. While it is true that at the time Zellerbach first guaranteed the account it stood in the name of "B. Salomon and/or A. I. Ellis" this fact was never ascertained by Zellerbach and there is evidence that Salomon and Ellis purposely refrained from notifying Zellerbach of any interest that Salomon had in the shares for fear that Zellerbach would not guarantee the account. There is evidence that Salomon knew of and consented to the consolidation of the account in an account standing in Ellis' name and that he knew of and consented to the transfer of the account to J. Barth & Co. It further appears that Salomon knew that Zellerbach had guaranteed the account. While there is no direct evidence that Salomon knew of the pledge of the stock to Zellerbach, Salomon himself testified that he knew that he could not obtain the stock without the consent of Ellis and Zellerbach, and, in explaining a letter written by Ellis at his request in which Ellis acknowledged Salomon's interest in the stock, Salomon testified that he wanted the letter to show his interest in the event that anything happened to Zellerbach. The ready inference is that Salomon knew that Zellerbach had an interest in the stock. There is nothing in the record which indicates that Zellerbach acted other than in good faith and in the ordinary course of business. That he parted with value is patent. Under all these circumstances Salomon cannot now assert his title against Zellerbach.

[5] What has just been said is equally true of both the pledge to secure Zellerbach on his guarantee of the account as it stood with J. Barth & Co. and the pledge to se-

cure Zellerbach on his guarantee of Ellis' debt to the Wells Fargo Bank and Union Trust Co. While the latter debt arose out of a transaction in which Salomon had no interest, the enforceability of the pledge rests not upon the fact that he had an interest in the account but upon his conduct as above enumerated. Civil Code section 2991 applies with equal force both where the person who has apparent ownership pledges the property to secure his own debt and where the true owner has some interest in the transaction out of which the pledge arose.

[6,7] Appellant contends that there is no evidence to support certain findings of fact and that the evidence is inherently improbable in regard to the guarantee of the account when it stood on the books of Manheim, Dibbern & Co. The evidence is not inherently improbable when it is remembered that Zellerbach and Ellis were friends and business associates of long standing. It speaks rather of the high degree of confidence which Zellerbach had in the integrity of Ellis. Conceding that there is no evidence that Salomon and Ellis were partners, the finding that they were is not essential to the support of the judgment. In other respects, the findings of the court are amply supported by the evidence.

[8,9] Appellant further contends that the guaranty of the account while it stood on the books of Manheim, Dibbern & Co. was oral and therefore unenforceable. Civ. Code, §§ 1624, 2793, 2794. While it was oral, it was merely voidable and not void (*O'Brien v. O'Brien*, 197 Cal. 577, 241 P. 861) and in this case was fully executed. Therefore, the fact that the guaranty was oral can have no effect on the validity of the judgment.

[10] The trial court's finding that appellant's cause of action is barred by the statute of limitations, (Code Civ.Proc., sec. 338, subd. 3), is also attacked by appellant. This point need not be considered, because, even if the cause of action is not barred, a judgment in favor of Zellerbach was proper under the facts proved.

The portions of the judgment from which the appeal is taken are and each is hereby affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

34 Cal.App.2d 684

PEOPLE v. FREITAS.
Cr. 2046.

District Court of Appeal, First District,
Division 2, California.

Sept. 27, 1939.

1. Bastards ⇨65

In prosecution for failure to provide for illegitimate minor child, evidence *held* sufficient to support jury's finding that defendant was the child's father. Pen.Code, § 270.

2. Bastards ⇨65

In prosecution for failure to provide for illegitimate minor child, evidence *held* not to authorize conviction on issue of wilfulness of failure to provide, in view of failure to show demand for support or defendant's knowledge that child was his. Pen.Code, § 270.

3. Bastards ⇨54

In prosecution for failure to support illegitimate minor child, testimony that witness mailed a picture of the child to defendant with statement indicating that child was defendant's was insufficient to raise a presumption that the picture had been received, so as to show defendant's knowledge that child was his.

4. Bastards ⇨92

In prosecution for failure to support illegitimate minor child, wherein evidence of guilt was weak, district attorney's arguments that unless defendant was compelled to support the child, the state would have to do so and jurors as taxpayers would suffer, was prejudicial error, though no objection was made to them at the time, but defendant objected before the jury was instructed and asked for a mistrial.

5. Bastards ⇨69

In prosecution for failure to support illegitimate minor child, wherein evidence of guilt was weak, district attorney's argument that unless defendant was compelled to support the child the state would have to do so and jurors as taxpayers would suffer could not be cured by admonition of the court.

6. Bastards ⇨92

In prosecution for failure to support illegitimate minor child, wherein evidence of guilt was weak, permitting witness to answer that the state was supporting the child was not cured by striking out witness' answer and

instructing jury to disregard it, where the error was aggravated by district attorney's comment at the time, and after the court had ordered the answer stricken, that "there is nothing else to do, the child has got to eat," and by subsequent references to the fact.

7. Bastards ⇨71

In prosecution for failure to support illegitimate minor child wherein evidence of guilt was weak, instructions referring to defendant's failure to furnish care "for his child" and referring to the child as having defendant's surname without evidence that child was known by such surname, were prejudicial error, as indicating opinion of the court that paternity was proved.

8. Bastards ⇨92

Where the record shows that from the weakness of the case and the prejudicial character of errors no admonition could have cured them, neither failure to object nor the giving of an admonition will preclude defendant from urging the errors on appeal.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

John Freitas was convicted of failure to provide for a minor child, and he appeals.

Reversed.

John H. Machado, of San Jose, for appellant.

Earl Warren, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

DOOLING, Justice pro tem.

The defendant was convicted after a jury trial of a violation of section 270 of the Penal Code, failure to provide for a minor child. The child is illegitimate and appellant claims that the evidence is insufficient to prove: 1. that appellant is the father of the child, and 2, that the failure to provide for the child was wilful and without lawful excuse.

[1] Before the birth of the child the mother had charged appellant with a violation of section 268 of the Penal Code, seduction under promise of marriage. Appellant was held to answer on that charge, but the information was later dismissed on motion of the district attorney, the ground stated being the insufficiency of the evidence to justify his prosecution. The evidence given by the mother on the hear-

ing before the committing magistrate on the seduction charge, and that given by her at the preliminary hearing and on the trial in the present action as to the number of claimed acts of intercourse with the appellant and the times when and circumstances under which they occurred, was quite divergent, and in many respects contradictory; and the account given of appellant's claimed proposal of marriage was according to conventional standards unusual in that the complaining witness testified that appellant came to her home with appellant's sister, and without any preliminary ado asked her if she would marry him and that she accepted. The parties are old country Portuguese and the complaining witness gave as an explanation of the inconsistencies in her testimony her lack of complete familiarity with the English language. In any event her testimony was not inherently incredible and its weight and credibility were for the jury. The evidence though weak is sufficient to support the jury's finding that appellant was the father of the child.

[2,3] On the question of the wilfulness of appellant's failure to provide for the child, however, we believe the evidence is insufficient. No demand was ever made on the appellant to support the child. The mother's testimony to that effect was positive and unequivocal. Coupled with this lack of demand was the further fact that, with the exception of the evidence hereinafter referred to, there was (quoting from the attorney-general's brief) "no evidence tending in the slightest degree to establish the fact that at any time prior to the filing of the Information he had any knowledge or had been informed that the child was to be born or had been born or was living or that the complaining witness had made any claim that he was the father of the child". The only evidence worthy of the name relied on by the attorney-general to supply this admitted deficiency is: 1. Testimony of the complaining witness that when she was three months pregnant she had gone to appellant's home and told him her condition and he had said that he would not marry her unless the law made him. This was prior to the bringing and dismissal of the seduction charge, and standing alone cannot be held to prove knowledge by appellant either that a child was afterwards born to the complaining witness or that the child, if born, was appellant's. 2. An older daughter of the complaining witness testified that when the

baby was five months old she sent a picture of the baby to appellant by mail with a piece of paper on which she wrote: "From your daughter Gene Marie Freitas." Appellant denied receiving this and the proof was obviously insufficient to raise a presumption of receipt. The witness did not testify in what manner or to what address this letter was directed. Her statement that she "mailed it to him" is her mere naked conclusion. Such language in an affidavit of service by mail would be patently insufficient and it would make a mockery of justice to sustain a conviction of crime on testimony which would not make even a prima facie showing of service of the most unimportant notice in a civil case. We conclude that there was a complete lack of evidence of the element of wilfulness.

[4.5] In addition to this failure of proof of the element of wilfulness the state concedes that the district attorney in his argument to the jury overstepped the bounds of legitimate argument in stating repeatedly that unless appellant was compelled to support the child the state would have to do so and the jurors as taxpayers would thereby suffer. No objection was made to these statements at the time but before the jury was instructed, counsel for appellant, in the absence of the jury, objected to them and asked for a mistrial. Ordinarily the failure to make more timely objection would amount to a waiver but in a case as weak as this one it is doubtful if such misconduct, where a verdict of guilty was returned, could have been other than prejudicial or could have been cured by an admonition of the court.

[6] The same comment is applicable to the answer of the complaining witness that the state was supporting her child. This answer was stricken out and the jury instructed to disregard it, but the error was aggravated by the district attorney's comment at the time, and after the court had ordered the answer stricken: "There is nothing else to do, the child has got to eat;" and by the repeated references to the same fact in argument as above noted.

[7] It is also conceded by the State that the trial court in two instructions to the jury in referring to the child as "Tillie Bernice Freitas" did so without any evidence that the child was known or called by the name of "Freitas"; and that it would have been better for the court not to give the following instruction: "You are

instructed that proof of the omission by the defendant to furnish such necessary food, clothing, shelter, medical attendance or other remedial care for *his child* is prima facie evidence that such omission was wilful and without lawful excuse." By the italicized words in these several instructions the jury may well have understood that in the opinion of the court the fact of paternity was proved.

In a strong case an appellate court would be justified in holding that these errors were harmless, but in a case as weak as the record shows this one to have been we are satisfied that they could not have been other than prejudicial.

[8] In our judgment this case falls within the rule announced in such cases as *People v. Podwys*, 6 Cal.App.2d 71, 44 P.2d 377; *People v. Simon*, 80 Cal.App. 675, 252 P. 758; and *People v. Stafford*, 108 Cal.App. 26, 290 P. 920, that where an examination of the record shows that from the weakness of the case and the prejudicial character of the errors no admonition could have cured them, then neither the failure to object nor the giving of an admonition will preclude the appellant from urging the errors on appeal.

For the reasons given the judgment appealed from is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.



34 Cal.App.2d 663

PEOPLE v. BURNETTE.

Cr. 2091.

District Court of Appeal, First District,
Division 1, California.

Sept. 27, 1939.

1. Criminal law ☞1084

The power of appellate courts is inherent and plenary to issue writs or orders by which execution of criminal judgments will be stayed pending appeal. Pen.Code, § 1243.

2. Criminal law ☞1084

A writ of supersedeas to stay execution of judgment pending appeal from judgment of conviction will issue where appeal pre-

sents debatable questions on which there may be honest difference of opinion, and will be refused only where appeal is frivolous. Pen.Code, § 1243.

3. Criminal law ☞1084

A writ of supersedeas to stay execution pending appeal from judgment of conviction would be granted where appeal was not frivolous. Pen.Code, § 1243.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Huston Burnette was convicted of a crime, and he appealed. The trial court refused him a certificate of probable cause, and he petitions for a writ of supersedeas to stay the execution of the judgment pending the appeal.

Petition granted.

William F. Herron, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PETERS, Presiding Justice.

Appellant has appealed to this court from a judgment of conviction rendered against him in a criminal case. The trial court refused him a certificate of probable cause, whereupon appellant petitioned this court for a writ of supersedeas to stay the execution of the judgment pending the appeal.

[1,2] Although section 1243 of the Penal Code as amended in 1927, St.1927, p. 1062, purports to place exclusive jurisdiction over the staying of executions in criminal cases in the trial court, it is now settled that the power of the appellate courts is inherent and plenary to issue writs or orders by which execution of criminal judgments will be stayed pending appeal. In *re Albori*, 95 Cal.App. 42, 272 P. 321; *People v. Biescar*, 95 Cal.App. 70, 272 P. 328; In *re Brahm*, 98 Cal.App. 731, 277 P. 895. Under the rule of these cases the writ should issue in all cases where the appeal presents debatable questions on which there may be an honest difference of opinion, and will be refused only where the appeal is frivolous. See, also, In *re Adams*, 81 Cal. 163, 22 P. 547.

In the present case the appellant urges four main grounds for appeal:

1. Insufficiency of the evidence to justify the verdict;

2. Misconduct of the trial judge;

3. Unwarranted restriction of cross-examination;

4. Misconduct of the district attorney.

[3] Without now commenting on the merits of these contentions, an examination of the reporter's transcript demonstrates that the appeal is not frivolous. It follows that the petition for the writ of supersedeas to stay execution pending the appeal should be granted. The writ was ordered issued from the bench at the time this cause was on the calendar. This opinion is filed to conform with constitutional requirements.

We concur: WARD, J.; GOODELL, Justice pro tem.



34 Cal.App.2d 665

PEOPLE v. RUSSELL.

Cr. 2051.

District Court of Appeal, First District,
Division 1, California.

Sept. 27, 1939.

1. Burglary $\S$ 42(1)

Mere possession of property stolen in burglary, recently committed, is insufficient of itself to warrant finding that the accused committed the burglary, and, in addition to possession of the stolen property, there must be corroborating evidence, which may be slight, if it is convincing. Pen.Code, $\S$ 459.

2. Burglary $\S$ 42(1)

Possession of property stolen in a burglary recently committed is a circumstance to be considered by the jury in connection with other evidence, and failure of accused to account for possession of the property upon a theory inconsistent with his guilt or to show that possession was honestly obtained is itself a circumstance tending to establish guilt. Pen.Code, $\S$ 459.

3. Burglary $\S$ 42(4)

False statements of accused showing consciousness of guilt or false statements relating to manner in which property stolen in a burglary recently committed came into

accused's possession are circumstances which, in addition to fact of possession of the stolen property, are sufficient to connect accused with the burglary and sustain his conviction. Pen.Code, $\S$ 459.

4. Burglary $\S$ 45

Where accused offers an explanation as to manner in which he came into possession of property stolen in burglary recently committed, question as to whether accused is telling the truth is solely for the jury. Pen. Code, $\S$ 459.

5. Burglary $\S$ 45

Although story told by accused who is charged with burglary of property found in accused's possession and proved to have been stolen in burglary recently committed may exculpate accused, such as where accused claims an alibi, and there is no direct contradiction of his story, it is still for the jury to say whether accused shall be believed. Pen.Code, $\S$ 459.

6. Burglary $\S$ 41(1)

Evidence sustained conviction of second degree burglary. Pen.Code, $\S$ 459.

7. Indictment and Information $\S$ 191(2)

Jury could not find accused, who was charged with burglary, guilty of receiving stolen goods, since the offense of "receiving stolen goods" is not included in the offense of "burglary." Pen.Code, $\S$ 459.

[Ed. Note.—For other definitions of "Burglary" and "Receiving Stolen Goods," see Words & Phrases.]

8. Criminal law $\S$ 741(1), 742(1)

Credibility of all witnesses and weight that should be given to their testimony are matters exclusively within the province of the jury to determine.

9. Criminal law $\S$ 369(2)

In burglary prosecution of accused who was in possession of the stolen property, in automobile accused alone was occupying at time accused was apprehended, and concerning which accused made conflicting statements, testimony of police officers describing circumstances under which accused was apprehended was admissible even though it was revealed thereby that accused at the time was committing a theft of gasoline and was occupying an automobile which had been reported stolen. Pen.Code, $\S$ 459.

10. Criminal law $\S$ 369(2)

Evidence proving chain of circumstances pointing to guilt of an accused is not reu-

dered inadmissible because it also tends to connect accused with commission of another offense.

11. Criminal law ⇐1036(1), 1137(5)

On appeal from conviction of burglary, accused could not complain of admission of testimony where the record disclosed that the point as to admissibility was not raised during the trial and the substance of part of the evidence complained of was brought directly before the jury by the accused himself. Pen.Code, § 459.

12. Criminal law ⇐665(4)

Disobedience by witness for the prosecution, of an order excluding all witnesses from the courtroom, although punishable as a "contempt," did not constitute ground for the exclusion of the testimony of the witness.

[Ed. Note.—For other definitions of "Contempt," see Words & Phrases.]

13. Criminal law ⇐789(4)

In burglary prosecution, instruction on reasonable doubt doctrine which advised jury among other things that if it had any reasonable doubt as to whether accused committed the crime charged in the information, he was entitled to an acquittal was sufficient. Pen.Code, § 459.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Carl Russell was convicted of second degree burglary and he appeals.

Affirmed.

Carl Russell, in pro. per.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

Appellant was charged with having burglarized the garage of an apartment house in San Jose, and with a prior conviction of burglary. He was tried by a jury and found guilty of second degree burglary, and the charge of prior conviction was found to be true. From the judgment of conviction and the order denying his motion for new trial he has appealed, and as first point for reversal urges that the evidence is insufficient to establish his guilt on the principal charge. After having examined the record, we are convinced that the point is not well taken.

The garage was burglarized some time after 7:30 o'clock on the night of June 15, 1938, and from one of the automobiles parked therein belonging to F. E. Anderson there was stolen a camera, a robe and a flashlight. The burglary was detected the next morning, and immediately reported to the police. About 10 o'clock that same night, June 16, 1938, appellant was apprehended three blocks from the apartment house by two police patrol officers while he was seated in a car alongside of a street grader, siphoning gasoline from the grader into the car he was occupying. Upon checking the license number and the registration certificate of the car, the officers discovered that the car had been reported stolen in Riverside earlier that month. Thereupon appellant and the car were driven to the police station, and upon searching the car the police found therein the camera, the robe and the flashlight which had been stolen in the garage burglary. When interrogated concerning the possession and ownership of said articles appellant told several conflicting stories. He first told the officers, according to their testimony, that the articles belonged to him; that he bought them a long time ago, but could not remember where or under what circumstances. He was asked particularly if the camera was his, and he replied that it was; but when informed that the number thereof corresponded with the number of the camera stolen from Anderson's automobile, he admitted having taken the camera, also the flashlight and the robe, from a car parked in a garage "out this way near where you fellows picked me up". The officers then requested him to sign a confession of guilt, but he replied it was not necessary, that he would plead guilty to petit theft. They informed him, however, that the offense was burglary, and not petit theft, and they read to him the section of the Penal Code defining burglary, Pen.Code, § 459; whereupon appellant denied having taken the articles, saying they were given to him that afternoon by "some fellow" he did not know—that he had never seen the man before. Some time later, and after he had been told that Anderson had identified the articles as his property, appellant was again asked how he came into possession of them. He replied that he did not know; and thereafter he refused to answer any questions more than to deny any knowledge of how the articles came into his possession. On cross-examination of one

of the police officers by counsel for appellant, it was brought out that appellant made conflicting statements also as to the possession and ownership of the car he was occupying at the time he was apprehended. In this regard the officer testified that when appellant was asked who owned the car, he replied that it belonged to him but was registered in the name of Miss Edith Hansen, his "girl friend", whereupon he was told that the car had been reported stolen; that appellant then changed his story, saying that "a fellow named Mickey", whose acquaintance he had made in San Quentin, had turned the car over to him the day before in San Francisco so that he could drive to San Jose and look for work in the fruit. As a witness in his own behalf appellant admitted the prior conviction but denied having committed the burglary. In this connection he testified that on June 15th he was in Salinas looking for work; that he had borrowed the car he was occupying at the time he was apprehended from a friend in San Francisco; that the camera and robe were in the car at the time he borrowed it, but that the flashlight belonged to him. Furthermore, he denied having made most of the statements attributed to him by the police officers, particularly that he had told them he had taken the articles from a car parked in a garage.

The substance of the argument advanced by appellant in support of his contention that the evidence is legally insufficient to support the verdict seems to be that it failed to place him at or near the scene of the alleged burglary until many hours after it had been committed; that his conviction was based on mere suspicion "surrounded by the appearance of a past criminal record, and the possession of alleged stolen property of very slight value"; that the testimony given by him to the effect that he was in Salinas on June 15th, being uncontradicted by any other witnesses, must be taken as true, and entitled him to an acquittal; that at most the evidence established the offense of receiving stolen goods, and that therefore in any event he should have been found guilty of that offense and not burglary.

[1-7] It is true that mere possession of property stolen in a burglary recently committed is not sufficient of itself to warrant a finding that the accused committed the burglary; that in addition to posses-

sion of the fruits of the burglary there must be corroborating circumstances—such as acts, conduct or declarations of the accused tending to show guilt. However, it is well settled that the corroborating evidence may be slight, provided it is convincing; that possession of stolen property is a circumstance to be considered by the jury in connection with the other evidence, and that failure of the accused to account for its possession upon a theory inconsistent with his guilt of the offense charged or to show that possession was honestly obtained, is itself a circumstance tending to establish guilt. Furthermore, among the circumstances which in addition to the fact of possession of the stolen property are held sufficient to connect the accused with the crime and to sustain his conviction, are false statements showing consciousness of guilt, or as to how the property came into his possession. *People v. Russell*, 120 Cal.App. 622, 8 P.2d 209; *People v. Taylor*, 4 Cal.App.2d 214, 40 P.2d 870. And in all cases where the accused offers an explanation as to the manner in which he came into possession of the stolen property, the question as to whether he is telling the truth is one solely for the jury. *People v. Taylor*, supra, citing *People v. McClain*, 115 Cal.App. 505, 1 P.2d 1085, and *Id.*, 115 Cal.App. 512, 1 P.2d 1023. Moreover, even though the story told by the accused may exculpate him, such as where he claims an alibi and there is no direct contradiction of his story, it is still for the jury to say whether he shall be believed. *People v. Wier*, 20 Cal.App.2d 91, 66 P.2d 703; 8 Cal.Jur., p. 589; 4 Cal.Jur. Ten Year Supp., p. 850. It will be seen, therefore, that when the evidence in the present case is measured by the foregoing rules, it is legally sufficient to support a verdict of guilty; and besides, there is the evidence of appellant's admission that he took the articles from a car parked in a garage, and his statement that he would plead guilty to a charge of petit theft, which when considered in connection with the evidence showing that a burglary had been committed and that the stolen property was found in his possession, doubtless established a case sufficient to meet the requirements of law. *People v. Hurst*, 108 Cal.App. 24, 290 P. 887. In no event could the jury have found him guilty of receiving stolen goods for the reason that the charge was burglary, and the offense of receiving stolen goods is not included therein.

[8] A considerable portion of appellant's brief is devoted to a discussion of the testimony of the prosecution's witnesses in an effort to show discrepancies therein, which he claims cast a doubt as to the accuracy and truthfulness of some of the statements made by said witnesses. In answer thereto it will suffice to say that the credibility of all witnesses and the weight that should be given to their testimony are matters exclusively within the province of the jury to determine.

[9-11] Nor do we find that any error was committed in connection with the admissibility of that portion of the testimony given by the police officers wherein they described the circumstances under which appellant was apprehended, even though it was revealed thereby that appellant at that time was committing a theft (of gasoline from a street grader) and occupying a car which had been reported stolen. It frequently happens that in proving a chain of circumstances pointing to the guilt of an accused one or more links of that chain may consist of circumstances tending to connect him with the commission of another offense; but even so, that does not serve as ground for the exclusion of the testimony. 8 Cal.Jur., p. 71; *People v. Perry*, 195 Cal. 623, 234 P. 890; *People v. Palumbo*, 127 Cal.App. 703, 16 P.2d 316. Here admittedly at the time appellant was apprehended the property stolen in the garage burglary was in his possession, in a car he alone was occupying, and concerning which he made conflicting statements. Clearly, therefore, the circumstances under which he was found in the possession of the fruits of the burglary, as well as the explanations offered by him at that time concerning the same, constituted proper subject-matter for the consideration of the jury in testing generally appellant's credibility as a witness, and especially the truth of his entire story as to the manner in which he claimed to have come into the innocent possession of the stolen articles. Moreover, the record discloses that the point as to the admissibility of the testimony about which appellant now complains was

not raised during the trial, either by objection to its introduction or motion to strike; and as above shown, the question of the ownership of the car and the conflicting explanations offered by appellant as to the manner in which he obtained possession thereof were brought directly before the jury by appellant himself, first, on cross-examination of the police officer, and again while testifying on direct examination as a witness in his own behalf. Such being the state of the record, appellant cannot now be heard to complain of the effect thereof.

[12] Also without merit is appellant's claim of error in permitting one of the prosecution's witnesses to testify after he had remained in the courtroom in disobedience of an order excluding all witnesses therefrom. Such disobedience is punishable as a contempt, but does not constitute ground for the exclusion of the testimony of the witness. *People v. Boscovitch*, 20 Cal. 436; *People v. Mack*, 115 Cal.App. 588, 2 P.2d 209; *Mintzer v. Wilson*, 21 Cal.App.2d 85, 68 P.2d 370.

[13] Appellant further contends that the court's instructions upon the doctrine of reasonable doubt were confusing, and that it should have instructed the jury that it was within its province to find him guilty of receiving stolen goods. But as already pointed out, the latter offense is not included in the crime of burglary; therefore such an instruction would have been improper; and the record shows that the doctrine of reasonable doubt was clearly defined and the jury fully instructed thereon, it being advised in this respect, among other things, that if it had any reasonable doubt as to whether appellant committed the crime charged in the information, he was entitled to an acquittal.

The remaining points urged by appellant are of minor importance, and being without merit do not require discussion. The judgment of conviction and the order denying the motion for new trial are affirmed.

We concur: PETERS, P. J.; WARD, J.

34 Cal.App.2d 647

**MARIN MUNICIPAL WATER DIST. v.
PENINSULA PAVING CO.**

Civ. 10539.

District Court of Appeal, First District,
Division 1, California.

Sept. 26, 1939.

1. Counties ⇨144

Where a county contracts for construction work according to plans and specifications and contractor performs work with proper care and skill, but work thus planned and specified results in injury to adjacent property, the county is liable for payment of damages, but where contractor departs from contract or performs work planned and specified in an improper, careless or negligent manner, which results in injury to adjacent property, he is responsible for damages resulting.

2. Highways ⇨113(4)

The provision in a contract for construction of state highway, which provided that contractor should take every precaution to protect and preserve pipe lines from injury or damage during construction operations, in no way enlarged liability of contractor for damage to pipe lines, but made contractor liable for failure to use ordinary care in performance of contract work.

3. Highways ⇨118

In water district's action against highway contractor to recover for damages to pipe line resulting from alleged negligence of contractor in forcing mud against pipe line during construction of state highway across a mud area, under evidence that contractor constructed highway across mud area under direction of state engineer, that district was informed of proposed construction and furnished plans, and that district's engineer knew of day by day progress of work, a finding of negligence of contractor was not warranted.

4. Eminent domain ⇨285

If the constitutional provision that private property shall not be taken or damaged for public use without just compensation paid to owner makes state or a public agency liable for indirect and consequential damages resulting from public construction, a contractor who constructed a state highway in accordance with plans furnished by state, was not liable for indirect damages to pipe line damaged by mud pressing against it. Const. art. 1, § 14.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action for damages for injury to pipe line by the Marin Municipal Water District (a public corporation), against the Peninsula Paving Company (a corporation). From a judgment for the plaintiff, the defendant appeals.

Judgment reversed.

Jordan L. Martinelli, of San Rafael, and Bronson, Bronson & McKinnon, of San Francisco, for appellant.

Duke & Cowen, of San Rafael, for respondent.

PETERS, Presiding Justice.

Defendant Peninsula Paving Company appeals from a judgment against it and in favor of plaintiff Marin Municipal Water District rendered in an action brought by plaintiff for damages for injury to its pipe line alleged to have been caused by defendant's negligence in constructing a state highway.

The basic facts are not materially in dispute. The plaintiff is a municipal water district engaged in the business of supplying water to various municipalities in Marin county. In the performance of this function it maintains various distributing water mains. One such main was a twelve-inch cast iron main leading to the town of Sausalito. This main, so far as pertinent here, was partially imbedded in the western shoulder of the state highway leading to Sausalito, and entirely within the state right of way. This highway, for a portion of its distance, crossed a mud swamp. In 1932 the defendant paving company entered into a contract with the department of public works, division of highways of the state of California, to construct a new state highway from a point designated as Waldo Point to Sausalito. This new highway was to replace the old highway, and roughly paralleled it. Where the new highway crossed the swamp the mud was twenty to sixty feet deep. The mud area between the old and new highways in some places was but thirty feet wide. In constructing the new highway the method of construction called for by the plans and specifications was to pile sufficient rock and dirt on the mud to cause it to settle through the mud to solid ground. The inevitable effect was to displace the mud, a considerable portion of which was forced to the west. The

westward displacement exerted pressure against the old highway and caused that highway to move westerly in some places as much as ten feet. This caused the plaintiff's pipe line to buckle and break, resulting in the injury which forms the basis of this action.

The pipe line originally had been installed in the center of the old highway in 1909, at which time the road was a county road. It became part of the state highway system in 1914. In 1916 the pipe line was moved to the west shoulder of the old highway, where it remained until the occurrences here described.

The defendant contractor, as well as the state engineers, knew of the existence of the pipe line. The contract between the state and defendant expressly called the attention of defendant to the fact that certain water, gas and sewer lines were buried within the limits of the work to be done, and provided that: "The contractor shall take every precaution to protect and preserve such lines from injury or damage during construction operations."

The evidence showed that the work of the defendant was planned by the state engineers, and that the actual construction work was supervised and directed by the state engineers. The work done conformed in every detail to the plans and specifications furnished by the state, and everything done by the defendant was approved by the state engineers.

Prior to the commencement of construction the state informed plaintiff by letter of the proposed construction and warned it to protect its property. Complete plans of the construction were forwarded to the plaintiff.

The theory of the complaint and the theory at the trial was that defendant contractor had so negligently performed the work that plaintiff was injured. The charging paragraph of the complaint, after describing the method of construction above set forth, alleged that the defendant: "did impose upon the mud adjoining said old county road large and unusual loads of earth and rock, and did negligently and carelessly permit said fill to accumulate in large quantities and to unusual heights above the grade of the new highway, at given points alongside of said old county road, whereby the mud underneath was caused to be displaced, and was caused to escape from beneath the load of said earth, rock and other filling material, to

the sides and underneath the old county road in which the pipes and transmission lines of plaintiff were so lawfully laid and maintained as aforesaid, and did cause said old county road to heave, bulge and crack, and did cause the water pipes and mains of this plaintiff to heave and bulge with the said county road, and did cause the joints thereof to leak and the said pipes to buckle and permit the water thereof to escape, and that through and by the negligence and gross carelessness of the said defendant Peninsula Paving Company this plaintiff suffered damage and injury to its said pipes in the sum of Twenty-Six Hundred Dollars (\$2,600.00)".

The trial court found this allegation to be generally true except that the court specifically found that the piling of the earth fill on the mud was "done and performed in accordance with the method ordered, directed and adopted by the Resident Construction Engineer of the Highway Department of the State of California; the Court further finds that under the plans and specifications of the contract between defendant and the State of California, the method and manner of performance of the aforesaid work by defendant at said time and place was specified to be so done under the direction and control of said State Highway Engineer".

After finding that the plaintiff had received notice of the proposed construction and a copy of the plans, the court found that the plaintiff took no steps to protect its pipes at the place of damage (although it did make some 33 changes in its pipe line at other places along the line of construction), and that the plaintiff by the exercise of ordinary care "could not have discovered that in the performance of said contract by said defendant that the old road would shift". The court then made this finding: "The Court further finds that all materials deposited by defendant along and upon the right of way of said State Highway hereinabove mentioned, were deposited by defendant in conformity with the method and under the directions and orders of said State Highway Engineer, and that plaintiff had actual knowledge of the manner in which the work performed by defendant was being performed as it progressed from day to day."

Appellant and respondent discuss at some length the nature of the right that plaintiff has in the state highway. By the

provisions of section 19 of the Municipal Water District Act (Stats. 1911, p. 1290; Deering's Gen.Laws, 1931, Act 5243), under which plaintiff is organized, it is provided: "The right of way is hereby given, dedicated and set apart to locate, construct and maintain said works over and through any of the lands which are now or may be the property of this state, and to have the same rights and privileges appertaining thereto as have been or may be granted to municipalities within the state."

We do not find it necessary to now decide the exact nature of the right the plaintiff water district has in the state highway. We are not here involved with the question as to who shall bear the expense of any changes required by the construction of the new highway, or with any liability in eminent domain the state or the highway department may owe to the plaintiff. So far as the contractor is concerned, the proper rule of liability is thus stated in *Northwestern Pac. R. R. Co. v. Currie*, 100 Cal.App. 173, at page 175, 279 P. 1057, at page 1058:

[1] "Where a county contracts for the doing of construction work according to plans and specifications theretofore adopted, and the contractor performs the work with proper care and skill, and in conformity with the plans and specifications, but the work thus planned and specified results in an injury to adjacent property, the liability, if any there is, for the payment of damages, is upon the county under its obligation to compensate the damages resulting from the exercise of its governmental power (*Elliott v. County of Los Angeles*, 183 Cal. 472, 191 P. 899; *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 39 P. 610, 46 Am.St.Rep. 237); but where the contractor departs from the contract, plans, or specifications, or goes beyond them, or performs the work planned and specified in an improper, careless, or negligent manner, which results in injury to adjacent property, then he is responsible in damages for the tort he has committed (*Shaw v. Crocker*, 42 Cal. 435; *Reardon v. San Francisco*, 66 Cal. 492, 6 P. 317, 56 Am.Rep. 109; *Eachus v. Los Angeles*, 130 Cal. 492, 62 P. 829, 80 Am.St.Rep. 147; *Norton v. Ransome-Crummey Co.*, 173 Cal. 343, 159 P. 1177; *Perkins v. Blauth*, 163 Cal. 782, 127 P. 50)." See, also, *Kaufman v. Tomich*, 208 Cal. 19, 280 P. 130. There is no contention here made that the build-

ing of the highway was of itself inherently wrong. In fact such a contention could not properly be made under the pleadings and proof. A reading of the complaint and the findings above referred to demonstrates that the action was brought and tried on the theory that the contractor had been guilty of negligence in the performance of the work. The sole question for determination, therefore, is whether the evidence sustains the finding of negligence.

[2] The provision of the contract between the state and defendant above quoted that the contractor should preserve and protect the pipe line, in no way enlarged the liability of the contractor to third persons. All that such a provision means is that the contractor is liable to third persons for failure to use ordinary care in the performance of the contract work. *Blochman v. Spreckels*, 135 Cal. 662, 67 P. 1061, 57 L.R.A. 213; *Gay v. Engebretson*, 158 Cal. 21, 109 P. 876, 139 Am.St. Rep. 67. The rule of these cases, so far as they apply to the problem here presented, has not been relaxed or changed by later decisions.

We turn now to a discussion of the issue of negligence. As pleaded in the complaint the one act of negligence relied on was that the defendant negligently permitted a fill to accumulate in large quantities and to unusual height above the grade of the new highway which forced the mud against the old highway and caused the damage to plaintiff's pipe line. Any contention that the work was improperly planned by the state, or that the contractor was guilty of any other act of negligence, is outside the issues formed by the complaint and answer. *McKeon v. Lissner*, 193 Cal. 297, 223 P. 965.

On the issue of negligence pleaded, the engineer of plaintiff district conceded that the defendant had not piled any greater fill on the mud than was reasonably necessary to force the fill down to solid ground. The evidence is without conflict, and the trial court found, that the defendant followed the plans and specifications exactly, and constructed the fill as directed by the state engineer, and that the plaintiff district was informed of the proposed construction and furnished plans thereof. Further it appears, and the trial court found, that plaintiff's engineer knew of the day by day progress of the work. There is no testimony that this was not the proper method of construction, plaintiff's engineer

testifying "whether that is the correct way, I do not say; I am not a highway engineer". Defendant's witnesses testified that the method of construction used was proper. Under such circumstances, under rules already discussed, it is obvious that in performing the work exactly in accordance with the plans and specifications, and under the supervision of the state engineer, the contractor was not guilty of negligence in reference to the only ground of negligence pleaded in the complaint.

Apparently it is respondent's theory that in some fashion the contractor should have removed the mud between the two highways and thus prevented the pressure on the old highway. This is not pleaded. No evidence was offered by plaintiff that this was feasible, or could reasonably have been done. Plaintiff's engineer did testify that clam shell dredgers could remove mud, but there was no evidence that enough dredgers could have been placed to materially reduce the pressure. Mr. Poss, district construction engineer, division of highways, under whose supervision the fill was constructed, testified that "I doubt if there was enough equipment could have been assembled there to have reduced the pressure entirely." There was evidence that a clam shell dredger had been used for a period of six weeks, at the order of Mr. Poss, and paid for as an extra, and that this had somewhat reduced pressure on the old highway, but there was no evidence that such methods would have reduced the pressure entirely so as to have prevented injury to the pipe line. Mr. Poss did testify that of course if all the mud had been removed before the fill was made no pressure would have been exerted against the old road; that there might be methods of dredging the entire bay; that the only method he knew of would be to put in an enormous suction dredge and suck the entire mud out. He did state that it was cheaper to let nature take its course and handle it afterwards. This might conceivable be pertinent as to the possible liability of the state or its agencies, but has no relation to the alleged negligence of defendant. No evidence was offered that the suggested method could reasonably have been employed.

There is evidence that after the old highway began to shift and the mud began to overflow the old road, that the contractor, under the direction and supervision of the state engineers, piled dirt over the mud between the two highways and that this in-

creased the pressure on the old highway. This was not pleaded as a ground of negligence. Moreover, the major damage to the pipe line had already occurred before this was done. There is no evidence that the pipe line would not have been injured had this not been done.

[3] Under these circumstances it is obvious that there is no substantial evidence to support the finding of negligence on the part of the contractor. As we view the case it presents the situation of a contractor carefully, and without negligence, constructing a highway according to the plans and specifications furnished by the state and under the constant supervision of the state engineers. If the plaintiff was entitled to compensation for injury to its pipe line by reason of certain rights gained in the highway, this right existed only as against the state or its public agencies. The proper rule is thus stated in *De Baker v. Southern Cal. Railroad Company*, 106 Cal. 257, 284, 39 P. 610, 616, 46 Am.St. Rep. 237:

[4] "It is suggested that, in view of the provision of our present Constitution (Article 1, § 14), that 'private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner,' the doctrine of *Green v. Swift* [47 Cal. 536], is no longer applicable to cases of this character. It is possible that this may be true, but it can make no difference in the present case whether it is true or not. Conceding, for the sake of the argument, that the effect of the constitutional provision is to make the state, or a public agency by it employed in the construction of a work designed to protect the lives and property of a large community, liable for indirect and consequential damages, such as were alleged and proved in this case, and which could not have been estimated or compensated in advance, although some damage might naturally have been apprehended, it does not follow that the contractor, executing the work carefully and properly according to the plan, would be liable. On the contrary, since in the case supposed the state or corporation would be liable, not for a tort, but only upon its obligation to compensate the damages resulting from the rightful exercise of its power, the liability would rest upon it alone, and the contractor, who has merely constructed the work carefully and properly according to the plan, will be exempt from any liability."

See, also, *Northwestern Pac. R. Co. v. Currie*, supra.

For the foregoing reasons it is apparent that the judgment should be, and, therefore, is reversed.

We concur: KNIGHT, J.; WARD, J.



35 Cal.App.2d 18

In re McLELLAN'S ESTATE.

McLELLAN et al. v. DE GEAR.

Civ. 10753.

District Court of Appeal, First District,
Division 1, California.

Oct. 2, 1939.

Rehearing Denied Nov. 1, 1939.

Hearing Denied Nov. 30, 1939.

1. Judgment ☞892

Where trustees of a testamentary trust were ordered by probate decree to pay beneficiary of trust a sum of money with interest from a named date, acceptance by beneficiary of sum mentioned in decree, without interest and execution by her of a "receipt and satisfaction" acknowledging full satisfaction of judgment against trustees, estopped beneficiary from claiming interest. Civ. Code, §§ 1541, 1542.

2. Judgment ☞892

Where, pursuant to a probate decree ordering trustees to pay beneficiary a named amount with interest, beneficiary accepted amount mentioned in decree, without interest and executed a receipt and satisfaction, the receipt and satisfaction was not a "general release" under statute providing that a general release does not extend to claims which a creditor does not know of at time of executing release, since by its terms it was restricted to single obligation established by decree. Civ.Code, § 1542.

3. Judgment ☞892

As respects applicability of statute providing that a general release does not extend to claims which the creditor does not know exist in his favor at time of execution of the release, it will be presumed that a beneficiary of a trust and her attorney, who

executed a receipt and satisfaction on payment by trustees of a sum of money pursuant to probate decree, knew what sums of money beneficiary was entitled to by terms of the decree. Civ.Code, § 1542.

4. Trusts ☞225

On settlement of account of trustees, trustees were not entitled to be reimbursed out of trust estate for costs of an appeal from a decree settling first account of trustees, where judgment on appeal reversed the decree and directed that beneficiary of trust should recover costs.

5. Trusts ☞321

On the allowance of compensation to trustees of a testamentary trust and their attorneys, trial court had right to consider actions of trustees in management of trust property, in view of judgment holding that trustees had been guilty of illegal commingling of trust funds and directing that such illegal action be considered in determining compensation.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Proceeding in the matter of the estate of Mary Belle McLellan, wherein Frank L. McLellan and Asa D. McLellan, as surviving trustees of a testamentary trust created by will of Mary Belle McLellan, deceased, appeal from portions of a decree settling the second account, the contest thereto having been instituted by Mary Grace De Gear.

Lower court ordered to revise decree to conform with opinion, and as so revised decree will stand affirmed.

Hankins & Hankins, of San Francisco, for appellants.

Alfred J. Harwood, of San Francisco, for respondent.

KNIGHT, Justice.

This is an appeal by the trustees of a testamentary trust created by the will of Mary Belle McLellan, deceased, from portions of a decree settling their second account. The contest thereto was instituted by respondent, who is the beneficiary of the trust and sister to the trustees. The subject-matter of the appeal involves three rulings of the superior court, first, in charging the trustees with interest amounting to \$206.57; secondly, in disallowing as

a credit a sum of money expended by the trustees in taking and prosecuting an appeal from the decree settling their first account; and third, in fixing the amount of compensation to be paid to the trustees and their attorneys.

The dispute about the item of interest arose out of these facts: In conformity with directions given by the Supreme Court in its judgment of reversal on the previous appeal (Estate of McLellan, 8 Cal.2d 49, 63 P.2d 1120) the superior court on January 29, 1937, entered a new decree wherein it was "ordered, adjudged and decreed" that there was due respondent from said trustees "as of, and on, June 7th, 1935, the date of said first account, the sum of \$1703.08 as income of said trust estate", that the trustees be charged therewith, and that they pay the same to respondent. However, there was a miscalculation in computing the amount adjudged to be due, and on February 25, 1937, the superior court made an order pursuant to the written stipulation and request of the respective parties amending the decree by reducing the amount of \$1,703.08 to \$1,666. No provision was made in the decree as reentered or as amended requiring the payment of interest on the amount so adjudged to be due respondent; and on February 26, 1937, the day following the filing of the order amending said decree, the trustees paid to her the said sum of \$1,666, the amount called for by said decree. Thereupon respondent delivered to the trustees a "Receipt and Satisfaction" signed by her and her attorney, reading as follows: "In the Superior Court of the State of California, in and for the County of San Mateo. In the Matter of the Estate of Mary Belle McLellan, also known as M. Belle McLellan, Deceased. Number 4122. Department Number 2. Receipt and Satisfaction. The undersigned, Mary Grace De Gear, hereby acknowledges that Asa D. McLellan and Frank L. McLellan, Trustees, have paid to her the sum of \$1,666.00 decreed to be due to her as of, and on, June 7th, 1935, by decree settling first account of trustees of trust for benefit of Mary Grace De Gear, et al, as said decree was amended by stipulation dated February 23rd, 1937, and said Mary Grace De Gear hereby acknowledges full satisfaction of said judgment for \$1,666.00." (Italics ours.) Approximately a month later and on March 29, 1937, the trustees filed their second account and at that time

respondent made a demand for the payment of interest on said sum of \$1,666 at the legal rate, amounting to \$206.57, from June 7, 1935, the date of the filing of the first account, to February 26, 1937, the date of the payment of the amount to her by the trustees; and her demand for said interest was allowed.

[1-3] For the purposes of this appeal it may be conceded that the indebtedness of \$1,666 established by said decree to be due respondent "as of, and on, June 7th, 1935", the date of the filing of the first account, bore interest at the legal rate from the due date thereof, and that a lawful demand therefor could have been properly made at the time said indebtedness was paid on February 26, 1937; but as shown by the terms of the "Receipt and Satisfaction" given by respondent and her attorney at the time of such payment, respondent accepted said sum of \$1,666 in "full satisfaction" of the obligation due under said decree; and that being so, under well-settled rules, she was estopped thereafter from claiming more. In other words, while the probate decree finding the amount due and directing the payment thereof did not have the technical legal effect of a civil judgment in favor of respondent and against the trustees for the amount so found to be due (Estate of McLellan, supra), nevertheless, as evidenced by the language employed in said "Receipt and Satisfaction", respondent and her attorney treated said decree as a judgment, and in receipting for the payment of the amount called for thereby acknowledged "full satisfaction of said judgment". Such being the case, the law will not permit her afterwards to take the opposite position and uphold the demand subsequently made by her for additional payment thereunder. As declared by section 1541 of the Civil Code, an obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration. It is true that as provided in the next code section, 1542, a general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor (sec. 1542, Civ. Code). But the instrument in question here is not a general release. By its terms it is restricted to the single obliga-

tion established by the decree. Then again, said instrument being signed by respondent and by her attorney as well, it will be assumed in the absence of any evidence showing to the contrary that at the time they signed the same and receipted in full satisfaction of the judgment they were as cognizant of respondent's asserted right to interest as they were a month later, when the second account was filed. At any rate, so far as the record shows, nothing had transpired within the month to alter the situation. It is our conclusion, therefore, that respondent's claim for interest in the sum of \$206.57 was improperly allowed.

[4] Appellants' contentions respecting the remaining two rulings are without merit. By the express terms of the judgment rendered on the previous appeal reversing the decree settling the first account it was directed that respondent should recover her costs on such appeal. Therefore the refusal of the superior court at the time of the hearing of the second account to reimburse the trustees for the costs of said appeal out of the trust estate of which respondent was beneficiary, was in conformity with the directions given in said judgment of reversal.

[5] The decision on the previous appeal is also determinative of the question of fees. In this regard it was held therein, among other things, that there had been an unauthorized and consequently an illegal commingling by the trustees of the trust estate with their individual interests, to their own profit; that the matter of the allowance of compensation to the trustees and their attorneys was in the sound discretion of the superior court; and that in fixing the same the court had the right to consider the actions of the trustees in the management of the trust property. And so here in fixing the fees at the time of the hearing of the second account the court was entitled to consider the manner in which the trust estate had been managed; also the amount of the allowances theretofore made on settlement of the first account.

For the foregoing reasons it is ordered that the superior court revise the decree herein appealed from so that it will conform to the views above expressed relating to the improper allowance of respondent's claim to interest in the sum of \$206.57, and as so revised said decree will stand affirmed. It is further ordered that the re-

spective parties pay their own costs of the present appeal.

We concur: PETERS, P. J.; WARD, J.



34 Cal.App.2d 659

RENZ v. PINNEY et al.

Civ. 12127.

District Court of Appeal, Second District,
Division 1, California.

Sept. 26, 1939.

Appeal and error ⇐ 773(3)

Where a review of appellant's brief satisfied District Court of Appeal that some specifications of error presented substantial questions, and impressed it that there were questions worthy of painstaking and careful consideration, in the solution of which it should have the benefit of a brief from respondent, motion to dismiss the appeal would be denied.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Walter J. Renz (substituted party plaintiff and judgment creditor instead of Alfred Whittell), against Harry J. Pinney, Annie L. Pinney, and Alfred Whittell. From orders, Alfred Whittell appeals, and Walter J. Renz moves to dismiss the appeal or affirm the orders.

Motion denied.

W. W. Kaye, of Los Angeles, for appellant.

J. G. Moser, of San Francisco, and Richard Coblentz, of Los Angeles, for respondent.

WHITE, Justice.

This is a motion to dismiss the appeal or affirm orders of the superior court of Los Angeles county granting a motion that Walter J. Renz be substituted as plaintiff and judgment creditor in the place and stead of Alfred Whittell and granting the motion of Walter J. Renz for an order recalling and quashing a writ of enforce-

ment in the action. Said motion is made on the following grounds:

"(1) The appeal was taken for delay only.

"(2) The questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

"(3) The appellant is not a party aggrieved; and

"(4) The orders from which the appeal is attempted are not appealable orders."

A motion such as this is regarded as something in the nature of a demurrer to the brief of appellant on the ground that it presents no substantial grounds for the appeal. Appellant's opening brief contains six specifications of error which are earnestly urged as grounds for reversal of the orders in question. A review of the brief satisfies us that some of these specifications of error present substantial questions, such as whether the superior court abused its discretion in making the order of substitution in view of the asserted rights of certain lienholders to have Whittell retained as one of the parties plaintiff in his capacity as trustee for the interests of such lienholders. Other questions raised also impress us as being worthy of painstaking and careful consideration by this court, and in the solution of which questions we should have the benefit of a brief from respondent to assist us in our labors.

Motion denied.

We concur: YORK, P. J.; DORAN, J.



37 Cal.App.2d Supp. 748

PEOPLE v. BARNHART.

Cr. A. 1610

Appellate Department, Superior Court,
Los Angeles County, California.

Sept. 28, 1939.

attorney for plaintiff in misdemeanor prosecutions within city, are definitive and declaratory of the duties of city attorney but are not limitations on constitutional power of municipal court. Const. art. 6, § 11, amended in 1924; § 13 amended in 1928.

2. Municipal corporations Ⓒ639(3)

As respects whether city prosecutor has sole right to issue complaints in misdemeanor prosecutions, the duties of a city prosecutor, in so far as violations of city's charter and ordinances are concerned, are a "municipal affair."

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

3. Criminal law Ⓒ84(5)

To interpret a provision of charter of city of Los Angeles authorizing city attorney to draft complaints, institute proceedings and act as attorney for plaintiff in misdemeanor prosecutions as prohibiting municipal courts from issuing complaints in misdemeanor cases would render such provision of charter void as obnoxious to general law in a field not constituting a municipal affair and already occupied exclusively by state. Pen.Code, § 1462; Const. art. 6, § 11, amended in 1924; § 13, amended in 1928.

4. Municipal corporations Ⓒ8

In interpreting city charter provision, a construction making provision unconstitutional is to be avoided in favor of one reasonably tenable and giving provision a valid effect.

5. Criminal law Ⓒ84(1)

In misdemeanor prosecution in municipal court of city of Los Angeles for reckless driving, fact that complaint had been filed by municipal court clerk upon instruction of municipal judge after a request had been made by a complaining witness did not deprive municipal judge of jurisdiction of case as against contention that city attorney had sole right to issue complaints. Vehicle Code, § 505, St.1935, p. 175; Pen.Code, §§ 836, 837, 849, 1426, 1426a, 1427, 1461a, 1462; Const. art. 6, § 11, amended in 1924; § 13, amended in 1928.

Appeal of Municipal Court of Los Angeles; Charles Newell Garns, Judge.

1. Criminal law Ⓒ84(5)

The provisions of the charter of the city of Los Angeles making it incumbent upon the city attorney to draft complaints, institute and conduct proceedings and act as

Proceedings by the People of the State of California against Stanley A. Barnhart, charged with reckless driving. From an

order dismissing the complaint, the plaintiff appeals.

Reversed and remanded, with directions.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

Albert E. Forster, of Los Angeles, for respondent.

SCHAUER, Judge.

This is an appeal by the plaintiff from an order dismissing the complaint (for violation of section 505 of the State Vehicle Code, St.1935, p. 175, i. e., "reckless driving") without a trial of the action. As shown by the Engrossed Statement on Appeal, the order was made on the ground "that the Court had no jurisdiction to try the case, in that it appeared that the complaint had been filed by the clerk [of the court] * * * upon the instruction of the * * * Judge presiding * * * after a request had been made to said Judge for a complaint by the complaining witness * * * and upon the further ground that said Judge had no authority under the law to issue said complaint, the right to issue the complaint being solely vested in the City Attorney of the City of Los Angeles." It is to be noted that the city attorney claims no such monopoly of power and himself prosecutes this appeal on behalf of the plaintiff. The order must be reversed.

We find nothing in the constitution or in any other law which limits the jurisdiction of the municipal court in misdemeanor cases to those which have been instituted by a complaint prepared or "issued" by the city attorney. A criminal (misdemeanor) action in a municipal court is commenced by filing a verified complaint with the court within one year after the commission of the offense, sections 1426, 1426a, 1461a, Penal Code; if the judge is satisfied from a perusal of the complaint that the offense complained of has been committed by the defendant, he must issue a warrant of arrest. Section 1427, Penal Code. The determination of the sufficiency of the complaint, the issuance of a warrant of arrest, the conduct of the proceeding and the ultimate disposition of the case are matters resting with the court rather than the city attorney.

[1] A person may be arrested without a warrant, under certain circumstances, by either a peace officer, section 836, Penal

Code, or by a private person, section 837, Penal Code, and in either case the requirement is that, section 849, Penal Code, "the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint stating the charge against the person, must be laid before such magistrate". There is no suggestion in the statute above quoted from that the complaint must be drafted or approved or "issued" by any certain person or particular officer—the sole exaction is that "a complaint stating the charge against the person, must be laid before such magistrate". The provisions of subdivisions (6), (7) and (8) of section 42 of the Los Angeles city charter, making it incumbent upon the city attorney to draft complaints, "institute" and conduct proceedings and generally act as attorney for the plaintiff in misdemeanor prosecutions within the city, are definitive and declaratory of the duties of the city attorney but are not limitations on the constitutional power of the municipal court. That court derives its power from section 11, Article VI of the Constitution of California (an amendment adopted in 1924), which provides in part that "In any * * * city which is governed under a charter framed and adopted under the authority of this Constitution containing a population of more than forty thousand inhabitants * * * a municipal court may be established as in this article provided, anything in this Constitution to the contrary notwithstanding. * * * Municipal courts shall have original jurisdiction [see also section 13, hereinafter quoted in part] * * * in all criminal cases amounting to misdemeanor punishable by fine and imprisonment in the city or city and county or county jail, or punishable by fine or such imprisonment. * * * The legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof except in the particulars otherwise specified in this section, and for the establishment of municipal courts in cities or cities and counties governed under charters framed and adopted under the authority of this Constitution, and having the population hereinbefore in this section specified." By amendment of section 13, Article VI of the Constitution in the year 1928, the jurisdictional scheme and control of municipal courts was somewhat altered by the adoption of the provision that "the legislature

may fix by law the jurisdiction of municipal courts". That jurisdiction, as to offenses committed in cities having such courts, has been declared by the legislature, in section 1462 of the Penal Code, as follows: "Each municipal court shall have exclusive jurisdiction in all criminal cases amounting to misdemeanor, where the offense charged was committed within the city in which such municipal court is established except those of which the juvenile court is given jurisdiction". Certainly the plain import of the constitutional and statutory provisions quoted negatives any contention that either the jurisdiction of, or procedure in, municipal courts is a municipal, as distinguished from a state, affair.

[2-5] To hold that the Los Angeles City Charter provisions eliminate prosecutions, whether for violations of the city charter, city ordinances or state laws, unless the same are "instituted," and the complaints prepared and presented, by the city attorney, would give such charter provisions either the effect of regulating procedure in the municipal courts (requiring the dismissal of actions not so filed by the city attorney) or of ousting them from a part of the jurisdiction conferred by the constitution and legislature. While the duties of a city prosecutor, in so far as violations of his city's charter and ordinances are concerned, may be said to be a municipal affair (*Fleming v. Hance*, 1908, 153 Cal. 162, 169, 94 P. 620), the procedure in, and jurisdiction of the municipal courts are by express constitutional provision, as we have noted above, matters of state rather than municipal concern. Sect. 11, Article VI, California Constitution; see also *Nicholl v. Koster*, 1910, 157 Cal. 416, 419, 420, 108 P. 302. The ordinance establishing the Los Angeles court expressly provides "That a municipal court in and for the city of Los Angeles is hereby created, constituted and established, under authority of, and in conformity with, the Constitution and laws of the state of California and the charter of said city * * * [and] said municipal court shall * * *

have and exercise such jurisdiction and powers as are now, or hereafter may be, provided by law". *Bancroft-Whitney Co. v. Payne*, 1925, 197 Cal. 551, 554, 241 P. 551, 552. To interpret the charter provisions as limiting the jurisdiction of, or regulating procedure in, such courts would render such provisions void as obnoxious to general law in a field not constituting a municipal affair and already occupied exclusively by the state. Such a construction is to be avoided in favor of one reasonably tenable and giving the provisions a valid effect. Such a one is that hereinabove suggested, i. e., that they are definitive and declaratory of the duties of the city attorney but are not limitations on the constitutional power of the court.

The order appealed from is reversed and the cause is remanded to the municipal court, with directions to deny the motion to dismiss on the ground stated, and for further proceedings pursuant to law and not inconsistent with this judgment.

I concur: SHAW, P. J.

BISHOP, Judge (concurring).

I concur in the judgment. By paragraph numbered (8) of section 42 of the Los Angeles city charter, it is declared that the city attorney "shall draw complaints for misdemeanors committed against the laws of this state." This measures his power and duty respecting the misdemeanor that is the basis of the present case, plainly does not attempt to make that power exclusive, and hence furnishes no basis for the order appealed from.

Paragraphs numbered 6 and 7 of charter section 42 provide in part: "(6) The city attorney shall institute * * * all criminal cases arising upon violation of the provisions of this charter or the ordinance of the city * * *.

"(7) The city attorney shall draw complaints in such cases * * *." I withhold my judgment on the effect of these charter provisions and the possibility that they do deal with municipal affairs.

PEOPLE v. PERRY.**Cr. 4248.**

Supreme Court of California.

Oct. 5, 1939.

Rehearing Denied Nov. 2, 1939.

1. Homicide $\hookrightarrow$ 354

Where jury finds defendant guilty of first-degree murder, without recommendation as to punishment, law imposes death penalty, and trial court must pronounce sentence accordingly, if new trial be not granted. Pen.Code, § 190.

2. Criminal law $\hookrightarrow$ 1130(4), 1134(1)

Where no counsel appears in Supreme Court for one appealing from judgment sentencing him to death on conviction of first-degree murder and no brief or argument is presented in his behalf, court must examine complete record of proceedings in trial court to ascertain whether appellant had fair trial. Pen.Code, § 1239.

3. Homicide $\hookrightarrow$ 18(5)

One fatally shooting bank janitor after obtaining ride in his automobile, securing his bank key by exhibiting gun, and going from automobile into park for purpose of tying him up, pursuant to plan to rob bank, was guilty of first-degree murder in attempt to perpetrate robbery, though killer had not entered bank at time of shooting, place of murder was far removed from bank, and his pistol was accidentally discharged as result of attack by janitor. Pen.Code, §§ 189, 211.

4. Criminal law $\hookrightarrow$ 1169(1)

In murder trial, admission in evidence of exhibits material to prosecution, including written memoranda on scraps of paper found in drawer of bureau in defendant's room, was not prejudicial to him, though he was not shown to have made such memoranda, where he confessed crime and stated when arraigned for sentence that he wrote memoranda.

5. Homicide $\hookrightarrow$ 223

In murder trial, evidence of testimony by defendant at coroner's inquest over deceased's body was admissible, where coroner advised defendant of his constitutional rights immediately before such testimony, which was freely and voluntarily given.

6. Criminal law $\hookrightarrow$ 456

In murder trial, question on examination of arresting officer as to whether defendant was "in a sort of daze" when ar-

rested was improper as calling for conclusion by non-expert witness.

7. Criminal law $\hookrightarrow$ 721(1)

In murder trial, deputy district attorney's comments in argument to jury on defendant's failure to take witness stand or deny incriminating evidence against him were not improper, in view of constitutional amendment and statute authorizing such comments. Pen.Code, § 1323; Const. art. 1, § 13, as amended in 1934.

8. Criminal law $\hookrightarrow$ 1037(1), 1044

A defendant, whose counsel interposed no objection to deputy district attorney's expressions of his personal opinion as to effect of evidence in argument to jury and made no motion to strike such remarks from record or instruct jury to disregard them, is in no position to complain of them on appeal.

9. Criminal law $\hookrightarrow$ 625

The statute providing that person cannot be tried, adjudged to punishment, or punished for public offense while insane, is merely codification of common-law rule that insane man may not be tried, sentenced or punished for criminal offense, though incontestably guilty thereof. Pen.Code, § 1367.

10. Criminal law $\hookrightarrow$ 625

To order trial of question of defendant's sanity on ground of doubt arising as to such matter before judgment in pending action, such doubt must arise in trial judge's mind, rather than that of defendant's counsel or any third person. Pen.Code, § 1368.

11. Criminal law $\hookrightarrow$ 625

Ordinarily, question whether doubt has arisen as to defendant's sanity, so as to require trial of such question, is for trial judge to determine. Pen.Code, § 1368.

12. Criminal law $\hookrightarrow$ 1148

A trial judge's conclusion that doubt had arisen as to defendant's sanity, so as to require trial of such question, may be disturbed on appeal only where such doubt appeared as matter of law or trial judge abused his discretion. Pen.Code, § 1368.

13. Criminal law $\hookrightarrow$ 981(2)

Where defendant thoroughly understood nature and object of proceedings against him and was capable of conducting his defense in rational manner, as shown by his testimony at coroner's inquest and sworn statement immediately after denial of his motion for new trial, trial court properly denied defendant's

motion for trial of question of his sanity before pronouncing judgment on his conviction of first-degree murder. Pen.Code, § 1368.

14. Criminal law ⇨762(3), 1172(1)

In murder trial, instruction that laws may as well be stricken from statute books, unless jurors do their duty to determine guilt or innocence of those accused of crime, was erroneous as amounting to statement of trial judge's personal opinion respecting asserted facts or assumed civic consequence or condition, but not prejudicial to defendant.

In Bank.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Robert C. Perry was convicted of murder in the first degree, and he appeals.

Affirmed.

Henry W. Hache, of San Diego, for appellant.

James B. Abbey, Dist. Atty., and H. Pitts Mack, Deputy Dist. Atty., both of San Diego, Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

PER CURIAM.

Principally, the facts in this case were supplied from the testimony which was voluntarily given by defendant at a coroner's inquest, and introduced in evidence on the trial of the action. From all the evidence which was adduced therein, it appears that defendant is a fairly well-educated man of 70 years of age; that his home is in some remote spot in Alaska, from which, ordinarily, mail may not be received in this state at times more often than once during a period of one year; that, at the place of his residence in Alaska, defendant is possessed of some financial means and has a family consisting of five children, besides some grandchildren and great-grandchildren; and that following the death of the mother of his children which occurred some years ago, defendant married a woman much younger than himself, who, soon after her marriage to defendant, deserted him and took with her approximately the sum of \$27,000 in cash, which, at the instance of the said wife, had been deposited in their joint bank account. Trailing her to impose revenge, "according to the law of the North", defendant went to San Diego, where he

found himself without money. Furthermore, a large tumor had developed at one side and the back of his neck, which caused great disfigurement in his personal appearance, and which tumor he was most desirous of having removed by a surgical operation. Because of the long time which ordinarily elapsed between mails from his home, defendant felt that he could not wait until money necessary for his needs could be secured from that source. Hesitating between suicide and robbery as a means of solution of his problems, he finally conceived a plan of robbing a certain bank in the city of San Diego, which employed as its watchman and janitor a young man named Anthony, 29 years of age. Early in the morning of March 16, 1939, defendant saw the janitor sweeping the sidewalk in front of the bank, preparatory, as defendant thought, to the janitor's leaving the premises. Thereupon defendant accosted the janitor and asked him for a ride "down town", which request the latter promised to fulfill. Shortly after the two men had become seated in an automobile which the janitor was driving, defendant exhibited a gun, told the janitor that it was a "hold-up" and demanded that the janitor deliver to him the key to the bank. Having thus secured the said key, defendant asked the janitor whether he would prefer to be "tied up" in the bank, or elsewhere,—to which query the janitor responded "somewhere else". Thereupon the janitor continued to drive the automobile until it had arrived at a point near one end of a large park, where the automobile was stopped and both men alighted therefrom and went a short distance into the park,—defendant carrying the gun in his right hand. The janitor then suddenly attacked defendant by striking him a blow on his head, which caused defendant to fall to the ground, and the janitor fell on top of him, with the result that defendant pointed his gun into the air and thereupon discharged it. The shot was fatal to the janitor. Defendant left the latter in the park—having concluded, as defendant later testified, that the janitor had fainted from fright, since he, the defendant, had had no thought of committing murder. On his return to the automobile, after leaving the park, defendant found the janitor's wallet lying on the front seat thereof. He then drove to his lodgings, for the purpose, assertedly, of removing some "grass stains" from his clothing. During the time he was at his room, defendant examined the wallet,

which contained a few dollars in currency. He testified, however, that he did not disturb the contents of the wallet, but that he placed it in his dresser and left it there. He then drove the automobile to the bank where the janitor had worked and opened the front door thereof with the key which had been obtained by defendant in the "hold-up". Since valuables in possession of the bank were locked in its vault, defendant decided to wait inside the bank until it should be regularly opened by some of its employees. Some time later, the manager and a teller of the bank arrived thereat for that purpose. The double entrance doors were unlocked by them and, in accordance with their custom, while the manager remained at the front door, the teller proceeded to make a tour of the banking rooms to see that everything was in order. In the course of his inspection, the teller suddenly encountered defendant, who, with gun in hand, ordered the teller to call the manager "inside". The teller obeyed the command, but, from his manner, the manager suspected that the teller was about to be "held up" and, instead of "coming in", he went outside and summoned help, which included the police. Having noticed the action taken by the manager, the teller suggested to defendant that he make his escape while it seemed possible for him to do so. Defendant then discarded a mask which he was wearing and, after having shut the teller in a washroom, left the premises. However, after a short pursuit by civilians, defendant voluntarily surrendered to the police who had arrived on the scene. At that time he admitted that he was "the man they wanted", handed them his gun and an extra "clip" of cartridges, and said that he could not "bring himself to shoot it out in the bank". The bank key was taken from his person.

[1] Defendant was convicted by a jury of the crime of murder in the first degree. For the reason that the verdict was returned without recommendation that defendant be imprisoned in the state prison for life, it became imperative upon the trial judge to pronounce a judgment by which defendant was sentenced to suffer the penalty of death. Although section 190, Penal Code, does not require a jury to specify the death penalty in its verdict,—where the crime of murder in the first degree is found, and no recommendation is made as to the punishment, the law imposes the death penalty (*People v. La*

Verne, 212 Cal. 29, 297 P. 561; *People v. Farrington*, 213 Cal. 459, 2 P.2d 814; *People v. Farolan*, 214 Cal. 396, 5 P.2d 893); and if a new trial be not granted, it thereupon becomes the duty of the court to pronounce sentence in accordance therewith. *People v. Superior Court*, 202 Cal. 165, 259 P. 943; *People v. Adams*, 199 Cal. 361, 249 P. 186; *People v. Bollinger*, 196 Cal. 191, 237 P. 25; *People v. Welch*, 49 Cal. 174.

[2] In part, section 1239 of the Penal Code provides that, "* * * When judgment of death is rendered, upon any plea, an appeal is automatically taken without any action by the defendant or his attorney."

Although, on the trial of the action, defendant was represented by an attorney, neither that attorney nor any other counsel has appeared in this court on the appeal from the judgment in behalf of defendant,—nor has any brief or argument been presented herein in his behalf. It therefore has devolved upon this court to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial on the charge that was preferred against him. In that connection, it is noted that by an information filed in the clerk's office of the county of San Diego, acting for the superior court of this state therein, it was regularly charged that on or about the 16th day of March, 1939, in said county of San Diego, defendant "did then and there wilfully, unlawfully and feloniously and of his malice aforethought kill and slay one J. R. Anthony, a human being, then and there being and existing". Neither demurrer nor plea other than "not guilty" and "not guilty by reason of insanity" was interposed by defendant to said information.

[3] In effect, section 189 of the Penal Code includes the provision that a murder which is committed in the perpetration of or attempt to perpetrate robbery is murder of the first degree; and by section 211 of the same code, robbery is defined as "* * * the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear".

There can be no serious question presented respecting the nature of the crime which was committed by defendant. At

the time when he shot the janitor, defendant was engaged in the execution of his plan to commit the crime of robbery. The fact that up to that time he had not entered the bank had no legal effect upon the nature of the offense which he had intended to commit. Each of his several acts, at and after the moment when he asked the janitor for a ride in his automobile, was overt and was done in pursuance of the ultimate object. And although the murder was committed at a place far removed from the bank which defendant had intended to rob, the character of the offense was not affected by that fact. In its legal aspect, it was exactly the same as though the janitor had been "held up" on the sidewalk in front of the bank and then compelled to admit defendant into the bank. Neither does the assumed fact that, in accordance with defendant's testimony, the janitor attacked defendant before the janitor was shot, nor that as a result of such attack defendant's pistol was accidentally discharged, have the effect of relieving defendant from the consequences of his act. *People v. Manriquez*, 188 Cal. 602, 206 P. 63, 20 A.L.R. 1441; *People v. Hadley*, 175 Cal. 118, 165 P. 442; *People v. Milton*, 145 Cal. 169, 78 P. 549; *People v. Witt*, 170 Cal. 104, 148 P. 928.

[4] On the trial of the action, few objections to any part of the proceedings were made by able counsel who represented defendant. One of the objections which was presented related to the introduction of certain exhibits, which were material to the prosecution of the action,—particularly of memoranda in writing that appeared on scraps of paper which were found in a bureau drawer of the room which for a short time that preceded the commission of the offense had been occupied by defendant. Whether such memoranda had been made by defendant was not shown, but since defendant had already confessed the commission of the crime, and, on his arraignment for sentence, made the statement that he had written the several memoranda, it is clear that defendant suffered no prejudice on the trial by reason of the fact that objection to the admission in evidence of such exhibits was overruled by the trial court.

[5] Another objection was made to the introduction in evidence of certain testimony which was given by defendant at the coroner's inquest over the body of the man who had been killed. But in view of

the fact that, immediately preceding the moment when defendant made such statement, defendant was fully advised by the coroner of his constitutional rights in the premises, and the additional fact that his statement was freely and voluntarily made—the objection to its admissibility was not well taken.

[6] An additional point made by defendant at the trial arose from the fact that the trial court refused to permit the arresting officer to testify whether at the time of arrest defendant was "in a sort of daze". It is apparent that the question called for a conclusion by a non-expert witness, and for that reason properly was objectionable. *Holland v. Zollner*, 102 Cal. 633, 637, 36 P. 930, 37 P. 231. However, in that connection, it should not be assumed that had a question been asked whether defendant "appeared to be in a sort of daze", it properly would have been subject to a similar ruling. *Holland v. Zollner*, 102 Cal. 633, 637, 36 P. 930, 37 P. 231; *People v. Arrighini*, 122 Cal. 121, 54 P. 591; *People v. Wong Loung*, 159 Cal. 520, 114 P. 829; *People v. Vaughan*, 131 Cal.App. 265, 21 P.2d 438; 8 Cal.Jur. 152, 153.

[7] In his argument to the jury, the deputy district attorney, who was in charge of the prosecution, made some remarks which on first consideration might seem objectionable. For example, he said: "We have the defendant hearing all of this evidence; he has been here in court. We have given him his chance to take the stand, if he so desires, and he has not seen fit to do that. * * * There is not one contradiction in the case, as I see it from the evidence, because there is no denial of anybody. * * * Not only from the evidence, but also from the fact that the defendant did not even see fit in this case to take the stand to make any explanation of any kind to you as to what occurred up there and he did not take the stand; he didn't see fit to take the stand because he didn't want to submit himself to cross-examination, Ladies and Gentlemen, to test out something * * *. *I personally myself, don't think there is anything you can do but to bring in a verdict of first degree, without any recommendation whatsoever.* * * * The defendant's Counsel has told you in his argument to you that he has done the best he could. Well, I submit to you that he probably has, but what did he have? He didn't have much to go on and he had this general evidence

which pointed irrevocably at the defendant and it will always point at him and you cannot get away from it, no matter how long you think it over, and if you do not find the defendant guilty of first degree murder, Ladies and Gentlemen, with no recommendation, *I will not be pleased*, although Mr. Hache [attorney for defendant] would have you believe that I will be, because I did not get this defendant into this spot. * * * You have got the case already of this man not taking the stand * * *." (Emphasis added.)

With reference to the comments made by the deputy district attorney regarding the failure of defendant to take the witness stand in his own behalf or to deny any of the incriminating evidence against him, it may be noted that by constitutional amendment, adopted in 1934, section 13 of article I thereof was amended to read that " * * * in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." And the same matter is covered by the provisions of section 1323 of the Penal Code.

[8] With respect to the statements which were made by the deputy district attorney concerning his own view of the case, the impropriety thereof is covered by American Bar Assn. Canon 15 and Boston Bar Assn. Canon XVI, respectively, as follows: "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause." "It is improper for a lawyer to assert in argument his personal belief in his client's innocence, in the truthfulness or untruthfulness of a witness, or in the justice of his client's cause, that belief being neither competent evidence nor fair argument." Although the expression by the deputy district attorney of his personal opinion of the effect of the evidence probably was contrary to the strict ethics of the profession and in the particular circumstances constituted mild misconduct on his part, nevertheless, no objection thereto was interposed by counsel who represented defendant on the trial of the action; neither did he make a motion to strike such remarks from the record, nor that the jury be instructed to disregard them. It becomes apparent, therefore, that defend-

ant is in no position to complain of any of such comments.

Another matter of procedure, regarding which counsel for defendant complained at a time when the motion for a new trial was presented to the trial court, was based in part upon the defendant's withdrawal of his plea of "not guilty by reason of insanity." It appears that, although on his arraignment for plea defendant had pleaded both "not guilty" and "not guilty by reason of insanity",—after the trial on the issue of "not guilty" had ended, and the trial judge had directed that counsel proceed with the trial of the issue of "not guilty by reason of insanity"—defendant, in person, withdrew his said plea of "not guilty by reason of insanity". That he did so is clearly indicated by the following excerpt from the record of the proceedings had at the time mentioned, to-wit:

"Mr. Hache: Well, I don't know—Mr. Perry thinks—I informed Mr. Perry that I am willing to proceed with this insanity plea but Mr. Perry says that he doesn't want any more publicity and does not want anything about his family brought in. He doesn't want his family to know anything about it. He would rather waive any further proceedings, and says he would take it on the chin.

"The Court: Is that correct, Mr. Perry? Do you at this time withdraw your plea of not guilty by reason of insanity, heretofore entered, and do you at this time consent, and do you now waive and withdraw your plea of not guilty by reason of insanity heretofore entered?

"Defendant Perry: Yes.

"The Court: Very well,

"Mr. Hache: Do you understand that Mr. Perry? Do you understand what he said? If you didn't, come up here and you can hear a little bit better.

"The Court: You may read that to the defendant, Mr. Reporter.

"Thereupon the statement of the Court is read by the Reporter.

"Defendant Perry: Yes.

"The Court: You understand that thoroughly, Mr. Perry?

"Defendant Perry: Yes, it means not to take the stand on the insanity plea, is that it?

"The Court: It means that you are withdrawing your plea of not guilty by reason of insanity heretofore entered.

"Defendant Perry: Now if I was to take the stand, I know that my lawyer, the questions that was put to me by him would be all right.

"The Court: Well, the sole question I am interested in, Mr. Perry, is do you at this time withdraw your plea of not guilty by reason of insanity heretofore entered, and do you at this time withdraw and waive that plea of not guilty by reason of insanity?

"Defendant Perry: Yes.

"The Court: Very well.

"Defendant Perry: I will join my boy that I lost in the World War."

In that connection, at the time when the motion for new trial was argued, defendant's counsel suggested that the actions and conduct of defendant throughout the commission of the crime, and at all times thereafter, were those "of a man that is not in his right mind"; and that especially was that conclusion deducible from the fact that defendant had precluded himself "from at least attempting to prove that he is [was] insane". Defendant's counsel then made the implied motion that "the question as to the sanity" of defendant be judicially determined,—which motion was denied by the trial court.

[9] By the terms of section 1367 of the Penal Code it is provided that: "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." And, in substance, section 1368 of the Penal Code provides that: "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; * * *."

The principle of law by virtue of which an insane man, even though incontestably guilty of the commission of a criminal offense, may neither be tried, sentenced, nor punished for his dereliction in that regard, is of long standing. In 4 Blackstone Commentaries, 24, it is said: "Also if a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence?

If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged [25] something in stay of judgment or execution. Indeed, in the bloody reign of Henry the Eighth, a statute was made, which enacted that if a person, being *compos mentis* (of sane mind) should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 and 2 P. and M., c. 10. For, as is observed by Sir Edward Coke, 'the execution of an offender is for example ut poena ad paucos, metus ad omnes perveniat (that the punishment may reach the few, but the fear of it affect all): but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others.'"

In the case of *Freeman v. People*, 4 Denio, N. Y., 9, 20, 47 Am. Dec. 216, after having referred to the foregoing common-law rule, it is said that: "As is said in 4 Harg. State Trials, 205, 'there may be circumstances lying in his private knowledge, which would prove his innocence, of which he can have no advantage, because not known to the persons who shall take upon them his defence.' The most distinguished writers on criminal jurisprudence concur in these humane views, and all agree that no person, in a state of insanity, should ever be put upon his trial for an alleged crime, or be made to suffer the judgment of the law. A madman cannot make a rational defence, and as to punishment, *furiosus solo furore punitur*. (1 Hale, P.C. 34, 35; 4 Bl. Com. 395, 6; 1 Ch. C.L. ed. 1841, p. 761; 1 Russ. on C. ed. 1845, p. 14; Shelf. on Lunacy, 467, 8; Stock. on Non Com. 35, 6.)" Practically an identical reference to the history of and the reason for the rule may be found in the case entitled *In re Buchanan*, 129 Cal. 330, 61 P. 1120, 50 L.R.A. 378. See, also, 1 Chitty Crim. Law, 619 (*761).

It therefore becomes clear that the governing statute, in reality, is but a codification of an already existing common-law rule, which, in effect, is so declared in each

of the cases hereinbefore cited. Also, in each of those latter authorities the basis for a correct conclusion respecting the mental condition of the person whose sanity is in question is declared to be that if he is capable of understanding the nature and object of the proceedings against him and can conduct his defense in a rational manner, he should be deemed sane for the purpose of being tried, though on some other subjects his mind may be deranged or unsound. See, also, *People v. Zeigler*, 142 Cal. 337, 340, 75 P. 1090; *People v. Kirby*, 15 Cal.App. 264, 268, 114 P. 794; *People v. West*, 25 Cal.App. 369, 372, 143 P. 793; *People v. Vester*, 135 Cal.App. 223, 26 P.2d 685.

[10] From a consideration of the language employed in section 1368 of the Penal Code, it becomes obvious that the "doubt" as to the sanity of a defendant is one that must arise in the mind of the trial judge, rather than in the mind of counsel for the defendant or in that of any third person. *People v. Rosner*, 78 Cal. App. 497, 248 P. 683; *People v. Lee Fook*, 85 Cal. 300, 24 P. 654; *People v. Fountain*, 170 Cal. 460, 150 P. 341; *People v. Huntoon*, 41 Cal.App. 392, 182 P. 776.

[11,12] Ordinarily, the question whether a "doubt" has arisen as to the sanity of the defendant is for the determination of the judge of the trial court. *People v. Keyes*, 178 Cal. 794, 802, 175 P. 6; *People v. Hettick*, 126 Cal. 425, 428, 58 P. 918; *People v. Fountain*, 170 Cal. 460, 467, 150 P. 341; *People v. West*, 25 Cal.App. 369, 143 P. 793. And it is only where, as a matter of law, a "doubt" may be said to appear, or where there has been an abuse of the discretion that is vested in the trial judge, in the determination of the question, that the conclusion of the latter properly may be disturbed on appeal therefrom. *People v. Gilberg*, 197 Cal. 306, 317, 240 P. 1000; *People v. Moriarity*, 61 Cal.App. 223, 214 P. 485; *People v. Rosner*, 78 Cal. App. 497, 248 P. 683; *People v. Kirby*, 15 Cal.App. 264, 114 P. 794; *People v. Little*, 68 Cal.App. 674, 230 P. 178; *People v. Hettick*, 126 Cal. 425, 58 P. 918.

[13] Furthermore, on again reverting to the record of the proceedings herein, and particularly to that part thereof which purports to set forth the testimony which was given by defendant at the coroner's inquest, as well as a sworn statement which was made by him immediately after his motion for new trial was denied, it be-

comes indisputable that defendant thoroughly understood "the nature and object of the proceedings against him", and that he was "capable of conducting his defense in a rational manner". Therefore, it follows that no error was committed by the trial court in its order denying defendant's motion that the question of his sanity should be determined before judgment be pronounced against him.

[14] The instructions which the trial court gave to the jury included the following language, to-wit: "The importance of your duties requires that you consider the right of the People of the State of California to have the laws properly executed and that it is with you, citizens selected from the County, that finally rests the duty of determining the guilt or innocence of those accused of crime and unless you do your duty, laws may as well be stricken from the statute books. You should also ever keep in mind the importance to the accused of the result of your deliberations and be just to him, as well as to the People of the State of California."

Considered in the abstract, and consequently dissociated from the facts and pertinent law of the case, such language may not appear to be objectionable. But, on reflection, it is evident that this was not the ordinary criminal case. A murder trial was in progress. All the sordid facts, as placed in evidence, were fresh in the minds of the respective jurors and probably were indelibly impressed thereon. The law, in minute detail, was solemnly declared by the judge; and he then added the admonishing words that unless the jurors performed their sworn duty with reference thereto, such laws might "as well be stricken from the statute books". It is obvious that such a declaration does not constitute the law, nor any part of it. It amounts to a statement of the personal opinion only of the judge with reference to asserted facts or an assumed civic consequence or condition. He clearly overstepped his prerogative as an official exponent of the law. In effect, such language was in the nature of a lecture on economics. Although no law was erroneously stated, the jury may not have understood the full import of his words, nor may it have been influenced thereby. However, in a "close" case, such a statement might become a potent factor in the process of reaching a verdict of "guilty". But ordinarily, however "dangerous" in fact such an instruc-

tion might be to the rights of a defendant in a criminal case, it appears that in each of several adjudicated cases in this state, a similar instruction has been held not to have been prejudicial. In the case of *People v. Stevens*, 78 Cal.App. 395, 409, 248 P. 696, 701, wherein the question was first presented, it was said: "It is claimed that the trial court erred in giving the following instruction: 'The importance of your duties requires that you consider the rights of the people of the state of California to have the laws properly executed, and that it is with you, citizens selected from the county, that finally rests the duty of determining the guilt or innocence of those accused of crime, and, unless you do your duty, laws may as well be stricken from the statute books.' It is said that by this instruction the jury was told that 'laws should be stricken from the statute books if they do not convict,' and that it was the duty of the jury to convict. This part of the instruction was not as carefully drawn as it might have been, but we think it contains language that saves it from the condemnation which is now sought to be placed upon it. The jury was told that the duty of its members was to see that the laws were properly executed. This language informed the jury, in effect, that it was to discharge its duties under the law as given in the entire instructions of the court. The jury was also told that it was its duty to determine the guilt or innocence of the defendants, and that, in effect, unless this duty was performed, laws might as well be stricken from the books. As thus viewed, we think the instruction was proper. It was not greatly different in legal effect from some parts of the instruction approved by us in *People v. Selby* [76 Cal.App. 715], 245 P. 792. It must also be observed that the court gave to the jury, in connection with and following the language upon which appellants based their claim of error, this further statement: 'You should also ever keep in mind the importance to the accused of the result of your deliberations, and be just to him, as well as to the People of the State of California. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case, and give to each your conscientious judgment, and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be.' This language,

taken together with that to which appellants take exception, made the instruction eminently fair."

The question was again before the court in the case of *People v. Harshaw*, 128 Cal. App. 212, 219, 16 P.2d 1025, 1028. In that case the court declared that: "The appellant challenges an instruction as erroneous which was given to the jury regarding the weight, sufficiency and manner of considering the evidence. This instruction informs the jury they are the sole judges of the weight and sufficiency of the evidence and of the credibility of witnesses. After charging them that they are not to be governed by passion, prejudice or sympathy, the following language is employed: 'The importance of your duties requires that you consider the right of the people of the state of California to have the laws properly executed, and that it is with you, citizens selected from the county, that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty, laws may as well be stricken from the statute books.' The jury was elsewhere fully and fairly instructed regarding the law of the case. This challenged instruction also contains a clear and impartial statement of general principles of law respecting the weight, sufficiency and manner of considering the evidence, in view of which it is quite likely the jury was not misled by the warning language above quoted. *People v. Stevens*, 78 Cal.App. 395, 409, 248 P. 696. However, that language does unduly emphasize the enforcement of the law as the only proper fulfillment of the duty of a jury, with the final warning that 'unless you do your duty, laws may as well be stricken from the statute books'. This language is misleading. It is in the nature of a warning. *It may be misconstrued by jurors. In the interest of clarity and justice, it should be omitted.*" (Emphasis added.)

In the case of *People v. Navarro*, 135 Cal.App. 535, 27 P.2d 652, 653, a similar conclusion was reached. It was there said: "We have read the entire charge and are unable to say any of the instructions are open to serious criticism. One paragraph taken from a lengthy statement of general principles which were announced as rules to govern the jury's consideration of evidence is challenged. It includes the objectionable statement that with the jury 'finally rests the duty of determining the guilt or innocence of those accused of

crime, and unless you do your duty laws may as well be stricken from the statute books.' This language has been criticized by the appellate courts as misleading, objectionable, and in the nature of a warning to the jury. *People v. Harshaw*, 128 Cal.App. 212, 16 P.2d 1025; *People v. Stevens*, 78 Cal.App. 395, 409, 248 P. 696. In the present case, however, we think the objectionable language was harmless since it was immediately followed by the statement that, 'You should also keep in mind the importance to the accused of the result of your deliberations, and be just to him as well as to the People of the State of California.' While the foregoing challenged language *should have been omitted from the instruction*, we are of the opinion it does not constitute reversible error." (Emphasis added.)

No prejudicial error appearing in the record herein, it is ordered that the judgment, and the order by which defendant's motion for a new trial was denied, be, and they are, affirmed.



34 Cal.App.2d 86

MARTIN v. VIERRA.

Civ. 10541.

Supreme Court of California.

Oct. 9, 1939.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

On rehearing.

For prior opinion, see 93 P.2d 261.

Superseding opinion in, Cal.App., 90 P.2d 846.

Frank V. Campbell, Robert E. Hayes, and Walter E. Rankin, all of San Jose, for appellant.

Jensen & Holstein and Robert E. Cassin, all of San Jose, for respondent.

PER CURIAM.

The petition for hearing is denied. However, we expressly withhold our approval of the following statement in paragraph four of the opinion of the District Court of Appeal concerning the rule of last clear

chance, 93 P.2d 261, 263: "In any event, the situation presented by the evidence was such as to justify the conclusion that after defendant observed plaintiff in the street in a position of peril of which she was obviously unaware, he had the last clear chance to avoid colliding with her by diverting the course of his automobile to the left, which he readily could have done if he had been driving prudently and with due care, instead of swerving to the right."



14 Cal.2d 375

CONNARD v. PACIFIC ELECTRIC RY.

CO. et al.

L. A. 17257.

Supreme Court of California.

Oct. 5, 1939.

1. Carriers ⇨347(8, 11)

Whether passenger was riding on street car steps within ordinance prohibiting riding upon steps of street car, and whether he attempted to alight when street car was in motion within prohibition of ordinance, were for the jury where evidence was conflicting.

2. Carriers ⇨347(8)

Where street car passenger in preparing to alight from street car stepped on middle step of rear platform grasping hand rod, believing that car would come to stop to permit him to alight, and was thrown from the car by sudden jerk, passenger's conduct could not be said as a matter of law to constitute "unlawful riding on car steps" in violation of ordinance.



In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Charles H. Connard against the Pacific Electric Railway Company and others to recover for injuries sustained when thrown from the steps of a street car. From a judgment for the defendants, plaintiff appeals.

Reversed.

Superseding opinion in 90 P.2d 817.

Laurence B. Martin and Curtis G. Bird, both of Los Angeles, for appellant.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

SHENK, Justice.

This action was brought to recover damages for personal injuries received by the plaintiff while preparing to alight from a street car. Judgment was entered for the defendants on directed verdict. Plaintiff has appealed. He contends that the trial court erred in taking the case from the jury.

The basis for the directed verdict was the court's conclusion that plaintiff had violated ordinance No. 77,000 of the city of Los Angeles; that such violation was negligence per se; that it contributed directly to the injury; and that it therefore constituted contributory negligence as a matter of law. *Reeves v. Lapinta*, 25 Cal. App.2d 680, 78 P.2d 465 and cases there cited.

If the evidence had conclusively established a violation of the ordinance by the plaintiff, the above reasoning would have justified the entry of the judgment appealed from. The evidence bearing on the point, however, was in conflict; it raised a substantial issue of fact, which should have been submitted to the jury.

[1] The pertinent sections of the ordinance read:

Section 80.46. "No person shall board or alight from any street car or vehicle while such street car or vehicle is in motion."

Section 80.47. "No person shall ride upon the fender, steps, or running board of any street car or vehicle."

The evidence leaves no doubt that the plaintiff, when injured was *using* the steps of the street car preparatory to alighting therefrom, and that the street car had not quite come to a complete stop. It leaves considerable doubt, however, as to whether the plaintiff was *riding* on the steps within the meaning of that term as used in the ordinance, and as to whether he attempted to alight when the car was still in motion. These were questions of fact for the jury, and it was erroneous for the trial court to direct a verdict. *Estate of Lances*, 216 Cal. 397, 14 P.2d 768; *Gish v. Los Angeles Railway*, Cal.Sup., 90 P.2d 792, and cases there cited.

The accident occurred on February 25, 1937, about 7 p. m., when the plaintiff was

returning in his customary manner by interurban street car from his place of employment to his home near Barham way station. He testified that after the car left Holly Crest station, and as it was approaching the next stop, Barham way, he got up from his seat in the middle of the car, and started toward the rear, passing the conductor in the aisle. The conductor asked him if he wanted to get off at Barham way. He replied that he did, whereupon the conductor reached up and pulled the signal cord. He then heard the usual "toots" with which the motorman responded to a stop signal. He proceeded rearward, and the car began to slow down. It had slowed to two or three miles an hour when he reached the back, and was continuing to decrease speed. It had already entered the area of the long dirt station platform at Barham way. He recognized this from the click of the car wheels going over a switch located between the end of the platform and a waiting bench. Believing that the car would come to a full stop, he started down the steps. There were three, including the car platform. As he reached the second, or middle step, while at the same time grasping the hand rod or stanchion, the car approached a standstill. It did not come to a full stop, however, but suddenly gave a jerk, or lurch, followed by a rapid forward movement. This unexpected occurrence threw plaintiff off the steps, broke his handhold, and cast him onto the station platform. The injuries which he sustained were most severe. The car continued on until, in response to an emergency signal given by the conductor, it was finally halted at a point across the street intersection beyond the station.

[2] Plaintiff contends that because, according to his evidence, his course of conduct preparatory to getting off of the car at the station was one of continuous movement and progress toward that end, it could not be said as a matter of law to constitute unlawful *riding* on the car steps in violation of the ordinance. This contention must be sustained. It is obvious that one cannot get off a street car without descending the steps, and customarily passengers are justified in preparing to alight as the car starts to slow down in response to the signal of the conductor at a regular stopping point. There is a clear distinction between the conduct of one who over a period of time deliberately stands or "rides" on the steps of a moving car, and

the conduct of one who merely undertakes, after the signal to stop has been given, to use the steps in the course of a continuous route from car seat to station platform. The former conduct may be a violation of the ordinance, negligence per se, and the latter not come within the terms of the prohibition. Thus, where evidence adduced as to the nature of the conduct is such as would support a finding of either the one type, or the other, a question of fact for the jury is presented. In the present case, it was for the jury to say whether, under the evidence, plaintiff's position on the steps was so maintained over a period of time as to constitute "riding" thereon, or whether he was attempting to alight from the car while in motion, or whether he was merely making a proper and necessary use of the steps as a means of exit, timing his descent to the station platform to occur simultaneously with the anticipated full stop of the car. Had these questions been submitted to the jury under proper instructions, and had the jury credited the testimony of plaintiff and the evidence favorable to him, it might well have concluded that there was no violation of the ordinance on his part.

The distinction between a proper, transitory, temporary, or necessary use of the platform and steps of a car, and "riding" on such platform or steps in violation of an ordinance, statute, or company regulation, has for many years received recognition in both this and other jurisdictions. *Pruitt v. San Pedro, etc., Co.*, 161 Cal. 29, 118 P. 223, 36 L.R.A., N.S., 331, and review of authorities therein; *Mitchell v. S. P. Co.*, 87 Cal. 62, 25 P. 245, 11 L.R.A. 130, citing *Buel v. N. Y. C. R. R.*, 31 N.Y. 314, 319, 88 Am.Dec. 271; *Froeming v. Stockton Elec. R. R.*, 171 Cal. 401, 153 P. 712, Ann.Cas.1918B, 408; *Thomas v. San Pedro, etc., R. Co.*, 9 Cir., 170 F. 129; *Chicago, R. I. & P. R. Co. v. Grace*, 61 Okl. 12, 159 P. 1011; *Standard Life & Accident Ins. Co. v. Thornton*, 6 Cir., 100 F. 582, 49 L.R.A. 116; *Central R. R. v. Miles*, Ala., 6 So. 696; 10 Am.Jur., p. 294, sec. 1503. These cases, it is true, involve railroad accidents. But it is immaterial, so far as the point under discussion is concerned, whether the carrier be a railroad passenger car or an interurban street car, for in either instance the distinction must be applied if the circumstances demand it.

Respondent relies on *Reeves v. Lapinta*, supra. That decision contains a correct statement of the general rule as to the ef-

fect of negligence per se, but it gives only a meagre statement of the facts which gave rise to application of the rule. It indicates that plaintiff, a bus passenger, was injured while standing on the step as the bus approached an intersection, and then announces the bare conclusion that in "riding upon the step of the automobile bus, she was guilty of negligence per se". It is quite likely that the factual situation in that case was distinguishable from that of the present one. If it was not, the decision cannot be harmonized with the authorities above cited, and should not be followed.

The judgment is reversed.

We concur: EDMONDS, J.; CURTIS, J.; HOUSER, J.; PULLEN, Justice pro tem.; SPENCE, Justice pro tem.



14 Cal.2d 403

PEOPLE v. LIENBA.

Cr. 4068.

Supreme Court of California.

Oct. 5, 1939.

Rehearing Denied Nov. 3, 1939.

1. Criminal law ⇨363, 404(4)

Production in court of snakes, identified as those employed by defendant and his accomplice in plan to cause death of defendant's wife, on trial for her murder by drowning in bathtub, was properly permitted as part of *res gestæ* and tending to corroborate prosecution witnesses' testimony and otherwise support People's case.

2. Criminal law ⇨358

Homicide ⇨166(7, 12)

In trial for murder of defendant's wife testimony that defendant told witness six days after wife's death that he would collect insurance on her life and marry witness, that he gave witness some money and promised to pay her more if she would testify that she met defendant and deceased five weeks before, that witness saw deceased on morning of latter's death, that deceased then complained of not feeling well, and that witness and defendant registered at hotel that night and talked over his assertion of attempt to frame him for wife's death,

was admissible as tending to establish claimed motive of collecting insurance money and marrying witness and to disclose effort by defendant to establish alibi.

3. Criminal law ⚡531(3)

Evidence held to show that defendant's confession of murder was made freely and voluntarily, without promises, immunities, threats, or violence, and hence admissible in evidence, though he was questioned for many hours.

4. Homicide ⚡253(1)

Evidence held sufficient to support conviction of first-degree murder.

5. Homicide ⚡30(2)

That accomplice was principal actor in commission of homicide, which he and defendant planned and perpetrated, did not relieve latter from full responsibility therefor.

6. Criminal law ⚡372(4)

In trial for murder of defendant's wife, insured in his favor, by drowning in bathtub, evidence that his former wife, also so insured, was found drowned in bathtub of their home several years before, was admissible as tending to show that second wife's death was result of general plan by defendant to insure, marry, and murder his victims in order to collect insurance.

7. Criminal law ⚡372(1)

Evidence of defendant's prior acts and crimes similar to that charged is admissible to show that latter crime was result of general plan or scheme.

8. Criminal law ⚡374

To render evidence of defendant's murder of his former wife by drowning in bathtub admissible on trial for murder of his second wife in same manner to show that latter's death was result of general plan or scheme to insure, marry, and murder his victims, prosecution was not required to prove elements of previous crime beyond all reasonable doubt.

9. Criminal law ⚡1169(5)

In trial for murder of defendant's wife, admission of evidence of his murder of his former wife in same manner without proof thereof beyond all reasonable doubt was not prejudicial to defendant, in view of instruction that jury must believe beyond such doubt that former wife was murdered before considering facts of such transaction.

10. Homicide ⚡268

Whether woman, whom witness testified that he saw in defendant's yard on morning after night on which accomplice testified that defendant's wife was murdered, was defendant's wife, was question for jury on conflicting evidence in trial for murdering wife.

11. Criminal law ⚡743

Inconsistencies in defendant's testimony were matters for jury to determine in considering and evaluating entire evidence on murder trial.

12. Criminal law ⚡1130(4)

Ordinarily, an appellate court is justified in ignoring points first raised by appellant in supplemental brief filed shortly before oral argument on rehearing.

13. Criminal law ⚡823(2)

In murder trial, instruction that as certain witness was defendant's accomplice or co-conspirator, his testimony must be corroborated, was not erroneous as calculated to lead jury to understand that court was instructing them that defendant murdered deceased and that witness assisted when read as whole and with other instructions. Pen.Code, § 1111.

14. Criminal law ⚡1178

An instruction that as witness was defendant's accomplice or co-conspirator in alleged murder, his testimony must be corroborated, was not prejudicial to defendant, if erroneous, in view of entire charge and entire cause, including evidence, especially where defendant's counsel failed to call Supreme Court's attention to any error in instructions by briefs presented before rehearing was granted. Pen.Code, § 1111.

CURTIS and HOUSER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Major Raymond Lisenba was convicted of first-degree murder, and he appeals.

Affirmed.

Rehearing denied; CURTIS and HOUSER, JJ., dissenting; CARTER, J., not participating.

Superseding opinion in 89 P.2d 39.

William J. Clark, R. E. Parsons, Samuel L. Rummel, and Morris Lavine, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Warner Praul, Deputy Atty. Gen., and Biron Fitts, Dist. Atty., and John Barnes, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

This cause is before this court on rehearing. In the former opinion, *People v. Lienba*, 89 P.2d 39, every point then raised by appellant was discussed. On further consideration of this appeal, we are of the opinion that the proper conclusions were reached in said former opinion on all points then raised. We therefore adopt said opinion as a part of this opinion upon rehearing. Said former opinion follows:

"In an indictment returned by the grand jury of Los Angeles county, Major Raymond Lienba (also known as Robert S. James and who will be referred to as the defendant), and one Charles H. Hope were jointly charged with the murder of Mary Emma James, defendant's wife. The alleged homicide was perpetrated on or about August 5, 1935, and remained undetected for a period of several months. In fact, the indictment was not returned until May 6, 1936. Thereafter, the accomplice Hope entered a plea of guilty to the charge and at the time of defendant's trial was awaiting sentence. He has been since sentenced to life imprisonment. Hope was the principal witness for the prosecution upon the defendant's trial, at which trial it was the theory of the People that defendant, in league with Hope, had plotted and consummated the death of defendant's wife for the purpose of collecting and dividing the proceeds of certain insurance policies on her life. It was also the theory of the prosecution that the homicide was perpetrated in such manner as to give the appearance of accidental death not only to allay suspicion but in order to bring into operation the double indemnity provisions of the insurance policies. In this connection, the evidence of the prosecution tends to establish that the conspirators undertook to bring about the deceased's death by means of a deliberately inflicted poisonous rattlesnake bite on the under side of deceased's left foot (the assumption probably being that, if fatal, such bite or laceration would appear to have been incurred in or about the garden of her home) and that this ingenious method of destruction having proved ineffective the conspirators accomplished their objective by deliberately drowning the deceased in the bathtub of her home, whereupon her body was placed in the fish pond on the premises to further the 'accidental' appearance of her demise. The methods assertedly employed to bring about the deceased's untimely death will herein-

after be more fully described upon a detailed recitation of certain of the evidence. Upon the conclusion of defendant's trial, a verdict was returned finding him guilty of murder in the first degree, without recommendation. This appeal is from the judgment imposing the extreme penalty and from the order denying a new trial. We turn now to a discussion of pertinent evidence in the case.

"Viola and James Pemberton, husband and wife, when called by the prosecution, testified, in substance, that they had accompanied the defendant to his home on the evening of August 5, 1935, where they were to take dinner with the deceased and defendant; that upon arrival there they failed to find the decedent in the house, whereupon defendant procured flashlights and suggested a search of the grounds and garden; that the defendant went to the back and James Pemberton to the front of the premises; that as the witness James Pemberton walked back through the shrubbery he saw the body of the deceased in and near the fish pond, with the upper part of the body and head (face down) submerged in the water; and that when the defendant was told of the gruesome discovery he cried and otherwise expressed his grief.

"John P. Toohey, a deputy sheriff, testified that he, in company with another deputy and in response to a summons, appeared at the scene at approximately 8:30 p. m., at which time he saw the body of the deceased near the fish pond; that at the time the head was in the water, face up (the discoverers undoubtedly having previously moved it); that the water was approximately 14 inches in depth; and that the body was so placed that he could see that the left leg 'was swelled and very blue'.

"A. L. Hutchinson, also a deputy sheriff, testified that when he arrived at the scene he 'noticed a cut on her [deceased's] left toe, her big toe on the left foot'; that the flesh of her left leg 'was very dark * * * and it was almost black between the ankle and the knee, very black'; that the 'whole [left] leg was black and blue from the ankle up to the knee and on the inside of the leg' and was 'some swollen'.

"Charles H. Hope, the defendant's confessed accomplice and who at the time was awaiting sentence upon his plea of guilty to the charge of murder, testified, as the state's principal witness, that he had known the defendant for approximately seven

years; that when conversing with the defendant in the latter's barber shop in June, 1935, the defendant asked him if he had any knowledge of rattlesnakes, to which the witness answered in the negative; that the defendant thereupon stated that he had a friend who had a wife he wanted to kill and desired rattlesnakes for the purpose, adding that if he (Hope) would 'get me some rattlesnakes, I will give you \$100' and 'defray all expenses'; that subsequently he (Hope) bought three rattlesnakes in Long Beach and delivered them a few evenings later to the defendant at his home; that the snakes cost \$5 but the defendant paid him \$20 prior to their delivery; that the defendant then had him stay at his (defendant's) home for several days and while there had the witness go to town and have two boxes made for the snakes with sliding glass tops; that the boxes were approximately two feet long and nine inches high; that in July, 1935, he again talked with the defendant at his barber shop, at which time the defendant said his friend was dissatisfied with the snakes because they were not fighters and that fighters could be procured at the Ocean Park Snake Pit; that thereafter he went with the defendant to said snake pit where the defendant conversed with the attendant and said 'that is the one I want'; that the following day the defendant sent him to purchase the snake so designated; that the purchase was made and the snake was delivered to the defendant; that he next saw the defendant on August 3, 1935, two days prior to the homicide, at which time the defendant said that the snake was no good and that he wanted some fighters; that he (the witness) thereupon went to 'Snake Joe' at Pasadena and purchased two snakes which he delivered to the defendant; that the defendant said 'his wife [the deceased] had \$5000 worth of insurance and he was going to collect it'; that he went to the defendant's home on August 4, 1935, the day preceding the homicide, at which time the defendant stated that the witness was in as deep as the defendant; that defendant had him bring one of the sliding glass top boxes containing a snake from the garage into the house; that he came in the back way to the kitchen at which time he observed the deceased in her nightgown strapped or tied to the kitchen table and with adhesive tape, previously purchased by the witness at the defendant's request, fastened over her eyes and mouth; that the defendant

told him he got the deceased, who was then pregnant, on the table under a ruse that a doctor was coming to 'perform some kind of an operation on her for pregnancy'; that while the deceased remained in this prostrate position the defendant put her left foot into the box containing the snake; that the witness then returned the box to the garage; that he later left in the defendant's car with the box containing the snakes and dead chickens, etc., which had fallen prey to the snakes in defendant's prior tests of their ability to destroy; that he then picked up his (the witness') wife at her place of employment and returned the snakes to 'Snake Joe' from whom they had been procured; that he threw the boxes out along the road; that he returned to the defendant's home about 1:30 a.m., August 5, 1935, the day of the homicide; that the defendant then appeared to have been drinking and told the witness that the snakes were no good and that his wife was not even sick; that the defendant thereupon jumped up and said, 'I am going in and drown her'; that the witness stayed in the automobile; that the defendant came out about 4 a.m. and said, 'That is that'; that at approximately 6:30 or 7:00 a.m., the defendant said the deceased had been dead since 4 a. m. and the house 'cleaned up'; that defendant then asked him to 'help me carry it', whereupon he accompanied the defendant into the house where he observed the deceased lying in the hall dead with her feet toward the bathroom; that the defendant took the upper part of deceased's body and the witness the lower part and carried her 'towards the fish pond'; that the witness refused to put deceased in the fish pond as requested by the defendant but went instead to the automobile; that the defendant told him he would care for him 'when I get this money'; and that some time later the defendant gave him \$100 and instructed him to 'get out of town'. The witness thereupon identified three persons in the courtroom as the three men from whom on separate occasions he had purchased the snakes as above mentioned. His story was not materially shaken on cross-examination.

"Certain portions of Hope's testimony were corroborated by his wife who, among other things, testified that on August 3, 1935, she drove with Hope to a snake farm in Pasadena; that Hope took a box and went to the side of the barn where she saw him with 'Snake Joe', whom

she identified when he arose in court; that the following morning she drove with Hope to within a block of defendant's home and Hope left her there, the witness driving back to Los Angeles alone; that Hope picked her up at work about 2:00 p. m. of that day (August 4th) in the defendant's car; that there were boxes in the back of the car; that they again drove out to the snake farm in Pasadena; that Hope took a box and went inside, returning several minutes later with 'Snake Joe'; that on the return trip Hope threw out two boxes with glass tops; that Hope left her after dinner and she did not see him again until the following morning (the morning of the homicide) when he appeared 'white and jittery and had been drinking'.

"Additional corroboration of portions of Hope's story appears in the testimony of the three persons from whom he assertedly purchased the several snakes. Roland H. Kirby testified that early in July, 1935, Hope came to him and said he was interested in experimental work and inquired if he had snakes 'with fangs and poison'; that Hope purchased three snakes and the witness gave him a jar of crystallized rattlesnake venom.

"Mike Allman, who operated a reptile show at Long Beach, testified that the defendant and Hope one day came to his snake pit; that they had been drinking and were noisy; that the defendant offered to bet that the witness had no poisonous snakes; that the following day Hope returned with a sliding glass top box and purchased a rattlesnake, stating that he had lost \$100 to the defendant in a poker game and the defendant had offered to bet him \$50 that the witness had no poisonous snakes; and that upon being assured that a certain snake was poisonous, Hope purchased it to recoup a part of his card loss to the defendant. On redirect examination the witness stated that some time later and after their arrest, he had identified and picked out the defendant and Hope from a crowd of persons.

"Joe Houtenbrink, known as 'Snake Joe', testified that he operated a snake farm in Pasadena; that Hope came there on August 3, 1935 (two days prior to the homicide) and purchased two Diamond Back or Crotalus Atrox rattlesnakes for which he paid \$3; that Hope said he had a friend and 'he said he already bought some snakes from other places and they wasn't hot and he wanted a real hot one and he was

told to come over to me to get the snakes, that I handled hot snakes'; that Hope explained he wanted the snakes to bite and kill a dog and thus win a bet; that Hope had a box with a glass cover or top for the snakes; that he saw Hope the following day about 3 p. m. (the day preceding the homicide) and that at that time he repurchased the snakes from him for half price. This testimony corroborates that of Hope and his wife.

[1] "At this point in the trial argument arose between counsel over the prosecution's proposal to bring into court the two snakes purchased by Hope from the preceding witness and which the district attorney declared were 'the actual snakes that were at the house that day'. Defense counsel vigorously opposed their production in court but the objection was overruled. The two snakes were thereupon produced in court confined in boxes. Defense counsel then insisted that the record show that the courtroom was assertedly thrown into a state of excitement and consternation by the production of the two snakes. However, in opposition to counsel's assertion, the record also discloses the statement of the trial judge that the decorum of the courtroom and the orderly conduct of the trial were not disturbed in any manner by the incident. Thereupon, 'Snake Joe', still on the stand, identified the two snakes so produced as the two he had sold to Hope two days prior to deceased's death and had repurchased from him one day prior thereto. According to Hope's testimony, at least one of the two snakes so identified was employed by defendant and him to inflict a poisonous bite on the deceased's left foot when it was pushed by the defendant into the box containing the reptile. In view of such identification of the snakes and their employment in the plan to bring about the death of deceased, we perceive no error in the trial court's ruling permitting the production of the snakes for the inspection of the jury. It is not uncommon upon a murder trial to offer in evidence as part of the *res gestae* the medium employed to bring about the violent or untimely death of the victim. In *People v. Bannon*, 59 Cal.App. 50, 56, 209 P. 1029, 1032, it is stated that 'As a general rule, physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation.' See, also, *People v.*

Peete, 54 Cal.App. 333, 348, 202 P. 51, and 8 Cal.Jur. 143, sec. 228. Moreover, the production of the identical snakes tended to corroborate the testimony of prosecution witnesses and to otherwise support the case of the People. It might also be mentioned that if the production of the snakes in court caused the extreme state of excitation urged by the defense, it is difficult to appreciate why defense counsel at a later time in the trial and during the development of the case by the defense, again produced the snakes and thus risked a repetition of the situation of which complaint is here made.

"Returning to our discussion of the evidence, we find that the witness Irving Sherman, called by the People, testified to the effect that his father was in the cabinet business and that Hope on July 28, 1935 (several days prior to the homicide) ordered and had made two boxes with sliding glass tops. This item of evidence lends some credence to portions of Hope's testimony as well as to that of other prosecution witnesses.

"In support of Hope's testimony that he was with the defendant at his shop and at his home several times prior to the homicide, thus affording opportunity for the planning and carrying out of their scheme, there is the testimony of Lois Wright, the defendant's niece, that she had seen Hope at defendant's barber shop, where she worked, and also had seen him in July, 1935, at defendant's home.

"Sam Grant, a barber in defendant's shop, also placed Hope there on many occasions in 1935.

"Dr. A. F. Wagner, the autopsy surgeon, testified that he found a laceration on the surface of deceased's great left toe; that her left foot was considerably swollen and discolored, the swelling extending up to the hip; and that deceased's lungs contained a considerable amount of water. He gave as the cause of death, 'drowning and an acute cellulitis [swelling] of the legs.' Cellulitis, he testified, is 'always due to an infection of some kind'; that cellulitis resulting from a bacterial infection would take from two or three days to a week to reach the extent it had in the deceased but that if caused by 'animal poisons' it would progress 'much faster'. He elaborated to the extent of saying that animal poisons capable of producing cellulitis such as the deceased had would be 'the venoms of insects and snakes, spiders, and so forth.'

He further testified that the cellulitis present in deceased was not of the bacteriological type but was of the 'animal poison' type and 'could have been' caused by the bite of a snake. In addition, he testified that he again had examined the deceased's body in May, 1936, following its disinterment when criminal proceedings appeared in order, and that he was of the opinion that the laceration on the deceased's toe was caused by a rattlesnake bite.

"Dr. Gustave Boehme, who was present at the examination following deceased's disinterment, testified that he had made a special study of snakes and snakebites; that on deceased's great toe of the left foot he had discovered an 'old laceration wound approximately a quarter of an inch in length' which could have been caused by a number of things but, in his opinion, had been caused 'by some venomous creature, probably a snake, and all the other findings on the leg were compatible with such a finding', adding that the single incision was such 'as could be caused by a fang striking at an angle, perhaps'. In his brief the defendant concedes that this testimony is corroborative of Hope's story.

"Mrs. Ethel Smith, another niece of the defendant, testified, among other things, that the defendant had sent a trunk to her home for storage and that certain rope shown to her was in the trunk. Charles Griffen, an investigator for the district attorney, testified that he found the rope in the trunk. The significance of the testimony of these two witnesses lies in the fact that Hope when on the stand had previously identified the rope as being similar to that with which the deceased had been tied to the table when her foot was placed in the box containing the snake.

"In support of its claim that the motive underlying the deceased's untimely death was the collection of insurance moneys, the prosecution produced as a witness one Louis Berry, an insurance agent with the Mutual Life Insurance Company, who testified that he had been a customer at defendant's barber shop and had solicited him for life insurance; that defendant said he was not personally interested but knew a girl who might be interested in life insurance; that about two weeks later defendant inquired as to the cost of a \$5,000, twenty or twenty-five year endowment policy on a girl 26 years of age, whose name he would not reveal; that defendant agreed to submit the matter to the prospect; that

about one week later the defendant introduced the witness to the prospective client, Mary E. Busch, who later became the defendant's wife and for whose murder he now stands convicted; that on June 25, 1935, he delivered to her a \$5,000 policy which named the defendant as beneficiary, that subsequently and on July 30th he called on the defendant in response to the latter's telephone request and the defendant inquired as to the effect on the policy of a misrepresentation by the insured at the time of applying therefor that she was married, when, in fact, she was not (deceased and defendant had been living together at the time); that the defendant stated they were not married until July 19th, following the issuance of the policy; that he (the witness) checked the matter with the company and reported back to the defendant that the policy was not affected thereby; that one premium was paid on the policy; and that after the deceased's death the defendant inquired if the company would pay under the double indemnity provisions of the policy as a result of the accidental character of her death. On cross-examination the witness testified that the defendant had procured other prospective clients for him.

"Max Galatz, a representative of the Occidental Life Insurance Company, testified that late in May, 1935, he received two applications for insurance on the life of the deceased, one for a \$5,000 policy and the other for a \$700 policy; that defendant was named beneficiary in both; that the defendant and deceased (contrary to the fact) said they were husband and wife at the time; that he told the defendant that he would have to have more insurance on his life than the deceased had on her; that defendant said he had ample insurance in two or three companies but applied for a \$3,000 policy on himself; that the policies were issued and delivered about June 12th; and that only one premium was paid by the defendant on each of said policies, including his own. On cross-examination, the witness stated that in litigation which followed on the policies after deceased's death the defendant claimed under the double indemnity provisions but later settled for \$3,500, which amount (less than the face value of the policies) was paid to the defendant. Defendant's testimony given during the trial of such action was read into this record by the phonographic reporter, from which it appeared that the defendant met the deceased about March 1, 1935; that

they began living together early in May, 1935; that defendant, unknown to the deceased, had arranged for a mock marriage inasmuch as he could not then legally marry deceased because of the pendency of an annulment proceeding growing out of a previous marriage; that they thereafter became legally married on July 19, 1935; and that the deceased was in 'marvelous health' up to the time of her death. In connection with the two policies last above mentioned, the defendant two or three weeks prior to deceased's death likewise made inquiry as to the effect of the misrepresentation that the parties were married at the time of making application therefor.

"E. L. Taggart, an automobile salesman, testified that he met the defendant early in 1935 and that defendant then stated that he desired to buy a cheap car with the understanding that he could turn it in on a large Studebaker in a few months upon his receipt of \$10,000 from an 'estate'.

[2] "Madge Reed testified, in substance, that she met the defendant in the Italian Village on July 10, 1935; that he stated he was visiting from Kansas and was staying with his sister; that the defendant became intoxicated and asked her to drive him home, which she did; that while she was at his home, a woman who identified herself as his wife (the deceased), came home unexpectedly from a convention; that the defendant telephoned her several times thereafter, including a call two days prior to the deceased's demise; that defendant visited her at her apartment on August 11th (six days after deceased had died) and stated that they were trying to frame him for his wife's death but that he would collect her insurance money, marry the witness and they would go north; that defendant stated in the event of his indictment he wanted to use the witness as a surprise witness and would give her \$2,000 if she would testify that she had met the defendant and deceased five weeks previously; that on the morning of deceased's death the witness had seen the deceased on her porch and that deceased had then complained of not feeling well, making particular mention of a sore leg; that she (the witness) and defendant registered that night at a hotel and talked over his troubles and the asserted attempt to frame him; that defendant had her make notes on a card as to how he wanted her to testify (briefly outlined above), whereupon the witness identified

the card on which she had written the notes and also the hotel register. She further testified that defendant gave her \$60 at that time and promised her \$2000 later.

"We find no error in the rulings admitting and thereafter refusing to strike out the testimony of this witness. It tended in some degree to establish the motive advanced by the prosecution—collection of insurance money coupled with the purpose of marrying another woman. It also tends to disclose an effort on the defendant's part to establish an alibi in the event his foul deed came to light.

[3] "At approximately this point in the trial the prosecution was about to offer in evidence a statement or confession made by the defendant in the early morning hours of May 3, 1936, in the office of the district attorney and in the presence of several persons. Preliminary to such offer, however, and upon objection thereto by the defendant, the People undertook to establish that the statement or confession was the free and voluntary act of the defendant, uninfluenced by promises, threats or persuasions. Defendant, on the other hand, undertook to establish that the statement or confession was improperly extracted from him. As a result, much of the evidence on this phase of the case is highly conflicting, the defendant in many instances contradicting the People's showing. The conflict so created was resolved against the defendant by the trial court in the first instance upon its ruling admitting the statement or confession as the free and voluntary act of the defendant and by the jury in the second instance by its verdict finding him guilty as charged. However, in view of the vigorous presentation and argument of this point upon the present appeal, we feel justified in developing the matter at some length in order that the general state of the record in this respect may be known.

"The defendant took the stand on voir dire in an effort to show the asserted involuntary character of the confession and testified that he had been constantly questioned, threatened and beaten by the officers from the time of his arrest on April 19th, without a warrant, until he was 'booked' at the county jail on the 21st. He asserted that his ears were bruised and swollen and that he had suffered a hernia as a result of such manhandling. During this period he was assertedly proffered manslaughter punishment in exchange for a confession. His counsel testified that

when he later saw the defendant in the county jail his ears were blue and swollen. Several depositions were offered by the defendant as tending to show that he was congenitally weak-minded and therefore more likely to capitulate to coercive methods than the average person.

"It appears from the testimony adduced by the People that the defendant was placed under observation in April, 1936, for suspected incest involving his niece, at which time the authorities uncovered and developed the criminal character of deceased's death which had occurred several months prior thereto. As a result of these developments the defendant was arrested on April 19, 1936. He was not taken without delay before a magistrate nor was he immediately incarcerated in the county jail as required by sections 849 and 1597 of the Penal Code. Instead, and after some preliminary questioning in the office of the district attorney, he was taken by the officers to a private home, adjoining that where the defendant had been living with his niece, and where admittedly he was held incommunicado for a period of about forty-eight hours, during all of which time he was admittedly subjected to incessant questioning by the officers who worked in shifts. The defendant was apparently deprived of rest and sleep during practically all of such period. At least, the prosecution failed to offer any positive testimony that defendant during this period was afforded an opportunity of going to bed, a privilege concededly enjoyed by the examining officers. In addition, one of the officers testified that during the questioning he became angered and 'slapped' the defendant's face when the defendant was said to have referred to the deceased as a 'whore'. Other than subjecting defendant to constant questioning, and the 'slap' administered to him the several officers categorically denied that any threats or promises were made to or any physical beatings were inflicted upon the defendant during the two-day period he was being held and questioned in the private house. Charles Griffen, the assistant chief of the bureau of investigation in the office of the district attorney, while admitting the continuous course of questioning of the defendant during this period, testified that other than the slap mentioned, no force or violence was employed on the defendant; that the defendant was calm and collected; and that he appeared unafraid and answered questions (other than admitting the crime) readily and rationally.

"Everett Davis, another investigator for the district attorney, denied that the defendant was offered a lighter punishment if he would confess and testified that the defendant was told no one could offer or promise him anything but if he wanted to tell the story they would listen. He added that of his own knowledge, the defendant slept from 3:30 to 8 a. m., April 21st, in a chair with his feet on a second chair. Two other officers likewise denied defendant's statement of threats and violence during the period April 19th to 21st, one of whom testified that defendant explained receiving the hernia in an automobile accident. Three deputy sheriffs, who saw the defendant (stripped and otherwise) in the county jail on and subsequent to April 21st testified, in substance, that they saw no bruises, marks or discolorations on defendant's body or head and that he made no complaints as to his treatment or condition.

"It is apparent, therefore, that the evidence is sharply conflicting on this phase of the case, other than that showing continued questioning of the defendant throughout the period of April 19th to 21st, during which an ill-advised slap was administered to him, and for all present purposes the conflicts therein must be presumed to have been resolved against the defendant by both the trial court and the jury.

"Regardless of the impropriety of holding and continuously examining the defendant for many hours in a place other than a county jail prior to the filing of any charge against him, a course which we expressly disapprove, it is of the utmost significance that a confession was neither obtained nor extracted from the defendant during such period. The record definitely discloses that this treatment of which defendant here complains failed of its asserted objective. In other words, no matter how improper the treatment of defendant between April 19th and 21st, a confession did not result therefrom. It was not until May 3, 1936, twelve days later, that the confession sought to be introduced was obtained. In this respect, the evidence shows that the defendant was removed from the private house where he had been held and booked at the county jail on April 21st. One of his counsel took the stand and testified that he saw the defendant in the county jail on April 25th, at which time he instructed the defendant not to answer any questions in his absence. On cross-examination, said counsel admitted that he saw the defendant

'when he was arraigned' on April 21, 1936. It is apparent, therefore, that the defendant was not held incommunicado when the confession was forthcoming. He had enjoyed the benefit and association of counsel and had been before the grand jury and the court. It is also of the utmost importance that the defendant did not confess until after Hope, his accomplice, had been arrested on May 1st and had told the story to the officers in charge of the investigation. The defendant's confession followed within two days thereafter. Defendant testified further on voir dire, however, that he still suffered from the pain and memory of the prior beatings assertedly administered to him; that he was afraid to follow the advice of his counsel and continue to refuse to answer questions or to deny the statements of the officers as to the manner of the commission of the homicide; that the officers accused him of lying and threatened to take him back to the house and 'beat your God damned head off'; that he could not take another beating and therefore offered to 'gladly admit it [Hope's story] and save myself other punishment'. On cross-examination, he admitted that he did not confess following the alleged beatings administered to him by the officers during his confinement in the private house from April 19th to 21st and he also admitted that no threats, promises or beatings preceded his statement and confession in the district attorney's office on May 2d and 3d.

"Chronologically, the circumstances leading up to the confession were narrated by certain of the officers, as follows: Williard L. Killion, a deputy sheriff, testified that on the morning of May 2nd, he took the defendant from his cell in the county jail to the chaplain's room; that many persons were there; that no one made any promises or exerted any coercive influence to induce the defendant to talk; that an unsuccessful effort was made to locate defendant's counsel, as requested by him; that all statements thereafter made by the defendant were free and voluntary and without objection on his part that his counsel was not there; and that Hope was brought into the room.

"Edward F. Lynch, who reported the proceedings at this meeting, testified that deputy district attorney Williams related Hope's story to the defendant and asked the defendant if he had anything to add thereto and the defendant replied 'Nothing'.

This session ended at 11:50 a. m. on May 2, 1936, whereupon the defendant was returned to his cell. Later in the day and pursuant to court order, he was taken to the scene of the homicide by a deputy sheriff. Still later, he was returned to the office of the district attorney where he answered questions in the presence of several persons. Robert P. Stewart, the chief deputy district attorney, testified that the district attorney principally examined the defendant during the afternoon of May 2d; that Hope was brought in during the session; that no promises or other improper influences were exerted over the defendant; and that defendant was rational and coherent at all times. Along about midnight the defendant was taken out to a restaurant by Killion, the deputy sheriff, and two others. While in the restaurant, the defendant, according to Killion's testimony, voluntarily unburdened himself as to the commission of the crime. In this narrative the defendant told of plotting with Hope to kill the deceased and to collect and share her insurance money. However, throughout his statement of the circumstances surrounding the commission of the crime, the defendant charged that Hope was the principal actor in the consummation of the crime. It was Hope, he said, who placed the deceased's foot in the box for the snake to bite and who later drowned deceased in the bathtub and placed her body in the fish pond. The defendant during this statement also admitted that he had had the deceased write a letter to her sister complaining of a sore foot and leg, which letter was found, unmailed, in the deceased's home on the evening of her death by the Pembertons and the defendant immediately after they had discovered her lifeless body. This letter was offered in evidence by the prosecution and there is evidence, conceded in the defendant's brief, that it was not in the deceased's normal handwriting. The inference was available to the jury that the defendant had compelled its writing, a fact later admitted by him in his confession, to furnish, if possible, an alibi.

"At the conclusion of this restaurant statement, the defendant was returned to the office of the district attorney where, between the hours of 1:30 and 3:30 a. m. May 3, 1936, according to the testimony of several there present, the defendant freely and voluntarily detailed the circumstances of the crime in a confession

which the prosecution thereupon offered and had admitted in evidence.

"It cannot be said, under all of the evidence, that the court below erred in admitting the defendant's reply to the accusatory statement and his confession as free and voluntary acts on his part. It is declared in *People v. Lebew*, 209 Cal. 336, 341, 287 P. 337, 339, that 'Whether a confession is free and voluntary is a preliminary question addressed to the trial court and a considerable measure of discretion must be allowed that court in determining it. * * * In *People v. Siemsen*, supra [153 Cal. 387, 95 P. 863], it is declared that the "admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed in the first instance to the (trial) judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forbore to mark with absolute precision the limits of admission and exclusion." The mere fact that the confession was made to a police or other officer of the law while the accused was under arrest does not necessarily render the confession involuntary and inadmissible. So, also, the mere fact that a confession is made in answer to questions will not authorize its rejection, though the fact of its having been so obtained may be an important element in determining whether the answers were voluntary. * * A reviewing court cannot say that the trial court committed error in admitting a confession of guilt, unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, and, where the evidence is conflicting on the subject, it must be assumed that the testimony concerning a defendant's admissions was properly admitted.'

"In the present case the testimony is overwhelming to the effect that during May 2d and May 3d, when the statement and confession were made, no promises, immunities, threats or forms of violence were employed to overcome the free will of the defendant. This is corroborated by defendant's own testimony. That he was questioned for many hours is not,

of itself, improper, particularly when, as testified, he freely responded thereto. Some recognition must be given to the practical problems presented in the work of crime detection. A reasonable conclusion, and one which the trial court and jury might have readily reached on all the evidence, is that the defendant broke down and confessed his participation in the crime only after his confederate and accomplice had been arrested and detailed the murder conspiracy and had been brought face to face with the defendant who had been informed of the details of his confederate's story. Each case must turn on its own facts and we therefore give but passing mention to the authorities relied on by the defendant.

[4,5] "Turning our attention now to the substance of the confession, and eliminating many unnecessary details, we find defendant relating that early in July, while the deceased was away for a few days at a convention, he and Hope planned to kill her and to share equally in the proceeds of her insurance policies; that Hope first suggested a false hold-up in which deceased would be shot, but they later agreed on Hope's second suggestion of permitting a rattlesnake to bite her in the hope that the infection would prove fatal; that he gave Hope \$20 and the latter had 'certain kinds of boxes made' and brought snakes up to defendant's home in them; that Hope brought three the first time and two the second, all of which proved unsatisfactory upon experimentation with chickens, rabbits, etc.; that two days before the deceased's death he gave Hope \$6 to purchase two 'hot' snakes Hope had reported seeing; that these snakes were procured and kept in boxes in his garage over Saturday night (Aug. 3, 1935); that the conspirators did some drinking with deceased that night and discussed an abortion which it was claimed she desired and believed that Hope, as an asserted medical student, was to perform the following day; that Hope left and returned the next morning about 11; that he gave Hope all the money he had, about \$100, and left about 1 p. m. because deceased 'had been too good to me and I just couldn't have anything to do with that part of it'; that Hope said deceased would die in about one hour; that he (defendant) returned about 4 p. m. and found Hope intoxicated and that Hope had deceased 'full of liquor'; that Hope told him he had put her foot

in the box containing a snake; that Hope left and returned at 6 a. m., Monday, August 5, 1935; that he suggested calling it off but Hope said they had gone too far to stop; that at Hope's suggestion he left for his barber shop with the understanding the Hope would 'care' for the deceased, who was still alive, by burning the 'house up'; that Hope came to the shop about 1 p. m. and reported that he had not burned the house but had thrown deceased 'in the bath tub and drowned her' and then placed her body in the fish pond; that he upbraided Hope for 'the worst thing you could have done' because he [defendant] 'had a wife down in a bath tub in Colorado Springs a little while ago'; that he told Hope 'there ain't enough men in the District Attorney's office to make me talk', adding 'and there wasn't if he [Hope] had not told * * * it'; that he then arranged to have the Pembertons, who were innocent of the situation and whose testimony is related above, go home with him; that when he left for his shop on Monday morning he did so with the idea that deceased 'was to be murdered by Hope' and they were to share equally in the proceeds of her insurance; that the snakes were purchased for that purpose and deceased, as a ruse, was informed a desired abortion was to be performed; that after deceased's burial and while intoxicated, he may have offered the Reed woman a \$1,000 to say she saw deceased alive in her yard on the day of her death; that the letter above referred to was written by deceased while intoxicated and under his direction; and that his statements were 'the true stuff' and made freely and voluntarily. During this session, Hope was brought in to the room and confronted the defendant.

"With the foregoing evidence before it the jury had ample support for its verdict. In his confession the defendant admitted his participation in the death of deceased, though he again undertook to point to his accomplice as the principal actor. Under settled principles, this would not, however, serve to relieve him from full responsibility for the homicide which he and his accomplice planned and perpetrated.

[6,7] "In addition to the evidence above narrated, and as tending to prove that the death of deceased was not the result of accident, as it at first appeared, but was deliberately planned and executed in order to collect insurance money payable on

the death of the victim, the prosecution offered evidence tending to show that a former wife of the defendant, equally heavily insured in favor of the defendant, while recovering from serious injuries incurred in an automobile accident in 1932, which the defendant survived with but little inconvenience, was likewise found drowned in the bathtub of their home with resulting monetary benefit to the defendant. In making the offer of proof in the absence of the jury, the district attorney stated that he would adduce evidence tending to show that the defendant struck his former wife on the head with a blunt instrument and then ran the automobile in which they were riding off the Pike's Peak Highway and the victim not having died from the injuries so incurred was later, and while recuperating, drowned in the bathtub. This evidence, hereinafter briefly narrated, in our opinion, was sufficient, *prima facie*, to indicate that defendant had been a party to the death of a former wife under somewhat similar circumstances and it was apparently offered and admitted as tending to show common plan or scheme in the execution of two homicides and an absence of accident in the deceased's untimely demise. Defendant unsuccessfully objected to the admission of this evidence on the ground that it would fail to establish any of the elements of the offense for which he was on trial and would serve only to prejudice him before the jury.

"In support of its offer of proof the prosecution produced several witnesses. The first, J. D. Rogers, superintendent of the Pike's Peak Highway, testified that he first saw the defendant about 7:00 p. m., September 21, 1932, at Glenn Cove, Colorado, where the defendant reported that he had been in an automobile accident; that defendant's clothes were 'neat' and not soiled or disarranged; that he drove the defendant back to the scene of the accident, the defendant stating that he 'really don't know how it happened' as his (former) wife had been driving coming down the mountain while he was looking across the valley with field glasses; that defendant said the car suddenly left the road and that he (defendant) jumped from the car after it had travelled about fifty feet down the mountainside; that the car came to rest against a large boulder one hundred and fifty feet below the road; that he (the witness) found the deceased lying on the right hand side of the car (though she was supposed to be driving on the left side) with her

head down hill and her feet on the running board of the car; that her clothes were free of dirt; that the car rested on its wheels; that there was considerable blood inside the car, especially on the back of the cushion on the right side and on the floor boards; that a hammer on the floor of the car was covered with blood; that he smelled liquor from the deceased and felt a softness behind her ear when he lifted her; that there were foot prints back about eighty feet where the car left the road and on either side of the tire marks, some pointing to where the car went off the road; that the defendant's car was the last one to come down the mountain that particular evening, all others having checked out ahead; and that the defendant appeared quite calm.

"Miss Grace Yarnell, a cousin of this former wife of the defendant, testified that she had visited the injured woman while she was recuperating in the hospital, which covered the period from September 21 to October 8, 1932; that she saw the injuries over her cousin's right eye and back of her ear; that after October 8th she saw the injured person in a cottage in Manitou Springs, Colorado, where defendant had moved her prior to complete recovery; and that defendant had told her he was thrown free of the car and had lifted his (former) wife from the car and placed her on the ground with blankets about her.

"Gerald Rogers testified that he worked in the local grocery store in Manitou Springs; that defendant came to the store about 5 p. m. on October 14, 1932, ordered some groceries and asked that they be delivered; that defendant then said that he would ride home with the witness; that he (the witness) went into the kitchen and the defendant went into the bedroom and then to the bathroom; that defendant then called him and he saw defendant's wife lying on her back in a half-filled tub of lukewarm water. On cross-examination, it appeared that the defendant had ridden home with him on prior occasions.

"Dr. George B. Gilmore testified that he was coroner in 1932; that he saw defendant's (former) wife on October 14, 1932; that she was then on a bed and dead; that defendant said he had been away from home for several hours at the time of her death; that the defendant related that the doctors in the hospital had theretofore warned deceased against washing her hair because of her head injuries but that she

apparently had undertaken it in his absence and drowned as a result; and that he (the witness) suggested an autopsy but defendant opposed it, saying he 'couldn't permit anything of that sort.' The doctor then identified certain letters subsequently addressed to him by the defendant requesting a change in the death certificate in order to show that the drowning was attributable to the injuries received in the earlier automobile accident (apparently to facilitate collection under the accidental and double indemnity provisions of the insurance policies.)

"Mrs. Irene F. Snyder, bookkeeper at the hospital, testified that defendant's former wife was there confined from September 21 to October 8, 1932, and that the defendant had stated at the time that he was without funds to pay the bill but intended negotiating a loan on an insurance policy. There is other evidence that defendant was financially embarrassed and had borrowed money about this time.

"The prosecution produced Doctor Decker, concededly qualified to express medical opinions, and who examined and interpreted certain x-ray photographs theretofore taken in the Colorado hospital, who testified that, in his opinion, the defendant's former wife suffered fractures of the skull from two blows, one on the side and the other on the front of the head; that the fractures had been caused by a hard, moving object being projected against the head and not by the head being projected against a hard, stationary object; and that the blow on the side of the head had been received first. That this evidence tends to support the prosecution's theory of a felonious assault on defendant's former wife must be admitted and defendant concedes in his brief that it was for the jury to weigh this evidence as against his conflicting medical testimony touching the same subject.

"John A. McKelvey testified that when defendant purchased a car from him in 1932, he stated that his previous car had been wrecked when the steering knuckle broke and the car went off the Pike's Peak road as he was driving.

"C. A. Pries, who was with the Prudential Life Insurance Company in 1932, testified that the defendant at that time told him he had an insurance prospect for him; that he later met Miss Winona Wallace (who subsequently became defendant's wife and, as shown, was found drowned in the

bathtub of their Colorado home) at defendant's apartment; that defendant said he wanted a \$5,000 policy on himself and a similar policy on the lady; that the defendant asked if he could be named beneficiary in the latter policy and was informed that this was not possible until the parties were married; that the two policies were later delivered, the defendant being named beneficiary in the lady's policy; that upon the death of the lady (who, as stated, had prior to death married defendant) the defendant asked for double indemnity payment under the policy; and that the defendant only carried his own policy for three months. The witness thereupon identified a check sent later to the defendant in payment of his claim under the policy.

"Bayard Judd, who was with the Kansas City Life Insurance Company, testified that just prior to the death of Winona Wallace James (defendant's former wife), she and defendant had sought an immediate loan on that company's policy covering her life.

"We find no error in the trial court's admission of this evidence touching the Colorado incident involving the death of a prior wife of the defendant under circumstances similar in many respects to the circumstances surrounding the death of the deceased for which he was on trial. In each instance the defendant had placed his asserted victim in touch with insurance agents with a view to and ultimate procurement of life insurance on her. In each instance defendant inquired whether he might be named beneficiary when the parties were not married. In each instance he received a negative reply and thereafter married the asserted victim. In each instance a policy or policies were issued naming him as beneficiary. In each instance the insured was shortly thereafter found drowned in or near the home she occupied with the defendant under circumstances having an appearance of accident but upon full and close inspection tending strongly to indicate foul play. In each instance the defendant claimed under the accidental double indemnity provisions of the policy or policies and, in each instance, ultimately profited financially by the collection of his wife's insurance.

"In view of these many similar and unusual circumstances, we are of the view that the evidence of the Colorado incident

was admissible not to prejudice the defendant by proof of the prior commission of another crime but as tending to establish that the death of the deceased in the present action was not accidental, as it might at first appear, and as claimed by the defendant, but was the result of a general plan or scheme on the defendant's part to insure, marry and murder his victims in order that he might thereby profit financially. In its instructions to the jury, several of which were requested by the defendant, the court below properly limited the purpose for which it might consider this evidence. That evidence of prior similar acts and crimes is admissible for the purposes already mentioned, is now well established. *People v. Stutsman*, 66 Cal.App. 134, 225 P. 477; *People v. Barnes*, 111 Cal.App. 605, 295 P. 1045; *People v. Morani*, 196 Cal. 154, 160, 236 P. 135; *Holt v. U. S.*, 6 Cir., 42 F.2d 103, 106, 107; *People v. Gosden*, 6 Cal.2d 14, 24, 56 P.2d 211. See, also, the English 'bath-tub' murder case, *R. v. George Joseph Smith*, 21 Crim.App.Rep. 229, 236.

"The *Morani* case, *supra*, contains the following [196 Cal. 154, 236 P. 138]: "'In the case of *People v. Seaman*, 107 Mich. 348 (65 N.W. 203, 61 Am.St.Rep. 326), it is said: 'Upon principle and authority it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain.'"

"It is stated in the *Holt* case, *supra* [42 F.2d 106], that 'No good purpose would be served by a review of the myriad of cases where evidence of other and collateral transactions has been admitted to prove the *quo animo*, scienter, motive, or intent of the defendant in the doing of a particular act; nor in restating the circumstances under which such evidence may strongly tend to support the charge made. Many of the authorities would be inapplicable to the present case, for there the evidence was introduced to show knowledge, while here its purpose is to

negative the claim of accident and the alleged innocent motive, injected into the case by the defendant himself. It is sufficient to say that from the earliest times the propriety of admitting evidence for the purpose here stated has been fully recognized. * * *

"When introduced to show intent, or repel the possibility of accident or mistake, the time of occurrence of the collateral circumstance is immaterial. Such duplication of the same situation is just as abnormal after the time laid in the indictment as before. Accordingly it is held that evidence of the collateral circumstance after as well as before the alleged commission of the crime may be admitted. * * * The courts generally use the phrase "at or about the same time," but it is clear, we think, that the length of the separating interval, and the fact that evidence of but one other similar instance was here proved, go only to the weight of the evidence, not to its admissibility. * * * In each case the question is, and of necessity must be, whether the evidence tendered has probative effect, logically and under the doctrine of chances. If it has, and we think such is the case here, it should not be excluded simply because it also shows the commission of another crime. This last fact is immaterial."

"In the *Gosden* case, *supra* [6 Cal.2d 14, 56 P.2d 215], the evidence tended to show that approximately six years prior to the death of his wife for which defendant was then on trial, a former wife of the defendant came to an untimely death under somewhat similar circumstances. We there declared that 'Turning now to the questions of law raised by appellant, the first contention made is that the trial court erred in admitting evidence of the death of appellant's former wife, Vivian Taylor Gosden. It is not necessary to repeat the evidence to show the similarity of the circumstances surrounding the deaths of appellant's two wives. This evidence tended to show that each died of strychnine poisoning, each was insured with the appellant as the beneficiary, and in each case the appellant attempted immediately upon the death of the wife to collect the insurance upon her life. The evidence as to the death of the first wife and the fact that her life was insured with the appellant as beneficiary was properly admitted to show the motive of appellant in the murder of his second wife. *People*

v. Northcott, 209 Cal. 639, 652, 289 P. 634, 70 A.L.R. 806.'

[8] "Nor do we think that in the present case the prosecution was required, as urged by defendant, to prove the elements of the asserted Colorado crime beyond all reasonable doubt, as would be the case were the defendant standing trial for such asserted earlier offense. In this connection it is declared in *Lund v. State*, 207 Ind. 347, 190 N.E. 850, 853, that 'It is only the ultimate material facts to which the rule of reasonable doubt applies. The facts regarding the other transactions were simply evidentiary facts introduced for the purpose of being considered, together with all of the other evidence in the case, upon the question of criminal knowledge and intent; and though the jury may have entertained some reasonable doubt as to some of the other transactions, or some of the other items of evidence, which tend to prove guilty knowledge or intent, if, notwithstanding that fact, and having considered the evidentiary facts, doubtful and otherwise, they were convinced beyond a reasonable doubt of the ultimate fact of guilty knowledge and intent, it is sufficient.'

"In 1914, Ohio adopted a contrary rule when in the case of *Baxter v. State*, 91 Ohio St. 167, 110 N.E. 456, 458, to which the defendant refers us, it was declared that 'Evidence that an accused was guilty of other similar offenses must be such that a jury would be authorized to find him guilty of these offenses.' However, defendant has failed to note that in the later case of *Scott v. State*, 107 Ohio St. 475, 141 N.E. 19, 26, the Ohio court renounced the rule of the *Baxter* case, declaring: 'Is the rule in the *Baxter* Case based upon sound reason? It has long been the general rule that a conviction is warranted if on the whole evidence the jury is satisfied beyond a reasonable doubt that every material element charged in the crime exists, and that the defendant is guilty of the crime charged. In other words, it is the holding that the state need not establish each particular fact of the case beyond a reasonable doubt, if it establishes beyond a reasonable doubt the existence of every material fact alleged in the indictment and the guilt of the defendant. * * * If testimony with regard to other similar crimes is to be dealt with as other evidence, it falls under this general rule and need not be discarded simply because particular items tending to

prove other similar offenses are not established beyond a reasonable doubt, so long as the jury, from the whole testimony, are convinced to a moral certainty of the guilt of the defendant of the crime charged and of the existence of every material element necessary to establish that guilt.

"That this common sense view of the situation obtains in certain other American jurisdictions is shown by the fact that while the case of *Baxter v. State*, supra, is the leading case which lays down the doctrine here discussed, it is by no means universally followed in its exact terms. While the *Baxter* Case is frequently cited, the degree of proof required in this class of testimony is held on excellent authority to be positive or substantial, but not "beyond a reasonable doubt."

"In effect, we recently held in *People v. Thorne*, 10 Cal.2d 705, 708, 76 P.2d 491 [493], that evidence which merely tends to show an attempt to commit or the commission of other offenses is admissible to prove common scheme or plan even though it falls short of proving the corpus delicti of such other offenses. In so concluding, we quoted from *People v. Whiteside*, 58 Cal.App. 33, 38-41, 208 P. 132, to the effect that 'If viewed with respect to its relevancy as tending to show that the facts constituting the charge contained in the information were a part of a scheme to defraud the public as distinguished from a single individual, it was not necessary, in order that *Stivers'* testimony be admissible, that an attempt be shown to have been made to sell him any stock or that the evidence, if accepted as true, should tend to show the commission of an offense like in character to the one charged. * * *

"We also there quoted from *People v. Sindici*, 54 Cal.App. 193, 196, 201 P. 975, to the effect that 'Where the very doing of the act charged is in issue [as here] and is to be evidenced, one of the essential facts admissible is the person's plan or design to do the act. This plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts * * * so connected as to indicate a common purpose including in its scope the act charged. * * *

"In *People v. Baker*, 25 Cal.App.2d 1, 76 P.2d 111, 112, it is declared in part that 'It is not essential that such similar transactions shall have resulted in the commission of a crime. It is sufficient if they tend to

prove a scheme of the defendant which included the acts charged.'

"In view of what has been said we are of the opinion that upon its offer of proof of the prior and in many respects similar Colorado incident, the prosecution made a substantial showing tending to prove that on that occasion (as well as on the one here under review) the defendant had financially benefited by the untimely drowning at home of his wife on whom, as here, he had previously procured insurance in which, as here, he was named beneficiary. Upon this substantial offer, later supported by the proof above narrated, the court below correctly admitted the evidence touching the prior incident in order that the jury in its weighing of the entire evidence might determine whether it tended to show a common plan or scheme on the defendant's part or tended to overcome the asserted element of accident involved in the death of the subsequent wife, for which death he was then on trial.

[9] "But even if we assume, as defendant would have us do, that the authorities require the asserted prior Colorado homicide to be proved beyond all reasonable doubt, no prejudice could have resulted to the defendant from the admission of the evidence for the court below, concluding the rule to be as is now being assumed, instructed the jury that it must believe beyond all reasonable doubt that defendant's former wife was murdered before it could consider the facts of that transaction in connection with the case at bar. It is to be assumed that the jury abided by the instructions given by the court.

[10] "In an effort to show that the deceased was alive on Monday morning, August 5th, when according to Hope's story she was dead, defendant produced a neighbor who testified that when he was in his yard at 9:25 a. m. on said morning he saw a mature, blonde woman, approximately five feet eight inches tall, wearing a rust colored smock, in the defendant's yard; that he had seen a woman in the yard on previous occasions but could not say it was the same one; and that he had never met the deceased nor had she been pointed out to him. Even if it be conceded that the person so described by the witness bore a resemblance to the deceased, the matter was one for the jury to resolve along with all other conflicts in the evidence.

"The defendant's sister testified that she visited with him and the deceased early in July, 1935, and saw Hope there on several

occasions; that she heard the deceased state she desired an abortion, whereupon the defendant said Hope would 'take care of her'. The witness also testified that during 1933-34 the defendant had loaned her several hundred dollars. This evidence was apparently offered for the purpose of overcoming the prosecution's showing that defendant was financially embarrassed and in need of the deceased's insurance moneys.

"Defendant also called one of the barbers in his shop who testified he saw the defendant on August 5, 1935 (after the killing but prior to the finding of deceased's body), and that he appeared normal, was not intoxicated and did not exude an odor of liquor. This testimony obviously was intended to rebut portions of Hope's testimony, particularly that part to the effect that during and immediately following the commission of the homicide he and the defendant had imbibed rather freely of liquor.

"The defendant also produced a naturalist who expressed his views as to the habits of snakes, their average life when held in captivity and the effect of snake bite upon human beings.

[11] "The defendant took the stand in his own defense and denied Hope's story that they had planned to murder, and had murdered, the deceased, by means of rattlesnake infection, drowning, or otherwise. He did testify, however, that Hope came to his home on July 3, 1935, in an intoxicated condition and expressed a desire to stay; that he told Hope to return sober the following day; that Hope, at the time, had with him a box of rattlesnake venom (which tends to corroborate portions of the prosecution's testimony to the effect that Hope was at the defendant's home and possessed reptile venom); that on July 6th, Hope came to his barber shop and again asked leave to stay at defendant's home; that he gave Hope the key and he came that night and stayed several days; that he introduced Hope to the deceased, his sister and his niece as 'Dr. Smith'; that at one of the breakfasts the parties discussed the pregnancy of the deceased and deceased during the course of the conversation stated that she could not go through with the ordeal of child-birth and that 'Dr. Hope will take care of me' (though earlier defendant had testified he introduced Hope as 'Dr Smith'); that he saw Hope again on August 3d (which corroborates Hope's story of being with defendant two days prior to the homicide) but

that Hope did not deliver any rattlesnakes to him; that Hope came to his home on August 4th (the day prior to the homicide) to abort the deceased (again corroborating Hope as to being at defendant's home at that time); that he did not approve of an abortion and left home while Hope 'cared' for deceased; that Hope left about 1 p. m. of that day and he did not see him again between that time and the time of the asserted drowning of deceased the following morning; that while he aided the deceased in taking out insurance on her life he did not do so with any thought of thereafter murdering her and collecting the same; that he did not cause the deceased to write the unmailed letter to her sister, found in the house and referred to above, but in his 'confession' had admitted so doing because one of the officers required it; and that on the day before her death the deceased stated to him that she had cut her foot on a tin can while walking barefooted in the yard (this apparently to explain the laceration on her foot which the prosecution contended was inflicted by the fang of a rattlesnake). On cross-examination the district attorney confronted the defendant with his inconsistent statements made to the police on August 7th, two days after deceased's demise, and several months prior to his arrest therefor, to the effect that she had not mentioned a cut or swollen foot to him. Inconsistencies between his testimony and prior statements to friends as to the movements of deceased and himself on Sunday, the day preceding her death, appear in the evidence. In rebuttal of his testimony that he opposed the abortion which deceased assertedly desired, the prosecution recalled Mrs. Pemberton, the friend who was with her husband and defendant when the body was found, whereupon she testified that a few days before the deceased's death the defendant told her (the witness) that deceased was 'crazy to have a baby, but I don't want one'. We will not undertake to set out additional inconsistencies in statements of the defendant. These were matters for the jury to determine in its consideration and evaluation of the entire evidence. The jury was fully instructed on the law and no complaint is here made of any of the instructions.

"The entire record has been examined and all contentions advanced have been considered. Reference to other items of evidence not here mentioned would neither add to nor detract from the conclusion here

reached. Sufficient has been said to illustrate that the verdict finds ample support in the evidence and that the judgment entered thereon should remain undisturbed."

[12] In the briefs filed before the former opinion was rendered, appellant made no claim that any error had been committed in the giving or refusing of instructions to the jury. Appellant filed his petition for rehearing but made no such claim therein. Such claim was first advanced in a supplemental brief filed by appellant shortly before the oral argument on rehearing. An appellate court is ordinarily justified in ignoring points so tardily raised but, owing to the nature of this case, we have reviewed the entire charge to the jury, giving particular attention to appellant's claim of error with respect thereto.

[13] The challenged instruction was one of several given on the subject of the necessity for corroboration of testimony of an accomplice. Pen.Code, § 1111. This particular instruction was given for the purpose of advising the jury of the character of testimony which might constitute corroboration. Appellant's attack is directed solely at the first sentence of this instruction which reads as follows: "You are instructed in this case that as Charles Hope is an accomplice or co-conspirator of the defendant in the murder alleged in the indictment, it is necessary that his testimony be corroborated." The instruction then continues at some length defining corroboration. It concludes "and so in this case, if you find, beyond a reasonable doubt, that the state has proven that the crime of murder was committed by the defendant, as charged in the indictment, and there is any corroboration of the testimony of the witness, Hope, of any character, falling under the definition of corroboration and the illustrations called to your attention in this instruction, then it will be your duty, under the law, to find the defendant guilty as charged".

When this instruction is read as a whole, and more particularly when it is read with the other instructions given, it is impossible to believe that the jury understood, as contended by appellant, that the court was instructing the jury that defendant had murdered the deceased and that Hope had assisted. In an instruction which was given before the challenged instruction, the court instructed the jury at the request of appellant that "Charles Hope is an accomplice in this case if the crime of murder is com-

mitted and his testimony, uncorroborated by other evidence, which of itself tends to connect the defendant with the commission of the crime, is insufficient to sustain a conviction. Therefore, if you and each of you believe the testimony of Charles Hope to be true, still you cannot convict the defendant unless you find other evidence which shall, without the testimony of Charles Hope, tend to connect the defendant with the murder of Mary James."

In addition to these instructions, the trial court gave several other instructions on the subject of corroboration, which last-mentioned instructions are not challenged. The court further gave the usual instructions to the effect that the defendant was presumed to be innocent until the contrary was proved beyond a reasonable doubt; that the jury was the sole and exclusive judge of the weight of the evidence; and that it was its duty "to determine all questions of fact arising from the evidence". The court further instructed the jury, that it could not convict the defendant "unless you, and each of you, is satisfied beyond all reasonable doubt, that he killed and murdered Mary James".

[14] Appellant has taken but a single sentence from one of the numerous instructions given to the jury and has sought to claim that the giving of said single sentence constituted prejudicial error requiring a reversal. A review of the entire charge to the jury and of the entire cause, including the evidence, convinces us that the error, if any, in the giving of the challenged instruction was not prejudicial. This conclusion finds support in the fact that appellant's counsel, after conducting the trial and reviewing the record for the purpose of presenting the cause on appeal, failed to find anything in the instructions given which he deemed of sufficient importance to call to the attention of the court in his briefs presented prior to the time that the rehearing was granted.

The judgment and order are, and each is, affirmed.

CURTIS, Justice (dissenting).

I dissent for the reasons stated in the dissenting opinion filed in this action at the time of the rendition of the former opinion. This dissent is set out in full in volume 89 2d of the Pacific Reporter at pages 54 to 108 thereof. *People v. Lisenba*.

I concur: HOUSER, J.

PACIFIC INDEMNITY CO. v. HARPER et al.

L. A. 17226.

Supreme Court of California.

Oct. 5, 1939.

Rehearing Denied Nov. 2, 1939.

1. Principal and surety ⇨174

Where contingency, against which surety on bond has contracted, does not arise, and surety sustains no damage and incurs no liability because of principal's act, neglect or default, principal should not be charged with payment of expenses incurred by surety in action brought by third person, in absence of express indemnity contract.

2. Principal and surety ⇨174

The statute providing that, if surety on bond satisfies principal obligation, principal must reimburse what surety has disbursed, including necessary costs and expenses, precludes surety on employee's fidelity bond from recovering from principal amount of attorney's fees, court costs, etc., paid by surety in successfully defending employer's action against surety alone on bond, in absence of agreement by principal to indemnify surety, especially where there was no judicial determination in such action that principal had defaulted. Civ.Code, § 2847.

The word "satisfied," when applied to note or bond, has been defined as meaning that instrument has been paid, while word "disbursed" usually refers to paying out or expending of moneys or currency.

[Ed. Note.—For other definitions of "Disburse; Disbursements" and "Satisfaction; Satisfy," see Words & Phrases.]

3. Appeal and error ⇨103

An attempted appeal from order denying plaintiff's motion to file amended complaint must be dismissed.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by the Pacific Indemnity Company against R. T. Harper, W. A. Moses, and another to recover the amount of plaintiff's expenditures for court costs, attorneys' fees, etc., in connection with its defense of an action against it on a fidelity bond. From a judgment for defendant Moses and an order denying plaintiff's mo-

tion to file an amended complaint, plaintiff appeals.

Judgment affirmed, and appeal from order denying motion to file amended complaint dismissed.

Rehearing denied; HOUSER, J., not participating.

Superseding opinion, 90 P.2d 132.

Charles E. R. Fulcher, of Los Angeles, for appellant.

C. H. Hartke and Freeman R. Brant, both of Los Angeles, for respondent.

PER CURIAM.

This appeal is from a judgment in favor of the defendant Moses, whose demurrer to the complaint was sustained without leave to amend. A purported appeal also has been taken from an order denying plaintiff's motion to file an amended complaint.

From the allegations of the complaint on file herein, it appears that some time prior to the filing of the instant action, at the instance of the defendant Moses and his employer, the West American Finance Company, the plaintiff surety company had issued a fidelity bond in a sum not to exceed ten thousand dollars, under the terms of which the surety company agreed to pay any financial loss which the employer finance company might sustain by reason of any act of larceny, embezzlement, theft, or any other fraudulent or dishonest act committed by the employee, Moses. Thereafter the finance company instituted an action against the surety company only, for damages in the full amount of the bond, by reason of financial losses the finance company alleged it had sustained on account of asserted fraudulent acts of the employee, Moses. The latter was not made a party to that action.

In the instant complaint it is further alleged that the plaintiff herein, the surety company, had prevailed in the former action, both at the trial and on the appeal (*West American Finance Company v. Pacific Indemnity Company*, 17 Cal.App.2d 225, 61 P.2d 963), its demurrer to the complaint having been sustained; but that, in connection with its defense of that action, the surety company alleges it had been necessary for it to expend various sums of money for investigations, court costs, attorneys' fees, the printing of briefs, etc., which expenditures assertedly amounted to the total sum of \$4,015.11. Based upon the contention of the surety that it is en-

titled to recover the latter sum from the principal on the bond, the instant action was brought to impose such liability.

It is not alleged in the complaint herein that the appellant surety company has ever paid the whole or any part of the principal obligation of the bond, nor that respondent Moses had ever entered into an agreement to indemnify the appellant for the expenses sought to be collected in this action, or otherwise. The question presented for determination therefore, is: If a surety is sued alone upon a contract of suretyship in an action brought by a third party, and the surety successfully defends the action so that it is not required to pay the principal sum of the bond, or any portion thereof, but the surety does expend certain moneys for attorney's fees, court costs, etc., is the surety entitled to recover from the principal—who was not a party to the former action—the disbursements so made in defending the action, where the surety has not exacted an agreement of indemnity therefor from the principal?

Both parties to this appeal agree that no appellate court decision of this state has involved the identical question here to be determined. They concede, however, that in a situation where the facts show that a surety has, in whole or in part, satisfied the obligation of the principal, the surety is entitled to be reimbursed by the principal for necessary expenses incurred because of the contract of suretyship. But it is contended by the respondent that where, as here, the surety was not required to satisfy any part of the principal's obligation, and no contract of indemnity was entered into, the surety has no right of reimbursement for the expenses here sought to be collected, either under the provisions of section 2847, Civil Code, or under the common law. On the other hand, the appellant contends that, with regard to the subject of suretyship, statutory enactments have taken away no rights of a surety which existed at common law, and that under the said common law there exists an implied obligation against a principal to reimburse a surety for expenditures such as are involved here. In support of his contention that at common law the only implied obligation of a principal to reimburse his surety arises when, and only when, the surety has satisfied the obligation of the bond, or some part thereof, respondent cites the case entitled *Title Guaranty & Surety Co. v. Burke*, 134 Ark. 499, 204 S.W. 215, 216, which, it appears,

involved a situation somewhat analogous to that here concerned. In that case the principal, Burke Bros., a firm of contractors, and the latter's surety defended on a cross-complaint which sought to establish the default of the principal under a fidelity bond. The principal and the surety were each represented by separate counsel and after judgment had been rendered in favor of both the principal and surety, the latter brought an action against the principal to collect attorneys' fees incurred by the surety in the former action. On appeal, the court upheld an instruction which had been given by the trial court to the effect that no recovery could be had by the surety unless it first showed that the principal had defaulted in the obligations of the bond. In that case it was said:

"* * * counsel for appellant cite and rely upon the case of United States Fidelity & Guaranty Co. v. Hittle, 121 Iowa 352, 96 N.W. 782, where the court said that, in the absence of such bad faith as would operate as a fraud, the surety upon a bond had the right to employ and pay counsel to defend an action against it arising out of the bond upon which it was surety. But in the statement of the facts in that case it appears that the application for the bond contained the recital that the principal would 'indemnify and keep indemnified' the company 'from and against all losses, costs, charges, suits, damages, counsel fees, and expenses of whatever kind or nature which said company shall or may, for any cause, at any time, sustain or incur or be put to for or by reason or in consequence of said company having entered into or executed said bond.' This agreement distinguishes that case from the instant case, and clearly entitled the surety company, acting in good faith, to employ counsel, as it did do. Other cases cited by counsel are likewise distinguishable from the instant case. Here the surety company was not given the right to employ counsel at its discretion. Upon the contrary, Burke Bros. agreed only 'to indemnify the surety company against losses, costs, damages, charges, and expenses resulting from any of their acts, default, or neglect.' It is true Burke Bros. were sued, and judgment for a large sum of money was asked against the surety company on account of the default and neglect of Burke Bros. But it was determined that Burke Bros. had been guilty of no acts, default, or neglect out of which any liability against the surety company arose. The surety com-

pany did not reserve to itself in the written application the right to employ counsel at Burke Bros.' expense, as was done in the Iowa case *supra*, and the condition against which it had contracted did not arise, because it did not sustain or incur any liability on account of the acts, default, or neglect of Burke Bros., and the court properly so instructed the jury, * * *."

Respondent contends that in the present case the facts are even more favorable to a ruling such as was made in the last cited case, than was the factual situation in the Burke case, in that here there was no express indemnity agreement whatever, entered into by respondent. In further support of his contention that at common law there was no implied obligation on the part of a principal to reimburse his surety for such expenses as are here sought to be recovered, the respondent cites the case entitled *Armstrong v. Anderson*, Tex.Civ. App., 91 S.W.2d 775, 780, wherein recovery of attorneys' fees from the principal was sought by the surety on an appeal from a judgment rendered against both the principal and the surety in an action on the bond. In that case it appeared that at the time the bond was given the principal had not entered into an indemnity agreement with the surety, although at a later time he did so. The court there held that the indemnity agreement subsequently executed was invalid, since it was not entered into until after the bond had been executed, and with regard to the contention of the surety that the law would *imply* an agreement on the part of the principal to pay the attorneys' fees, the court said:

"The surety company's position that the law *will imply* an agreement upon the part of a principal to repay to the surety the money it might be compelled to pay as attorney's fees in defending both itself and the principal cannot be sustained. The general rule is that *when a surety is forced to pay the debt of his principal* a promise on the part of the principal to repay him the amount so paid is implied and that the surety becomes a simple contract creditor of the principal. We know of no rule of law which allows a simple contract creditor to recover attorney's fees. That a surety is not entitled to recover attorney's fees in the absence of a contract therefor was held in *Hays v. Housewright*, Tex.Civ. App., 133 S.W. 922." (Italics ours.)

Likewise, the text writers agree that in the absence of an express contract of in-

demnity no cause of action to recover costs such as are here involved arises by implication of law in favor of a surety and against the principal unless the surety has satisfied all or some part of the principal's obligation.

Thus, in *Spencer*, on *The General Law of Suretyship*, 1913 Edition, section 122, pages 161, 162, under the caption, "When the surety's Action for Reimbursement or Indemnity Accrues", the author says: "In the absence of express contract, the surety's right to indemnity matures and is directly enforceable at law only when he has paid or discharged, in whole or in part, the debt or obligation of his principal. * * * the right to indemnity becomes enforceable whenever the surety has paid any part of the debt for which he is liable, * * *", and in section 131, page 172, the author also says: "Generally, as we have seen, the principal is under no implied duty to indemnify the surety or guarantor until the latter has paid the debt or discharged the liability imposed upon him by his undertaking, * * * But the surety may by express agreement contract for more or less than strict indemnity * * *."

Also, in *Stearns*, *The Law of Suretyship*, 4th edition, sections 279, 280, pages 503, 507, it is said: "If the promisor in suretyship pays the debt of the principal in whole or in part, he is entitled to recover the amount paid from the debtor. If the principal makes no express promise to indemnify the one who engages to answer for his debt or default, the law will imply a promise. * * * But a cause of action against the principal does not arise until the promisor makes payment."

Appellant has cited the cases entitled *Ellis v. Norman*, Ky., 44 S.W. 429, 19 Ky. Law Rep. 1798, and *Abeles v. Mitchell*, 13 Phila., Pa., 81, in support of its claim against the respondent herein. It appears that in each of those cases the plaintiff was a surety under a bail bond which was forfeited for nonappearance of the defendant. Thereafter each surety was successful in securing an advantage to itself as the outcome of proceedings to secure a reduction in the amount of liability on the bonds, and in each instance a civil action was brought by the surety to secure reimbursement from the principal for attorneys' fees incurred in the former proceedings. The claim of the sureties was upheld in each of those cases. However, we think

those authorities are distinguishable from the present case in that in those cases, each surety had become liable on the bond due to the default of the principal, whose acts had resulted in a forfeiture of the bond; and the principal thereupon became liable to the surety for the amount the latter would be compelled to pay. The proceedings taken by the sureties to reduce the bail, had the effect of extinguishing the liability altogether, in the one case, and of reducing it substantially, in the other. The result of the action taken by the sureties in each case operated as a distinct benefit to the respective principals.

[1] The theory of law which implies an obligation on the part of a principal to reimburse his surety, if and when the surety pays the obligation of the principal, is based upon equitable considerations. The liability of the latter is made to depend upon the damage suffered by the surety because of the default of the principal, and it is but equitable, in circumstances where the surety has satisfied the principal's obligation, that the latter should reimburse the surety. However, where the surety has not been called upon to answer for the default of the principal, and has not paid any part of the principal obligation, it would seem equally just that no recovery of expenses should be imposed against the principal where the litigation out of which the expenses arose, resulted, in effect, in a determination that there was no default upon the part of the principal. Where the contingency against which the surety has contracted does not arise, and the surety sustains no damage and incurs no liability on account of the acts, neglect or default of the principal, in the absence of an express contract of indemnity, the latter ought not to be charged with the payment of expenses incurred by the surety in an action brought by a third person.

[2] Notwithstanding what has been said hereinbefore with regard to equitable considerations, it appears that the provisions of section 2847, Civil Code, preclude the recovery herein sought. That section reads: "If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he [the surety] has disbursed, including necessary costs and expenses; * * *."

That section presupposes the existence of a legal obligation against the principal,

and the subsequent satisfaction or discharge of some part of such obligation by the surety before necessary "costs and expenses" of the latter may be recovered. The section only provides for a recovery of costs when the surety has disbursed some amount "including necessary costs and expenses". (Italics ours.) However, the appellant argues that the word "satisfies", as used in the section, does not necessarily mean to "pay" the amount of the bond or some part thereof, but that, in the circumstances existing here, the termination of the former action in favor of the surety should be deemed to have been a "satisfaction" of the principal obligation, so far as respondent's liability thereon is concerned. We do not believe the section was intended to have that construction. Furthermore, there was no judicial determination in the instant action, that the principal had defaulted. In 3 Bouv. Law Dict. Rawle's Third Revision, page 3007, the word "satisfied", when applied to a note or bond, is said to mean that the instrument has been "paid". To the same effect is *Windt v. Covert*, 152 Cal. 350, 354, 93 P. 67; *Anderson's Dictionary of Law*, p. 920. Furthermore, section 2847 also refers to that which the surety has "disbursed". The latter word, in its general usage, usually has reference to the paying out or the expending of moneys or currency. *Anderson's Dictionary of Law*, p. 359; 1 Bouv. Law Dictionary, Rawle's Third Revision, p. 878.

It follows from that which has been said hereinabove, that there was no error in the ruling of the trial court.

[3] The judgment is affirmed. The attempted appeal from the order denying the motion to file an amended complaint is dismissed.



14 Cal.2d 360

WESTBERG et ux. v. WILLDE et al.
L. A. 17094.

Supreme Court of California.
Oct. 2, 1939.

1. Negligence ⇨117

Rule, that contributory negligence will not be available to defendant as a defense

unless alleged in the answer, is based on presumption that every person obeys the law.

2. Negligence ⇨135

Rule, that burden of proving contributory negligence by preponderance of evidence is on defendant, is based on presumption that every person obeys the law.

3. Evidence ⇨53

A presumption is "evidence" and is sufficient to support verdict of jury or finding of trial court unless overcome by satisfactory evidence.

[Ed. Note.—For other definitions of "Evidence," see Words & Phrases.]

4. Evidence ⇨89, 589, 594

A fact is proved as against a party when it is established by uncontradicted testimony of party himself or of his witnesses, under circumstances which afford no indication that the testimony is product of mistake or inadvertence, and when the fact so proved is wholly irreconcilable with a presumption sought to be invoked, the presumption is dispelled.

5. Death ⇨104(2)

In action for death of motorist, instructing that the presumption was that every man obeys the law, and the presumption was that motorist was traveling at lawful rate of speed and on proper side of highway, and that such presumption should prevail until overcome by satisfactory evidence, was not error where defendants did not contend that motorist was contributorily negligent as matter of law or that evidence was wholly irreconcilable with presumption.

6. Appeal and error ⇨1064(1)

Negligence ⇨138(4)

Where question of plaintiff's negligence is in issue, and both plaintiff and his witnesses testify to plaintiff's acts and conduct at time of alleged negligence, instructing that, until such presumption is overcome by satisfactory evidence, plaintiff should be presumed to have exercised ordinary care for his own safety, is of doubtful propriety although possibly not prejudicial.

7. Death ⇨104(2)

Where whether the acts and conduct of a deceased person were negligent is in controversy, instructing that deceased is presumed to have exercised ordinary care for his own safety is proper.

8. Trial ⇐234(4)

In action for death of motorist killed in collision with truck driven by alleged employee of defendant, instructions merely expressing doctrine of respondeat superior were not objectionable as formula instructions.

9. Trial ⇐253(4)

In action for death of motorist killed in collision with truck driven by alleged employee of defendant, an instruction purporting specifically to instruct upon question of negligence of employee and motorist, but not attempting to instruct upon question of agency, was not erroneous as ignoring defendant's defense that alleged employee was not acting as defendant's agent at time of collision.

10. Appeal and error ⇐1066

In action for death of motorist, general instructions by which jury was told that it was duty of a driver to keep his automobile under control and to use reasonable care were not prejudicial to defendants on ground that instructions authorized jury to find for plaintiffs regardless of how negligent motorist might have been, when instructions, as phrased, applied to any motorist.

11. Trial ⇐296(1)

The giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict.

12. Trial ⇐243

Where conflicting instructions are given, verdict cannot be sustained.

13. Appeal and error ⇐1064(1)**Trial ⇐243**

In action for death of motorist killed in intersectional automobile collision, instructing in language of Vehicle Code provisions concerning duty of motorists to drive at proper speed and fixing prima facie speed limits, and providing that proof of speed in excess of prima facie limits declared in code should not establish negligence as a matter of law, was prejudicial, since instructions were conflicting. Vehicle Code, §§ 510, 511, 513; St.1935, pp. 176, 177.

14. Appeal and error ⇐1050(1)

In death action, permitting introduction of photograph of deceased taken when deceased was in cap and gown at graduation from university was not reversible error, since photograph would give truer conception of deceased's physical appearance than could be conveyed by testimony.

15. Death ⇐99(5)

\$5,650 was not excessive for death of 25-year-old man who was a second year law student attending university and who showed promise of being able to render pecuniary assistance, if necessary, to parents in future.

16. Automobiles ⇐242(6), 245(30)

In action for death of motorist killed in automobile collision, that codefendant was an employee of defendant and driving an automobile owned by defendant at time of collision gave rise to inference that codefendant was acting in scope of his employment at time of collision, and such inference was not dispelled as matter of law by the evidence.

17. Automobiles ⇐245(31)

In action for death of motorist killed in automobile collision with truck driven by codefendant, who was claimed to have been defendant's employee at time of collision, it was within province of jury to discredit codefendant's testimony that he was on a personal errand at time of collision.

18. Automobiles ⇐245(31)

In action for death of motorist killed in automobile collision, whether codefendant was acting within the "scope of his employment," by defendant at time of collision, was for jury where collision occurred while codefendant, using defendant's truck, was on way to see codefendant's father after having delivered and picked up packages for defendant, notwithstanding that defendant had forbidden codefendant to use truck for purposes other than defendant's business.

[Ed. Note.—For other definitions of "Scope of Employment," see Words & Phrases.]

19. Master and servant ⇐302(1)

A mere deviation by a servant from the strict course of his duty does not relieve master from liability for torts committed by servant in the course of such deviation.

20. Master and servant ⇐302(1)

In order that a master may be relieved from liability for torts of his servant committed while servant is engaged in a deviation from the strict course of his duties, the deviation must be so substantial as to amount to an entire departure from servant's duties for master.

21. Master and servant ⇐302(6)

A servant does not cease to be acting within "scope of employment" merely by

fact that servant's most direct and immediate pursuit of master's business is subject to necessary, usual, or incidental personal acts, nor even by slight and immaterial delays or deflections from most direct route of performing master's business for personal or private purpose when pursuit of master's business continues to be controlling purpose of servant's acts.

22. Master and servant ⇨330(1)

When a servant's acts for his personal benefit do not amount to a turning aside completely from master's business, such as to be inconsistent with its pursuit, the master's assent to the performance of the acts may be assumed.

23. Master and servant ⇨332(2)

Whether a servant, at the particular time in controversy, has made a deviation from his employment so material or substantial as to constitute a complete departure from such employment, is usually question of fact.

24. Master and servant ⇨302(1)

An employee's deviation from the strict course of his duty does not necessarily take him out of "scope of employment" if meanwhile his main purpose is still to carry on the business of his master.

25. Automobiles ⇨242(6)

In action for death of motorist killed in automobile collision, instructing that a presumption arose that codefendant was acting in scope of employment by defendant at time of collision from fact that codefendant was defendant's employee and driving defendant's truck was error, since an inference, rather than a presumption, arises in such case.

In Bank.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Edward Westberg and Anna T. Westberg, husband and wife, against Stanley H. Willde, B. Talsky, and B. Talsky doing business under the fictitious firm name of Reliable Delivery Service, and others, to recover damages for the death of plaintiffs' son. From a judgment for \$5,650 entered upon a verdict for plaintiffs, the named defendants appeal.

Reversed.

Superseding opinion in 85 P.2d 507.

Parker & Stanbury, Harry D. Parker, and Vernon W. Hunt, all of Los Angeles, for appellant Stanley H. Willde.

Richard E. Reese, of Los Angeles, for appellant B. Talsky and B. Talsky doing business under fictitious firm name of Reliable Delivery Service.

Earle M. Daniels and W. Eugene Craven, both of Los Angeles, for respondents.

CURTIS, Justice.

From a judgment for \$5,650 entered upon a jury verdict for plaintiffs for the death of their son, defendants prosecute this appeal. Plaintiffs' son, Morris E. Westberg, twenty-five years of age, received injuries from which he died when a Plymouth coupe which he was driving was struck by a Ford truck driven by defendant Stanley H. Willde and owned by defendant B. Talsky, doing business under the name of Reliable Delivery Service. The collision took place in the intersection of Twenty-third and Trinity streets in the city of Los Angeles at 11:30 a. m. on March 12, 1937. It had been raining and the streets were wet.

The defendant Willde, driving west on Twenty-third street, made a boulevard stop at San Pedro street, one block east of Trinity. He then passed a dump truck on its left side and a Graham Paige touring car on its right side. The decedent was driving north on Trinity street.

The defendant Willde placed the point of impact as just over a manhole in the center of the intersection. There was evidence for plaintiffs that the cars collided in the northeast quarter of the intersection. The truck hit the right side of the coupe toward the rear. The coupe came to rest on the west side of Trinity street north of the intersection, with its front wheels on the sidewalk. Morris Westberg was lying beneath the car. The Ford truck spun around and stopped on the north side of Twenty-third street, west of Trinity, facing east, the opposite direction from that in which it had been proceeding.

The defendant Willde estimated his speed at 25 to 30 miles an hour in the block east of the intersection, and at about 25 miles an hour as he entered the intersection. He claims to have entered the intersection first. When he first saw the Plymouth coupe it was not yet in the intersection, he testified. As he observed the Plymouth he took his foot off the accelerator, put on the brake and swerved to the left.

No one but Willde testified for defendants as to the facts of the accident.

The driver of the dump truck and the driver of the Graham-Paige both testified for plaintiffs as eye-witnesses, as did a third witness, who was standing near the intersection. This last witness estimated the speed of the Plymouth car as 20 miles an hour, the speed of the Ford truck at 50 miles. The other two witnesses fixed the speed of both cars at 25 to 30 miles an hour. There was testimony on behalf of plaintiffs that the Plymouth entered the intersection first.

The defendants do not contend that the evidence will not support a verdict of negligence on the part of defendant Willde and freedom from contributory negligence on the part of the decedent. As grounds for reversal they claim error in instructions.

The instruction on which appellants' principal attack is made reads as follows: "The presumption is that every man obeys the law, and the presumption in this case is that the plaintiffs' son, Morris E. Westberg, was traveling at a lawful rate of speed, and on the proper side of the highway at all times. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence."

[1,2] This instruction is in almost the precise words of the instruction set out in the opinion in the case of *Olsen v. Standard Oil Co.*, 188 Cal. 20, 25, 204 P. 393, 395, which was approved by this court in the following language: "The defendant claims that this is erroneous. We think it is correct. The rule that contributory negligence of the plaintiff must be alleged in the answer, or it will not be available to the defendant as a defense, is based on this presumption. So, also, is the rule that the burden of proving it by a preponderance of the evidence is on the defendant. The Code expressly declares that this presumption is disputable that it 'may be controverted by other evidence,' and that unless so controverted, the jury is bound to find in accordance with it. Code Civ.Proc. §§ 1961, 1963, subs. 1, 33. The instruction is therefore strictly in accordance with the Code on the subject."

In later cases we expressly approved our decision in that case (*Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884; *Smellie v. Southern Pacific Company*, 212 Cal.

540, 299 P. 529; *Mar Shee v. Maryland Assurance Corporation*, 190 Cal. 1, 210 P. 269), and it thus has been followed by the District Court of Appeal in *Ramsey v. Pardini*, 108 Cal.App. 527, 529, 291 P. 884, and *DeLannoy v. Grammatikos*, 126 Cal.App. 79, 14 P.2d 542.

[3] From these decisions, and others of this court which might be cited, the rule is firmly established in this state that a presumption is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence. *People v. Milner*, 122 Cal. 171, 54 P. 833; *Sarraille v. Calmon*, 142 Cal. 651, 76 P. 497; *People v. Siemsen*, 153 Cal. 387, 95 P. 863; *Pabst v. Shearer*, 172 Cal. 239, 156 P. 466; *Thompson v. Davis*, 172 Cal. 491, 157 P. 595; *Gilmour v. North Pasadena Land, etc., Co.*, 178 Cal. 6, 171 P. 1066; *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 P. 393; *Mar Shee v. Maryland Assurance Corporation*, 190 Cal. 1, 210 P. 269; *Pacific Portland Cement Co. v. Reinecke*, 30 Cal.App. 501, 158 P. 1041; *Grantham v. Ordway*, 40 Cal.App. 758, 182 P. 73.

[4] In the case of *Mar Shee v. Maryland Assurance Corporation*, 190 Cal. 1, 210 P. 269, 273, this court had before it the question as to whether the presumption in favor of one of the parties to said action had been "overcome by satisfactory evidence". In that case the rule was announced that "a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

[5] In the instant case the defendants do not contend that as a matter of law decedent must be held to have been guilty of contributory negligence. That is, they do not urge that the evidence is "wholly irreconcilable" with the presumption. It was therefore no error to give the questioned instructions under those circumstances. *Ellison v. Lang Transportation Co.*, 12 Cal. 2d 355, 84 P.2d 510.

The further claim is made that the giving of the said instruction was improper, in view of the fact that the witnesses on behalf of respondents and those of the appellants testified fully as to the acts and

conduct of the deceased at the time of and immediately prior to the collision, and therefore that there was no place for a presumption as to his conduct on that occasion. *Mundy v. Marshall*, 8 Cal.2d 294, 65 P.2d 65, 66, is cited in support of this last mentioned contention. In that case, however, the court held that, "There is only one reasonable conclusion to be drawn from the facts established by the testimony of the plaintiff's own witness". That conclusion was that the deceased in that action had been guilty of contributory negligence. In other words, the court concluded that the deceased's negligence was established by "uncontradicted testimony" of the witnesses of the plaintiff, and the case was therefore brought within the rule of the *Mar Shee* case.

Campbell v. City of Los Angeles, 28 Cal. App.2d 490, 82 P.2d 720, is also cited in support of this last mentioned contention. In that case the statement of facts is quite brief and so far as appears from the opinion the instruction was not qualified as in the instant case. See, *Ellison v. Lang Transportation Co.*, 12 Cal.2d 355, 359, 84 P.2d 510. It cites the recent case of *Engstrom v. Auburn Automobile Sales Corp.*, 11 Cal.2d 64, 77 P.2d 1059, which followed the *Mar Shee* and *Smellie* cases. In so far as the decision in the *Campbell* is inconsistent herewith it is disapproved. There is language in the cases of *Lindley v. Southern Pac. Co.*, 18 Cal.App.2d 550, 556, 64 P.2d 490, and *Varner v. Skov*, 20 Cal. App.2d 232, 67 P.2d 123, cited in the *Campbell* case, which is perhaps only dicta, but which is apparently in conflict with the rule announced in the *Mar Shee* case and the decisions of this court following the last named case and which, in so far as it departs from such rule, is not approved.

The *Campbell* case also cites the case of *Paulsen v. McDuffie*, 4 Cal.2d 111, 47 P.2d 709, 714, in which the acts and conduct of plaintiff were shown not only by his witnesses but by his own testimony, and we raised the question whether a presumption as to his acts and conduct had any place in such case. We did not hold that the giving of the instruction given in that case and which is similar to the one given in the *Campbell* case was prejudicial error, but left the entire question open, as the contributory negligence of the plaintiff in that action, brought under the Jones Act (46 U. S.C.A. § 688), was not a defense to plaintiff's cause of action based upon the defend-

ant's negligence. We therefore held that the giving of said instruction "worked no serious prejudice to the defendant".

[6,7] We think it well to state here that in our opinion there is a substantial difference in the situation before a court where the question of the plaintiff's negligence is in issue, and both plaintiff and his witnesses testified to all his acts and conduct at the time of his alleged negligence, from a situation where the acts and conduct of a decedent are the issues before the court. In the first instance, all possible facts both in favor of and against the alleged negligence of the plaintiff are before the court, and it is difficult for us to perceive how any presumption as to his conduct can add to or detract from this evidence. Surely if this evidence conclusively supports the claim that he was negligent, then, according to our decisions cited above, the presumption as to his conduct has been dispelled. On the other hand, if the plaintiff has testified respecting his acts and conduct, and his testimony and that of his witnesses showed that he used ordinary care for his safety, an instruction to that effect would not be of any assistance to him; but if such evidence did not clearly and unmistakably clear him of the charge of negligence, then an instruction which would place his testimony in a more favorable light than it would be without such instruction would seem to be uncalled for, if not improper. In such a case the giving of any instruction as to the presumption of plaintiff's conduct would seem to be of doubtful propriety. It has, however, been held that the giving of such an instruction under the circumstances just related was not prejudicial. *Tuttle v. Crawford*, 8 Cal.2d 126, 63 P.2d 1128; *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 38, 39, 297 P. 884. But in the other situation, where the acts and conduct of a deceased person are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the *Mar Shee* case, and other cases decided by this court following the *Mar Shee* case, an instruction that the deceased is presumed to have exercised ordinary care of his own concerns is not only proper but this court in an unbroken line of decisions, has sustained the giving of such an instruction. *Ellison v. Lang Transportation Co.*, supra.

In answer to the brief of *amicus curiæ* in which the contention is made that the rule as sanctioned by this court in its decision in the *Mar Shee*, the *Smellie*, and kindred cases, is out of line with the decisions of the United States Supreme Court and particularly with the decision in *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78, 32 L.R.A.,N.S., 226, Ann.Cas.1912A, 463, we need only refer to our decision in the *Smellie* case, 212 Cal. at pages 553 and 554, 299 P. 529, 535, where the *Henderson* case (*Western & A. R. R. v. Henderson*, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884), is discussed with our conclusion that "the laws of this state have never gone to the extent denounced by the Supreme Court in the *Henderson* case", and the point here raised is decided adversely to the *amicus curiæ's* present contention.

Our conclusion therefore is that the giving of the criticized instruction, being instruction No. 17, was proper and that it was not an error on the part of the trial court to so instruct the jury.

[8] It is next contended that instructions No. 14 and No. 18 are formula instructions and that they and each of them omitted the element of proximate cause. These instructions are not unlike an instruction considered by us in the case of *Douglas v. Southern Pacific Company*, 203 Cal. 390, 264 P. 237, in which it was held that the instruction there under review was not a formula instruction, the court stating (203 Cal. page 394, 264 P. page 238), "In our opinion, the instruction constitutes nothing more than an expression of the doctrine of *respondet superior*".

[9] Instruction No. 38 was not erroneous in that it ignored the defense of appellant *Talsky* that appellant *Wilde* was not acting as the former's agent at the time of the collision. It purported specifically to instruct the jury upon the question of negligence both of appellant *Wilde* and of the decedent. No attempt was made in this instruction to instruct the jury upon the question of agency, which latter question was covered by other instructions.

[10] A similar answer may be made with reference to instructions 23, 15, and 22, general instructions by which the jury was told that it is the duty of a driver to keep his automobile always under control and to use reasonable care. Appellants contend that the effect of these instruc-

tions through omitting any reference to the duty of the decedent to exercise ordinary care was to authorize the jury to find for plaintiffs regardless of how negligent the decedent may have been. The instructions as given were not applicable only to *Wilde*, since they applied to the "driver of an automobile". The question of the decedent's contributory negligence was fully covered by other instructions.

However, we are of the view that the court committed prejudicial error in its instructions as to the law regulating the speed of automobiles. The court instructed the jury in the language of section 510, Vehicle Code (St.1935, p. 176), that "no person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property". The court then read to the jury section 511 of the Vehicle Code, verbatim. This section fixes "prima facie" speed limits. It includes the following provision: "The speed of any vehicle upon a highway in excess of any of the limits specified in this section is prima facie unlawful unless the defendant establishes by competent evidence that any said speed in excess of said limits did not constitute a violation of the basic rule declared in section 510 hereof at the time, place and under the conditions then existing."

The court gave the further instruction: "You are instructed that by Section 513 of the Vehicle Code of the State of California, in force at the time of the collision, it is provided: 'In any civil action proof of speed in excess of any prima facie limit declared in section 511 hereof at a particular time and place shall not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence.'"

In *Akers v. Cowan*, 26 Cal.App.2d 694, 80 P.2d 143, and *Anderson v. Mothershead*, 19 Cal.App.2d 97, 64 P.2d 995, it is held that section 513 declares the rule as to burden of proof in civil cases, and that the above quoted paragraph of section 511 is applicable only to criminal actions.

[11] In *Akers v. Cowan*, supra, the district court of appeal reversed the judg-

ment for plaintiff for instructions similar to those given in the instant case. There, as in the instant case, the court read both sections 511 and 513 to the jury. The court held that the effect of reading both provisions to the jury was to give conflicting instructions. The court said [26 Cal. App.2d 694, 80 P.2d 144]:

"In connection with the prima facie speed limits thus given to the jury the above instruction included the second paragraph of Section 511 of the Vehicle Code, which sets forth the rule applicable in criminal actions where a defendant is charged with traveling on a highway at a rate of speed higher than the prima facie limits set forth in that section. In such a case the burden is placed upon the defendant of proving that any speed in excess of these limits did not constitute a violation of the basic rule set forth in section 510. A contrary rule prevails in civil actions, which rule is set forth in section 513 of this code. The question of speed was here material and important and the giving to the jury of this wrong instruction with reference to the burden of proof in connection with that issue was plainly erroneous. *Anderson v. Mothershead*, 19 Cal.App.2d 97, 64 P.2d 995.

* * *

"Since section 513 was also read the jury was given two conflicting instructions relating to the burden of proof in this connection, the first of which, although clearly erroneous, was particularly tied in with and directly related to two of the prima facie limits of speed referred to in the same section of the code. It has been frequently held that the giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict. [Citing cases.]

* * *

"The evidence in this case is not only sharply conflicting, but is so nearly evenly balanced that it would seem from the written record that the matter of upon which side lay this burden of proof may well have been determinative upon the question of appellant's negligence as presented to the jury. The appellant was entitled to have that matter clearly and correctly presented by the instructions. The first instruction on that subject contained mat-

ter which was not only erroneous but which had no place in any civil action and, under the circumstances here appearing, the giving of the same must be held to have been prejudicial."

[12, 13] In *Akers v. Cowan*, supra, the court held that a further instruction tended to confuse, rather than to clarify the matter. But the language quoted above is applicable in the absence of a further instruction. The rule is thoroughly settled that where conflicting instructions are given the verdict of the jury cannot be sustained. Adherence to this rule impels a reversal of the judgment for respondents.

[14] Appellants cite *O'Meara v. Hayden*, 204 Cal. 354, 355, 268 P. 334, 60 A.L.R. 1381, in support of their contention that it was error to introduce a photograph of the deceased in cap and gown taken upon his graduation with the B. A. degree from the University of Southern California, in that the effect was to arouse the sympathies of the jury. In the cited case, we disapproved the admission of the photograph but did not find it grounds for reversal. Mr. Justice Seawell in a concurring opinion declared that the photograph would give a truer conception of the youth's physical appearance than could be conveyed by testimony, and would also reflect something of his mental force, which matters were pertinent in determining damages. In our view, considering the facts of the instant case, it may well be questioned whether the admission of the photograph constituted error. Surely it was not reversible error.

[15] In the present case, the verdict for \$5,650 damages plainly is not excessive. The youth was a second year law student at the University of Southern California, and gave every promise not only of being a comfort and satisfaction to his parents, but also of being able to render them substantial assistance in a pecuniary way should they require such assistance in their future years.

[16] The defendant Talsky further contends that the court erred in refusing to direct a verdict for him on the ground that Willde was not acting in the scope of his employment when the accident took place. The facts that Willde was an employee of Talsky and driving a car owned by him, give rise to an inference that Willde was acting in the scope of his

employment. *Pozzobon v. O'Donnell*, 1 Cal.App.2d 151, 36 P.2d 236; *Kruse v. White Bros.*, 81 Cal.App. 86, 253 P. 178; *Maupin v. Solomon*, 41 Cal.App. 323, 183 P. 198. This inference was not dispelled as a matter of law by the evidence.

[17] Talsky conducted a package delivery service under the name Reliable Delivery Service. Willde left his employer's place of business at 8:30 in the morning in a Ford truck of his employer. After finishing deliveries and also picking up packages, as directed by his employer, he went to his home on East 24th street for lunch. The collision occurred while he was on his way back to his employer's office, with the packages in the truck which he had collected at his employer's direction to be returned to his office. Willde testified that he planned to stop at the California Hospital, where his father was employed, to give him a letter telling of the serious illness of the father's mother. The hospital lies between Willde's home and his employer's office, but several blocks to the west of the most direct route to the office, which is by way of Griffith street. The collision took place before he reached the hospital, at Trinity street, which is the third street west of Griffith. Both defendants testified that Talsky had forbidden Willde to use the truck for purposes other than the employer's business. It may be doubted whether such a slight deviation would be within the spirit of this general prohibition. However this may be, the jury was not bound to accept Willde's testimony as to this personal errand. At the trial he testified that he wished to give his father a letter. Plaintiff Edward Westberg stated at the trial that at the coroner's inquest Willde told him he was going to get money from his father to pay a telephone bill. The jury may have discredited his testimony that he was on a personal errand. *Market Street Ry. Co. v. George*, 116 Cal. App. 572, 3 P.2d 41; See note, 8 A.L.R. 796, 820. His testimony as to the facts of the accident varied from that of plaintiffs' witness. By returning the verdict for plaintiffs, the jury impliedly rejected his version of the accident.

[18-23] Furthermore, giving full credence to Willde's testimony as to his personal errand, it cannot be held as a matter of law that Talsky is not liable. The rule is stated in *Kruse v. White Bros.*, 81 Cal. App. 86, 92, 253 P. 178, 181, as follows:

"A mere deviation from the strict course of his duty does not release the master from liability. In order to have that effect it must be so substantial as to amount to an entire departure. 39 Corp. Jur. p. 1297, Master and Servant, § 1493. As the rule has been stated: 'One does not cease to be acting within the course of the master's employment because his most direct and immediate pursuit of the master's business is subject to necessary, usual or incidental personal acts, nor even by slight and immaterial delays or deflections from the most direct route for a personal or private purpose, the pursuit of the master's business continuing to be the controlling purpose. Such acts, not amounting to a turning aside completely from the master's business so as to be inconsistent with its pursuit, are often only what might be reasonably expected, to which, therefore, the master's assent may be fairly assumed; or they are in many instances the mingling with the pursuit of the master's business some purpose of the servant's own.' *Shearman & Redfield, Negligence*, (6th Ed.) [p. 362], § 147a.

"Whether there has been a deviation so material or substantial as to constitute a complete departure is usually a question of fact. In some cases the deviation may be so marked, and in others so slight relatively, that the court can say that no conclusion other than that the act was or was not a departure could reasonably be supported; while in still others the deviation may be so uncertain in extent and degree in view of the facts and circumstances as to make the question of what inferences should be drawn from the evidence properly one for the jury. * * *

In the above case an employee intending to call on a customer had driven beyond the point where he could have turned to reach the customer's home in order to take a friend to her home. The accident took place before he reached the friend's home. A judgment for plaintiffs against the employer was affirmed.

In *Dennis v. Miller Automobile Co.*, 73 Cal.App. 293, 238 P. 739, 741, it was the duty of the employee to transport packages from his employer's garage to an express company. His usual and direct course was west and north. To accommodate two other employees who were going home to lunch he drove south several blocks and the accident occurred before he reach-

ed their residences. A judgment against the employer was affirmed. The court said: "We think the facts in this case bring it well within the principle applied to departures, incidental departures, and incidental services had or performed in connection with the main duties and obligations being performed by the employee, and did not constitute an abandonment for the time being of the employer's service. There is presented no element of a junketing trip, or pleasure trip; nothing further than going to the express office by a different route."

[24] In the recent case of *Cain v. Marquez*, 31 Cal.App.2d 430, 88 P.2d 200, 205, reviewing numerous authorities, the court declares the rule to be: "A deviation from the strict course of duty does not necessarily take him [the employee] out of the scope of employment if meanwhile his main purpose is still to carry on the business of his master."

The court did not err in the present case in refusing to direct a verdict for Talsky.

[25] Error of the court in instructing the jury that a presumption arose that the employee was acting in the scope of his employment from the fact that he was operating his employer's automobile, can be corrected upon a retrial. An inference, rather than a presumption arises in such event. *Pozzobon v. O'Donnell*, supra; *Maupin v. Solomon*, supra; *Engstrom v. Auburn Automobile Sales Corp.*, 11 Cal. 2d 64, 69, 77 P.2d 1059.

We have heretofore held that the court committed prejudicial error in its instructions as to the law regulating speed.

The judgment is reversed.

We concur: SHENK, J.; HOUSER, J.; YORK, Justice pro tem.

I concur in the judgment: EDMONDS, J.

EDMONDS, Justice (concurring).

I concur in the judgment because I am in accord with the holding of my associates that the instructions relating to the allowable speed of automobiles under stated conditions were prejudicially erroneous. However, I do not agree with their conclusions concerning the instruction relating to the presumption of due care.

PEOPLE v. DOZIER et al.

Cr. 523.

District Court of Appeal, Fourth District, California.

Oct. 3, 1939.

Rehearing Denied Oct. 16, 1939.

Hearing Denied Nov. 1, 1939.

1. Robbery ☞17(2)

Information, charging that accused did "wilfully, unlawfully and feloniously take from the person" of complaining witness certain money without his consent by force and by then and there putting the complaining witness in fear, was sufficient as against contention that it failed to charge felonious intent. Pen.Code, § 211.

2. Robbery ☞17(5)

Information, charging that accused feloniously took from "the person, possession and immediate presence" of complaining witness certain money "and of the personal property of said person" by means of force and putting complaining person in fear, was sufficient as against contention that ownership of property taken was not charged to be in any person other than accused. Pen. Code, § 211.

3. Robbery ☞17(5)

An information, charging that accused feloniously took from person, possession, and immediate presence of complaining witness "the personal property of said person" without his consent and against his will, by force and by putting complaining witness in fear, was sufficient as against contention that element of theft was not charged on ground that information failed to charge that money taken from complaining witness was his personal property or the property of someone other than accused. Pen.Code, § 211, and §§ 951 and 952, as amended.

4. Robbery ☞24(5)

Evidence that accused by force and putting complaining witness in fear took money from complaining witness was sufficient to sustain conviction of robbery. Pen.Code, § 211.

5. Criminal law ☞721(1)

Where accused failed to testify, prosecuting attorney's comments on failure of accused to take stand and either deny or explain evidence against them were within the

intent of the constitutional amendment. Pen.Code, § 1323, as amended by St.1935, p. 1942, § 3; Const. art. 1, § 13, as amended in 1934.

6. Criminal law ⇨728(2)

Prosecuting attorney's argument, in robbery prosecution, that if jury was convinced of guilt of accused it should not turn them loose because it was only a \$6 case or because it took place in a certain locality, did not constitute "misconduct," which could not have been obviated by timely admonition of jury.

[Ed. Note.—For other definitions of "Misconduct," see Words & Phrases.]

7. Criminal law ⇨728(5)

Appellant cannot take advantage of attorney's misconduct upon appeal unless at the time of the occurrence he assigns alleged misconduct as prejudicial error and requests the court to admonish the jury with respect thereto.

8. Criminal law ⇨1037(2)

Where accused did not assign alleged prejudicial remarks of prosecuting attorney as error and ask court to declare a mistrial or to admonish jury to disregard remarks at time they were made and admonition to jury would have removed any prejudice, accused could not complain of alleged prejudicial misconduct of prosecuting attorney.

9. Criminal law ⇨772(3)

Where information charging robbery was sufficient, and trial court read statutory definitions of offense to jury, instructions on the offense "as charged in the information" were not erroneous. Pen.Code, §§ 31, 211, 211a, 212.

10. Criminal law ⇨787(1)

Under constitutional amendment and statute authorizing comment on accused's refusal to testify in criminal prosecution, accused was not entitled to an instruction that failure to testify "should not create a prejudice or unfavorable inference in the minds of the jury, no inference can be drawn against the defendant from his failure to testify." Pen.Code, § 1323, as amended by St.1935, p. 1942, § 3; Const. art. 1, § 13, as amended in 1934.

11. Criminal law ⇨1038(3)

It is the duty of court in criminal cases to give of its own motion instructions on

general principles of law pertinent thereto, but the defendant cannot complain of a failure to instruct upon specific matter unless he has expressly requested such instruction.

12. Criminal law ⇨824(3), 1038(3)

Court is not required to give an instruction as to lesser degrees of offense charged unless expressly requested, and, in absence of such request, defendant cannot complain of the failure to give such instruction.

13. Criminal law ⇨824(3)

Failure of court to instruct on the law applicable to the crime of "attempt to commit robbery" and "to the crime of assault" in robbery prosecution was not error where no request was made for such instruction.

14. Criminal law ⇨438

Admission of a picture representing hotel where accused were rooming, and which accused were seen entering short time after robbery occurred, was not error where no harm was shown.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Clifton Dozier, alias Boots Hale, and Carl Fisher were convicted of second-degree robbery and first-named defendant appeals.

Affirmed.

Clifton Dozier in pro. per.

Earl Warren, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

GRIFFIN, Justice.

Appellant and his codefendant, Carl Fisher, were charged in an information filed by the district attorney of Kern county with the crime of robbery. Defendants were found guilty by a jury of the crime of robbery, which was fixed as robbery in the second degree. Appellant admitted the two prior convictions, and his motions in arrest of judgment and for new trial were denied. Appellant Dozier alone appeals from the judgment of conviction and from the order denying him a new trial.

Charles Jones, the victim of the robbery, a young man from the Arvin District, drove into Bakersfield with an acquaint-

ance on New Year's day of this year, arriving early in the morning, about six o'clock. They went to a restaurant to get some coffee. After that, Jones and a Mr. Ragsdale, who was going to drive Jones back to Arvin, and another man with him, went back to the car which was parked on "L" street somewhere in the vicinity of 20th street. While they were at the car, appellant, a colored man, approached and tried to interest them in the purchase of a watch. His codefendant, Fisher, also colored, followed him and told appellant "not to give the watch away, he could sell it for \$5.00 himself." While Mr. Ragsdale was looking at the watch, a Cherokee Indian boy came along and talked to Jones and asked the latter if he would buy him a drink. Jones and the Indian boy then walked off and went to a near-by drinking establishment where Jones bought them each a drink. Right after Jones walked away, appellant and his codefendant also left. When Jones and the Indian boy had had their drinks, they left the saloon and started back to the car. They walked down the street and then turned into an alley. As they turned into the alley appellant hollered at them and came up to them in the alley with his codefendant and asked if they would give him enough money to eat on. Jones had a \$5 bill and a \$1 bill in a billfold in his left hip pocket and a little change in his front right pocket. Jones said: "Well, let's go around to the restaurant, might rake up enough to eat on, I will feed you." As Jones then stepped forward, appellant stepped around in front of him and said: "You are going to give me that money or am I going to take it?" Jones replied: "Well, if you get any money you will have to take it." With that, appellant hit him on the jaw and grabbed him by the throat and choked him and knocked him down. The Indian boy started toward them when Fisher, who had a knife in his hand, said: "Don't you go up there; I will cut you in two." The Indian boy then ran away and while appellant held Jones and scuffled with him, Fisher came up and took the billfold out of Jones' hip pocket and ran off. Then appellant gave Jones a shove and ran out of the alley. This took place about 9 a. m. on New Year's day. Later, the police found the watch that had been shown to Mr. Ragsdale and Jones that morning in a room at the Palace hotel occupied by Dozier and Fisher, in an envelope addressed to Carl Fisher.

Appellant attacks the judgment and order of the trial court upon seven grounds, namely: 1. That the information upon which appellant was convicted does not charge the public offense of robbery and judgment based thereon is void in toto. 2. That the evidence is insufficient to sustain conviction and judgment. 3. That the district attorney prosecuting the case was guilty of prejudicial misconduct. 4. That the court misdirected the jury in matters of law. 5. That the court erred in refusing to give certain pertinent instructions to the jury as requested by the defendant. 6. That the court erred in failing to give certain instructions to the jury on general principles of law applicable to the facts of the case in evidence. 7. That the court erred in its decision upon the questions of law arising during the course of the trial. For the purposes of convenience we will dispose of these several grounds of attack in the same sequence.

1. The Penal Code, section 211, defines robbery as follows: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

The charging portion of the information reads as follows: that they did "wilfully, unlawfully and feloniously take from the person, possession and immediate presence of one Charles E. Jones, six dollars, lawful money of the United States of America, and of the personal property of said person, which taking was then and there without the consent and against the will of the said person and was then and there accomplished as aforesaid by means of force used upon and against the said person by the said defendant, and by then and there putting the said person in fear; * * *."

Appellant contends that such information is insufficient in that (a) felonious intent is not charged; (b) ownership of property in another than appellant is not charged; (c) taking property of another against his will by means of force or fear is not charged; and (d) theft as an element is not charged. It is appellant's position that the element of "felonious intent" must be present and must be pleaded as such, and that the averment as contained in the information herein to the effect that appellant did "feloniously take from the person of Charles E. Jones" is not equivalent to an averment of "felonious intent" as required. In support of this he cites

People v. Vice, 21 Cal. 344; People v. Jones, 53 Cal. 58; People v. Nelson, 56 Cal. 77; People v. Ammerman, 118 Cal. 23, 50 P. 15; and various authorities from other states.

[1] The customary form of information charging the crime of robbery followed the language of Penal Code section 211, defining the same, in alleging that defendant did "feloniously take" the property in question. Such form of information has, so far as our research discloses, never been questioned nor held insufficient; but on the contrary, such form of information with no other averment of felonious intent has been sustained by the court in such cases as People v. Fallai, 99 Cal.App. 297, 278 P. 449; People v. Covington, 1 Cal.2d 316, 34 P.2d 1019; and People v. Voiler, 2 Cal. App.2d 724, 38 P.2d 833.

[2] Appellant's next contention is that the information is defective in that the ownership of the property taken is not charged to be in any person other than the appellant or defendant. In support of this appellant cites People v. Vice, supra; People v. Nelson, supra; and People v. Rosen, 11 Cal.2d 147, 78 P.2d 727, 116 A.L.R. 991. In People v. Vice, supra, the information which merely charged that the defendant did take certain money from the person of another, naming such person, by force, threat and intimidation and against his will, was held insufficient as containing no allegation of the ownership of the property or that it did not belong to defendant. This particular point was not involved in People v. Nelson, supra. In People v. Rosen, supra, the sufficiency of the information was not questioned nor passed upon by the court.

Appellant maintains that the statement in the information that the defendant took from the person of Charles E. Jones \$6, lawful money, *and of the personal property of the said person*, is not an averment that such money was the personal property of Charles E. Jones, and that the words "said person" might refer to any of the four persons mentioned in the information, to-wit, the district attorney, either of the defendants, or Charles E. Jones. He claims that the words "said person" in the context mentioned, can refer to any person other than the victim Charles E. Jones, especially in view of the statement further on in the same sentence that it was accomplished "by means of force used upon and against the said person by the said defendants". This

is so obviously a strained construction that it does not merit consideration. From the language contained in the information that the defendants took from "Charles E. Jones Six Dollars (\$6.00), lawful money of the United States of America, and of the personal property of the said person" there can hardly be any question but that the same expresses clearly that such money was the personal property of Charles E. Jones. It is likewise contended by appellant that what he claims regarding the lack of any averment in the information charging ownership of the property taken in some person other than appellant applies also to the alleged insufficiency of the information to charge the taking of the property against the victim's will and by means of force or fear. Presumably this contention is likewise based upon the claim that the term "said person" does not refer to Charles E. Jones. What we have already said regarding the reference of the term "said person" to Charles E. Jones, applies with equal force here.

[3] It is finally claimed that the information is fatally defective in that the element of theft is not charged and that the same must exist as the basis of the crime and appear fully and sufficiently charged in the information. This contention seemingly rests upon the claim already made that the information fails to charge that the money taken from Jones was his personal property or was at least the property of someone other than the defendant. The additional authorities cited by appellant, to-wit, People v. Hicks, 66 Cal. 103, 4 P. 1093; People v. Crowley, 100 Cal. 478, 35 P. 84; and People v. Ball, 204 Cal. 241, 267 P. 701, have little bearing and are of no aid to appellant's contention.

It will be noted that practically all of the authorities cited by appellant relative to the sufficiency of the information were decided prior to the amendment to sections 951 and 952 of the Penal Code in 1927 (St.1927, p. 1043). Under such amendment the court, in People v. Hirschler, 98 Cal.App. 499, 277 P. 170, sustained an information, the charging part of which merely alleged that defendant "robbed Alfred E. Couvier of one purse containing \$44.80, more or less, lawful money of the United States, one California Diamond Jubilee 1925 one-half dollar, and one United States 1872 half dime". It was commented on by the court there that, as is the case in the instant action, no de-

murrer was interposed by defendant. This holding was followed in similar cases, such as *People v. Fallai*, supra; *People v. Sampsell*, 104 Cal.App. 431, 286 P. 434; and *People v. Summers*, 107 Cal.App. 250, 252, 290 P. 464. Informations and indictments far less specific and considerably more open to criticism were sustained in *People v. Covington*, supra; *People v. O'Neal*, 2 Cal.App.2d 551, 38 P.2d 430; and *People v. Voiler*, supra.

The attitude of the courts since such amendment in regard to the sufficiency of such informations and indictments is well expressed in *People v. Fallai*, supra, 99 Cal.App. at pages 299 and 300, 278 P. 449. Under the 1927 and subsequent amendments to sections 951 and 952 of the Penal Code, it is sufficient in charging an offense if the statements thereof be made in any words sufficient to give the defendant notice of the offense of which he is accused. Certainly, in the instant case the wording of the information is sufficient to give the appellant ample notice of the offense of which he was accused.

[4] 2. Appellant claims that the evidence is insufficient to sustain the conviction and judgment, basing his contention upon the ground that there is no direct testimony that he took the money, that if he did he was merely accepting the challenge of Jones to take it, that no force or fear was established by the prosecution, and that there is no evidence to show that the money which appellant is accused of taking belonged to Jones or that it did not belong to appellant.

The facts constituting the robbery are clear and uncontradicted. Jones, the complaining witness, testified that when he refused to give appellant his money, the latter stepped around in front of him, hit him on the jaw, grabbed him by the throat and choked him and knocked him down, and the change in his pocket and the billfold with the \$6 in currency in it was taken. On cross-examination, he said that he did not remember whether his money fell out when appellant hit him and got him down or whether appellant "just went in after it". It is quite evident that when appellant had Jones down beating and choking him, the latter could not truthfully say whether the money might have rolled out of his pocket or whether it was taken out. However, there were two eye-witnesses to the robbery. Mr. Prior saw the scuffle

between appellant and Jones, saw Fisher approach the latter and take something from Jones' back pocket. Mr. Johnson saw appellant strike Jones and knock him down and then while appellant held Jones he saw Fisher reach into the latter's pocket and take what looked like a billfold from Jones' rear pocket and run. Then appellant gave Jones a shove and also ran out of the alley. In the face of this clear and uncontradicted testimony, the appellant's contention that there was no evidence that any money was taken from the complaining witness, and, if so, that there was nothing to establish the element of force or fear, loses its character of legitimacy.

[5] 3. Appellant assigns various remarks made by the prosecuting attorney during his argument before the jury as prejudicial misconduct, and contends that the same warrant a reversal of the judgment. The first remark complained of in the course of the argument of the prosecuting attorney is as follows: "You have Mr. Fisher and Mr. Dozier both refusing to take the stand, not taking the stand to deny the commission of this act, not saying 'I am guilty', not giving the ladies and gentlemen of the jury the benefit of hearing their testimony as to where they were and what they were doing, not exposing themselves to cross-examination. Does that appear to you the act of an innocent man on the part of either one of them?"

Since the amendment (in 1934) of article I, section 13, of the state Constitution and section 1323 of the Penal Code, as amended in 1935 (St.1935, p. 1942, § 3), the courts have upheld the right of courts and counsel to comment upon the failure of defendants to take the stand and either deny or explain evidence against them. In the present instance neither of the defendants took the stand and their only defense was an attempted alibi presented by other witnesses. This is what occasioned the foregoing comment by the prosecuting attorney. The comments referred to seem to us to be well within the spirit and intent of the constitutional amendment. *People v. Owens*, 11 Cal.App.2d 724, 728, 54 P.2d 728; *People v. Swenson*, 28 Cal. App.2d 636, 641, 83 P.2d 70; *People v. Zirbes*, 6 Cal.2d 425, 429, 57 P.2d 1319.

[6,7] Appellant next complains of remarks by the prosecuting attorney in his argument to the jury, which, in the main, are to the effect that if the jury is

convinced of the guilt of the defendants that it should not turn them loose because it was only a \$6 case or because it took place in a certain locality; that it was the duty of the jury if convinced of the guilt of the defendants not to turn them loose, for to do so would be to turn loose a person who would prey upon the public and endanger the public regardless of whom his victim was or where he found him. We do not believe that there can be any prejudicial misconduct in the prosecuting attorney admonishing a jury, in the event they believe a defendant guilty beyond a reasonable doubt, of the danger of acquitting him and turning him loose merely because of the persons involved in the crime or the locality in which it occurred or the amount of money involved. With respect to the alleged misconduct of the district attorney, it will be noted that as to the first charge of commenting on failure of the defendants to testify, that no objection was made whatsoever; while as to the second charge just discussed, though appellant did assign the remarks as prejudicial error and asked the court to declare a mistrial, no request was made of the court to admonish the jury to disregard the same. The rule is thoroughly established in this state that even though misconduct did occur, appellant may not take advantage of the same upon an appeal unless at the time of the occurrence he assigns the same as prejudicial error and requests the court to admonish the jury with respect thereto. This principle of law is clearly set forth in *People v. Davidson*, 23 Cal.App.2d 116, 199, 72 P.2d 233. See, also, *People v. Chilcott*, 18 Cal.App.2d 583, 64 P.2d 450.

We do not believe that either of the portions of the district attorney's argument complained of could reasonably be classed as misconduct. Certainly, they were not of that extreme character that the error could not be cured and the harmful result obviated by a timely admonition or instruction to the jury.

[8] We have carefully read the other statements of claimed prejudicial misconduct of the district attorney. If there be any, they are certainly of such a minor nature that an admonition to the jury to disregard the same would have entirely removed any prejudice, and appellant in the complete absence of any request to the court to so admonish the jury, cannot now be heard to complain.

[9] 4. Appellant complains of certain instructions numbered 3, 5, 12, 13, 14 and 15. We have examined these instructions carefully and it would serve no useful purpose to set them out in full here. They bear mainly on the appellant's theory that the information being defective and not constituting a proper allegation of the offense of robbery, the phrase used in the instructions, "as charged in the information" was erroneous, because, as appellant claims, the information did not state a public offense. We have disposed of that claim or contention and need not dwell upon it further. The trial court read the definition of robbery as set forth in section 211 of the Penal Code, and also read sections 211a, 212 and 31 of the Penal Code, which amply and correctly cover the subject matter.

[10] 5, 6. Appellant complains of the failure and refusal of the court to give to the jury two instructions requested by him. The second of these is merely an instruction to the jury to return a verdict of not guilty and requires no reply under the evidence and result in this case. The other instruction requested deals with the failure of the defendant to take the witness stand and testify. As neither of the defendants took the stand and testified, the facts in this case are applicable to the instruction requested. Such an instruction was pertinent, and defendant, under the circumstances here involved, was entitled to the same under the law as it stood prior to 1934. However, the constitutional amendment to article I, section 13, adopted in that year, and the amendments to the Penal Code, section 1323, have materially changed that law. While defendant still may not be compelled in a criminal case to be a witness against himself, his failure to take the stand and to explain or deny by his testimony any evidence or facts in the case against him may now be commented upon by the court and counsel and may be considered by the court or the jury. Obviously, if such failure can so be commented upon and considered, he is not now entitled to an instruction to the jury that such failure "should not create a prejudice or unfavorable inference in the minds of the jury; no inference can be drawn against the defendant from his failure to testify". This instruction is directly contrary to the law as it now stands, and to give the same would in effect completely nullify the changes made

by the amendments. As said by this court in *People v. Dukes*, 16 Cal.App.2d 105, 110, 60 P.2d 197, 199: "The instruction, if given, would, in effect, have told the jury not to consider that which the Constitutional amendment authorized it to take into consideration."

[11-13] Appellant finally complains of the failure of the court to instruct the jury upon certain matters upon which he contends that it was the duty of the court to instruct, regardless of the failure of the defendant to request such instruction. His first contention is that the court failed to instruct the jury that every element necessary to constitute the crime of robbery must be established beyond a reasonable doubt. It appears from the record that the jury was fully and explicitly instructed upon every point here mentioned by appellant. The other two contentions in this regard by appellant are that the jury should have been instructed on the law "applicable to the crime of attempt to commit robbery" and "to the crime of assault". While it is the duty of the court in criminal cases to give of its own motion instructions on the general principles of law pertinent to the same, the defendant cannot complain of failure to instruct upon specific matters unless he has expressly requested such instruction. Among those matters necessitating a specific request for instruction on the part of a defendant is an instruction as to lesser degrees of the offense charged. The court is not required to give such instruction, unless expressly requested, and in the absence of such request, defendant cannot complain of the failure to give the same. *People v. Montezuma*, 117 Cal.App. 125, 3 P.2d 370, 4 P.2d 285; *People v. Welsh*, 7 Cal.2d 209, 211, 60

P.2d 124; *People v. Ramirez*, 21 Cal.App. 2d 466, 468, 69 P.2d 913.

[14] 7. After broadly asserting that all of the decisions and rulings of the court upon all of the questions of law mentioned were objected to, appellant confines himself specifically to the alleged error in admitting into evidence Exhibit No. 2 (a photograph). The picture in question represents the Palace Hotel, the place where the two defendants were rooming, and where the police officer found the watch. Its proximity to the place where the robbery occurred is established, and both of the defendants were seen entering the hotel and going up to their room a short time after the robbery occurred. Assuming that its materiality is questionable, nevertheless, the exhibit certainly is relevant and appellant does not and obviously cannot point out how he was harmed in the slightest by its admission.

It is difficult to find a record containing clearer or more convincing proof of the guilt of a defendant. The attempted alibi quite apparently made no impression upon the jury. A glance at the photograph of the complaining witness taken three days after the offense, shows the severity of the beating he received from the defendant in the perpetration of the robbery.

The record indicates that the appellant had a fair and impartial trial. The evidence is such that the jury was quite justified in returning the verdict of guilty as charged.

The judgment and order of the trial court are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

35 Cal.App.2d 41

ANDREWS v. W. K. CO. et al.
Civ. 2450.

District Court of Appeal, Fourth District,
California.
Oct. 3, 1939.

1. Appeal and error ⇨1078(3)

The reviewing court would assume that specifications of uncertainty, ambiguity, and unintelligibility in a demurrer had been abandoned where they were not argued.

2. Mines and minerals ⇨79(7)

Where landowners under community oil and gas lease had right to receive proportionate share of royalty reserved from all wells drilled on any part of leased premises, and defendant, which succeeded to certain landowners' interests, produced oil and gas from property formerly owned by them but refused to account to other landowners or pay them any part of royalty on its production, the other landowners had a cause of action for an accounting.

3. Quieting title ⇨42

A count in a complaint alleging a cause of action to quiet title to alleged interests in oil royalty, though it was defective in alleging plaintiffs' claims and not that they were the owners of their proportionate shares of landowners' royalty in oil and gas produced from defendant's property, was saved from being entirely defective and was amendable, where plaintiffs' titles and sources of titles were set forth in another cause of action the allegations of which were incorporated in the cause of action to quiet title.

4. Action ⇨6

A cause of action stating controversy that had arisen between plaintiffs and defendant over division of landowners' royalty from oil and gas produced from defendant's land, and alleging that it was an actual bona fide controversy between the parties concerning their existing rights and duties under a community oil and gas lease, was sufficient to invoke equity jurisdiction in an action for declaratory relief. Code Civ. Proc. § 1060.

5. Mines and minerals ⇨79(1)

Under community oil and gas lease providing that, on quitclaim of a portion of

leased land, owners of quitclaimed land should continue to receive their proportion of royalties from land not quitclaimed, lessors intended to retain an interest in all of the royalties from oil and gas produced from any part of leased property, and that interest was a "vested interest" which could not be divested by the act of one party without the consent of the other parties.

[Ed. Note.—For other definitions of "Vested Interest," see Words & Phrases.]

Appeal from Superior Court, Orange County; Hon. James L. Allen, Judge.

Action by Mary Elizabeth Andrews and others against the W. K. Company and others for an accounting, to quiet title to alleged interests in an oil royalty, for declaratory relief, and for the reformation of an oil and gas lease. From a judgment entered after a demurrer of the named defendant to a second amended complaint had been sustained without leave to amend, plaintiffs appeal.

Judgment reversed with directions.

Pease & Dolley, of Los Angeles, for appellants.

C. Douglas Smith, of Santa Maria, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after a demurrer of the W. K. Company to a second amended complaint had been sustained without leave to amend.

[1] The demurrer was both general and special. It is clear from the ruling of the trial judge that it was sustained without leave to amend because, in his opinion, no cause of action was stated against any defendant. The specifications of uncertainty, ambiguity and unintelligibility in the demurrer are not argued. We therefore assume that they have been abandoned.

The plaintiffs are landowners or have interests in lands in the Huntington Beach oil fields in Orange county. Their controversy is with the W. K. Company, a corporation, which we will hereafter refer to as the defendant. The individual defendants and the other corporate defendants are joined either because they refused to join as parties plaintiff or because their presence was deemed necessary to a com-

plete adjudication of the controversy. They have filed no appearances here.

The second amended complaint contains four causes of action. The first is for an accounting. The second is to quiet title to alleged interests in an oil royalty in oil produced from land in Huntington Beach. The third is for declaratory relief. The fourth is for the reformation of an oil and gas lease.

A copy of the oil and gas lease is not attached to the second amended complaint. In each count reference is made to the copy of that document attached to the first amended complaint and by such reference it is attempted to be made a part of the second amended complaint. Attention of counsel is called to 21 California Jurisprudence, page 44, section 24; *People ex rel. Carrillo v. De La Guerra*, 24 Cal. 73; *Ralphs v. Hensler*, 97 Cal. 296, at page 304, 32 P. 243, and *Groom v. Bangs*, 153 Cal. 456, 96 P. 503. The ruling of the trial court was based on a construction of the language of the oil and gas lease and counsel's principal arguments are made on that issue. We therefore find it advisable to construe certain provisions of the oil lease in order to decide the questions argued in the briefs.

The first cause of action alleges the representative characters of certain of the plaintiffs, the existence of certain partnerships, and of the corporations plaintiff and defendant and the reasons why various defendants are joined. It also alleges interests of certain plaintiffs, not the original lessors, in the subject-matter of the action. These allegations are formal and sufficient and need no further mention.

[2] On August 10, 1920, Thomas E. Ashton and Edna P. Ashton, Carl H. Hankey and Adele A. Hankey, Martin McQuiney Schenck and Sadie Alida Schenck, Arthur Prouse and Martha Prouse, G. Wellner and Marie E. Wellner, James J. Conrad and Gussie Conrad, and Claude D. Crowell were the respective owners of described parcels of land in the Huntington Beach oil fields. They entered into a community oil and gas lease with Louis A. Copeland as lessee. The lessors, and successors to certain of their interests, except Arthur Prouse and Martha Prouse, his wife, are still the owners of those parcels of land. The W. K. Company has succeeded to the interests of Arthur and Martha Prouse in their

described parcel of land and in and to their interests in the community oil lease which is still in full force and effect.

Several oil wells have been drilled on the leased land and are now producing oil and gas.

Under the terms of the community oil lease the owner or owners of each parcel of the leased land acquired an interest in, and the right to receive a proportionate share of the one-sixth landowners royalty reserved by the lease to the landowners, from all the wells drilled on any part of the leased premises without regard to the ownership of the particular parcel of land upon which any well might have been drilled. For many years each landowner (or his successor in interest) so shared proportionately in such landowners' royalty from each and all of the producing oil wells except wells operated by defendant.

Since about the month of March, 1936, oil and gas have been produced and are still being produced by defendant from the property formerly owned by lessors Arthur and Martha Prouse whose interests have been succeeded to by defendant. Demand has been made on defendant for an accounting of plaintiffs' shares of the production of oil and gas from the Prouse property but defendant has refused and still does refuse to so account to plaintiffs or to pay them any portion of the royalty on such production.

While many of the allegations of this cause of action could be made much more definite and certain it is rather clear that it states a cause of action for an accounting as it appears that a relationship exists which requires an accounting and that there is something due to plaintiffs from defendant. See *Brea v. McGlashan*, 3 Cal.App.2d 454, 39 P.2d 877.

All of the allegations of the first cause of action are incorporated by reference in the other causes of action.

[3] After incorporating the allegations of the first cause of action in the second, the second count alleges that plaintiffs claim an interest in, and the right to receive, their proportionate share of the landowners' one-sixth royalty of oil and gas produced from defendant's land; that defendant denies these claims and at the same time claims an interest in the landowners' one-sixth royalty in all the other land described in the community lease.

Taken by itself this allegation is defective as it alleges the claims of plaintiffs and not that they are the owners of their proportionate shares of the one-sixth landowners' royalty in the oil and gas produced from defendant's property. However, plaintiffs' titles and sources of titles are set forth in the first cause of action, the allegations of which are incorporated in the second, which saves this portion of the pleading from being entirely defective. While it is badly in need of amendment we cannot say that it does not and could not be made to allege a good and sufficient cause of action to quiet plaintiffs' titles to their claimed interest in the landowners' royalty in the oil and gas produced from defendant's property.

[4] The third cause of action states the controversy that has arisen between plaintiffs and defendant over the division of the landowners' royalty from oil and gas produced from defendant's land; that this is an actual bona fide controversy between the parties as to their existing rights and duties under the community lease. These allegations are sufficient to invoke the equity jurisdiction of the courts in an action for declaratory relief. Sec. 1060, Code Civ.Proc.; *Pacific States Corp. v. Pan American Bank of California*, 210 Cal. 472, 292 P. 494; *Pacific States Corp. v. Pan-American Bank of California*, 213 Cal. 58, 1 P.2d 4, 981; *Tolle v. Struve*, 124 Cal.App. 263, 12 P.2d 61; *California C. P. Growers v. Corcoran*, 14 Cal.App.2d 264, 57 P.2d 1360; *Rolapp v. Federal Bldg., etc., Ass'n*, 11 Cal.App.2d 337, 53 P.2d 974.

We need devote little attention to the fourth cause of action to reform the community lease because of mutual mistake. From our study of the lease we do not believe any great necessity for reformation appears, as the true intent of the parties is quite easily ascertained from the lease in its present form. However, as the judgment must be reversed with directions to grant plaintiffs a reasonable time within which to amend their pleading we see no serious objection to permitting them to amend their fourth cause of action if they be so advised.

The lease in question is a rather awkward form of a community oil and gas lease whereby the landowners leased to the lessee the described property for the exploration for and removal of oil, gas

and other kindred substances for a term of twenty years and as long thereafter as those substances be produced in paying quantities, with a one-sixth royalty to be paid to the lessors.

We find the following pertinent provisions in the lease:

"Lessee may surrender this lease before or after the commencement of drilling, without liability for failure to commence or continue operations; but upon such surrender Lessee shall execute to Lessors and record a quit-claim deed to said premises. Cancellation and termination of lease shall be the only remedy for failure to commence and/or continue operations.
* * *

"The Lessee shall have the right at any time to retain any producing well or wells, together with four acres surrounding each such well in the form of a square subject to the provisions of this lease, upon surrendering the remainder of such land and executing and recording to Lessors a quit-claim deed for the surrendered land. The Lessors will not drill upon surrendered land within two hundred fifty (250) feet of any producing well retained by Lessee.
* * *

"It is further agreed between the Lessors herein and between the parties hereto that all rents and royalties due and payable hereunder shall be pro-rated and paid by said Lessee to said Lessors in proportion as their respective acreage holdings as herein stated bear to the total or aggregate area hereby leased. In event of quit-claiming any portion of the land hereby leased the owner or owners of said lands so quit-claimed shall retain his or their proportionate share of all royalties payable hereunder."

We believe the lease before us comes squarely within the rule announced by this court in *Clark et al. v. Elsinore Oil Co.*, 138 Cal.App. 6, 31 P.2d 476, 478, where the land belonging to the plaintiffs had been quit-claimed to them. It was there said:

"The decision in *Higgins v. California P. & A. Co.*, supra [109 Cal. 304, 41 P. 1087], is authority for the proposition that where the owners of distinct contiguous parcels of land enter into a joint lease of their properties such lease is valid; that the reservation of a specified monthly royalty for each ton of bituminous rock and liquid asphaltum that may be mined or

removed from the leased premises as rent of such premises is unobjectionable; and that although the agreement of lease contained no language providing for equal division of the royalty, the terms of the lease warranted the presumption that each lessor was to receive one-half of such royalty, which presumption was in perfect accord with the practical construction of the lease by the parties thereto.

"From the above recital it is apparent that if the lease agreement made by respondents and appellant on May 3, 1929, had contained no clause providing for equal division of whatever royalties might be received, the above-cited case would, under the terms of said lease, have been authority for the proposition that the lessors were entitled to an equal division of such royalty. However, since the parties to the lease contract which is here considered chose to render it certain that there was to be an equal division of whatever royalties might be received, we fail to grasp the force of appellant's argument that no consideration should be given to this very plain provision. On the contrary, it would seem that the provision is of considerable importance, and that we are not warranted in disregarding it. We entertain the opinion that the provision sheds light on the intention of the parties and particularly on the intention of the lessors and points to the fact that respondents and appellant intended to pool their holdings to the end that one or more oil-producing wells might be developed on their joint properties and that no matter at what location or on whose land such well or wells might be drilled whatever profit might result therefrom should be divided equally between appellant on the one hand and respondents on the other.

"Since this was undoubtedly the intention of the lessors, it is entirely reasonable to presume that they intended that this equal division of any royalties that might be received should continue in the event that the lessee should surrender any portion of the demised premises covered by the joint lease. * * * The fact that the lessee had elected to drill a well on that portion of the demised premises owned by appellant detracts nothing from the right of respondents to receive their proper share of the royalty. The terms of the lease agreement made the royalty payable to the lessors, not to the particular lessor

on whose land a producing well might be drilled. When the lease contract was made, the lessee had the right to drill a well on any portion of the demised premises and except for its surrender of $\frac{7}{8}$ of such premises would not only have had the right, but would have been obligated to drill seven additional wells. The royalty of $\frac{1}{8}$ of the net proceeds derived from any producing well or wells is simply a convenient and customary mode of estimating the rent to be paid for the exclusive occupation of the whole premises and the right to drill for oil at any place on such premises during the term of the lease."

[5] The terms of the lease before us support the contentions of plaintiffs much more strongly than the lease in the Clark case. That lease contained no provision, as does the lease here, that on the quitclaim of a portion of the leased land the owners of the quit-claimed land should continue to receive their proportion of the royalties from the land not quit-claimed. This clearly shows an intention on the part of the owners to create in each an interest in the royalties from all the leased property. This conclusion is strengthened by the terms of the lease providing for a quitclaim of all or any portion of the leased property. The quitclaim is to be made to the "lessors" as a body and not to an individual owner of a quitclaimed parcel of land. It is also provided that the "lessors" not the owner of a quitclaimed tract, shall not drill a well on the quitclaimed land within two hundred fifty feet of a well retained by the lessee. These provisions disclose a clear intention on the part of the lessors to retain at least an interest in all of the royalties from oil and gas produced on any portion of the leased property. *First Nat. Bank v. Standard Oil Co.*, 91 Cal.App. 705, 267 P. 548; *Jones v. Pier*, 124 Cal.App. 444, 12 P.2d 646. See, also, *Pimentel v. Hall-Baker Co.*, Cal.App., 90 P.2d 588. Such interest is a vested interest in the respective landowners, or their, or any of their successors, and will so remain vested at least as long as hydrocarbons are produced in paying quantities from the leased properties during the life of the present lease. What may happen to those interests after that time need not be considered here. Such a vested interest cannot be divested by the act of one party without the consent of the other parties.

There is nothing in *Higgins v. California Petroleum, etc., Co.*, 122 Cal. 373, 55 P. 155, that conflicts with any of the conclusions we have reached.

The judgment is reversed with directions to the trial court to grant plaintiffs a reasonable time within which to amend their second amended complaint.

We concur: BARNARD, P. J.; GRIF-FIN, J.



35 Cal.App.2d 39

CROSSAN v. CROSSAN.

Civ. 6214.

District Court of Appeal, Third District,
California.

Oct. 3, 1939.

1. States ⇐59

A state employee has no property or contract right in the retirement fund provided for by the State Employees' Liability Law, but when the event on which payment is contingent occurs, the amount payable represents "earnings." *St.1931, p. 1442, as amended.*

[Ed. Note.—For other definitions of "Earnings," see Words & Phrases.]

2. Divorce ⇐249(3)

The interest which a state employee has in the retirement fund provided for by the State Employees' Liability Law is to be treated as "community property," in dividing community property between an employee and his divorced wife. *St.1931, p. 1442, as amended.*

[Ed. Note.—For other definitions of "Community Property," see Words & Phrases.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Virginia Crossan against Alexander Crossan for a division of the community property. From a judgment dividing the property, defendant appeals.

Affirmed.

Chester F. Gannon and John B. Heinrich, both of Sacramento, for appellant.

McAllister & Johnson, of Sacramento, for respondent.

DEIRUP, Justice pro tem., delivered the opinion of the court.

Plaintiff was granted a divorce from defendant in the state of Nevada, and subsequently brought this action for a division of the community property. The trial court awarded to the plaintiff a dwelling house and the household furniture therein, which it found to be of the net value of \$1,500. It gave to the defendant an insurance policy, an automobile, and a cabin which it found to be worth \$806, and also an interest in the State Employees' Retirement Fund of the value of \$811.67, as found by the court. Defendant has appealed from the judgment.

The only question raised upon the appeal is whether the interest in the Retirement Fund is to be treated as community property. Defendant claims that it is not property and should be ignored, and that with this interest omitted, the division of the rest of the items of community property is inequitable. On the other hand, the defendant has been awarded more than half of the community property if the interest in the fund was properly included with the other items.

The Retirement Fund in question is the one provided for by the State Employees' Liability Law. *Stats.1931, p. 1442, as amended.* The defendant is an employee of the state. A portion of his salary has been deducted and paid into a fund which is under the control of a board of administration. He may withdraw his portion of the fund if his employment is discontinued; otherwise, it is beyond his control. The act provides for allowances for permanent disability, for death benefits and for an annuity and pension upon retirement. The defendant's interest in the fund bears a certain resemblance to an insurance policy, but it differs in that he is compelled to contribute to the fund, and also in that the state will pay to him a larger sum than his contributions alone would warrant.

[1] It is true that the defendant has no property or contract right in the fund. Such a right cannot accrue until the happening of an event upon which payment is contingent. But when such an event occurs, the amount which will be payable

will represent earnings. *Cheney v. City and County of San Francisco*, 7 Cal.2d 565, 61 P.2d 754.

[2] The money which has been paid into the retirement fund by defendant was community property. His interest is a valuable right which has been purchased with community funds. It was proper, therefore, for the trial court to award to the plaintiff other community property equivalent in value to that interest.

The judgment is affirmed.

We concur: THOMPSON, Acting P. J.; TUTTLE, J.



34 Cal.App.2d 514

MONTGOMERY et al. (KENNEDY, Intervener) v. BOARD OF ADMINISTRATION OF CITY EMPLOYEES' RETIREMENT SYSTEM OF SAN DIEGO et al.

Civ. 2330.

District Court of Appeal, Fourth District,
California.

Oct. 7, 1939.

1. Appeal and error ⇨1210(1)

The effect of order, reversing judgment which denied widow of pensioner the right to receive his retirement pay under San Diego Charter, was to remand the case for new trial as to her, at which time the effect of declaratory relief action of another pensioner, to which widow was not a party, might be determined.

2. Appeal and error ⇨1177(1)

Municipal corporations ⇨220(9)

An employee of the city of San Diego, who, after being continuously employed by city for more than ten years, worked intermittently for the city until retirement, was entitled to something in the form of retirement, and his widow as his successor in interest succeeded to his rights, so that judgment against widow would be reversed, but, where amount and character of payments could not be determined from the record, the character, amount, duration, and other

necessary facts concerning such payments would be left for determination on retrial.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 93 P.2d 1046.

Ray D. Johnson, of El Centro, and John Langston, of Taft, for appellants.

Dayton L. Ault, City Atty., and James J. Breckenridge, Deputy City Atty., both of San Diego, for respondents.

MARKS, Justice.

Respondents have filed a petition for rehearing and present two questions that require further notice. They first urge that the judgment in the declaratory relief action has become final, is binding on intervenor and precludes her from recovering anything in this action. They next urge that our statement in the opinion that intervenor, as successor in interest of A. R. Kennedy, "is entitled to his retirement pay" has the effect of awarding her \$32.50 a month for life, when, under an optional selection made by Kennedy during his lifetime, she was only entitled to receive a smaller monthly payment until a reserve fund is exhausted. We will consider the two questions in the order stated.

[1] Mrs. Kennedy was not a party to the declaratory relief action. There is nothing in the record before us indicating that she either actively or tacitly participated in its prosecution or actually knew that it was filed or prosecuted. Our order merely reverses the judgment against her and has the effect of remanding her action for new trial. The effect of the judgment in the declaratory relief action may be inquired into and determined at such time. Under the very unsatisfactory condition of the record before us, we expressly refrain from passing upon the question of the effect, if any, of that judgment on the suit of intervenor.

[2] When we said in the opinion that [93 P.2d 1046, 1050], "We can find nothing in the city charter nor in the retirement ordinances that require the ten years of continuous service to immediately precede the retirement. As, on the record before us, it appears that Kennedy was eligible for retirement and that intervenor as his

successor in interest is entitled to his retirement pay, the judgment against intervenor must be reversed" we spoke rather loosely.

We did not and do not now intend to intimate that Kennedy or intervenor as his successor in interest was or is entitled to any particular amount or kind of retirement benefits. All we intended to state was that at the time of his retirement Kennedy was entitled to something in the form of retirement and that intervenor succeeded to his rights. The amount and character of those payments cannot be determined from the record. Nor can we determine whether the fund from which those payments have been made has been exhausted if the source of such payments be limited to any particular fund or amount.

All that we intend to hold is that, on the record before us, it appears that intervenor might be entitled to some payments from the retirement fund. As this portion of the case must be retried, the character, amount, duration, and other necessary facts concerning such payments and the fund from which they may be drawn, if any, may be determined at that time, if the evidence discloses that she is entitled to receive anything in addition to the payments already made.

The petition for rehearing is denied.

I concur: BARNARD, P. J.

GRIFFIN, J., being disqualified, does not participate herein.



35 Cal.App.2d 82

PEOPLE v. NEUMEN.
Cr. 389.

District Court of Appeal, Fourth District,
California.
Oct. 6, 1939.

1. Criminal law ⇨1159(2, 3)

An appellate court may not reverse a conviction because of conflicts in the testimony, or of inconsistencies or disparities in the testimony of any one witness, or because of conflicts between the testimony of

different witnesses, or because the testimony is susceptible of two reasonable inferences.

2. Criminal law ⇨561(1)

The mere fact that there is a conflict in the evidence does not give rise to a reasonable doubt of guilt as a matter of law.

3. Criminal law ⇨1159(2, 3)

Where the evidence is reasonably susceptible of different inferences or where the evidence is in substantial conflict, the verdict of the jury is conclusive on appeal.

4. Criminal law ⇨1159(3)

In prosecution of bartender for murder of intoxicated patron, where the evidence was conflicting and susceptible of different inferences, verdict of manslaughter would not be disturbed.

5. Criminal law ⇨776(5)

One accused of murder was entitled to have the jury instructed that, in determining whether he was guilty beyond a reasonable doubt, his good reputation for peace and quiet, if proved, should be weighed as any other fact established, and that it might be sufficient to create a reasonable doubt as to his guilt.

6. Criminal law ⇨1186(4)

In murder prosecution, where court charged that good character of accused for peace might be considered in connection with other facts and evidence of guilt was clear, refusal to instruct that good character of accused for peace might be sufficient to create a reasonable doubt of guilt and that good character, when established, was itself a fact tending to establish innocence, was not prejudicial error, though portions thereof might have been given. Const. art. 6, § 4½.

7. Criminal law ⇨829(18)

Where statutory definition of reasonable doubt in language of statute was given, refusal to instruct that, if jury had any reasonable doubt as to what caused death of victim, jury should find accused not guilty, and that, if they were unable to determine beyond a reasonable doubt that accused did some act that caused the death of victim, then jury should find accused not guilty, was not error. Pen.Code, §§ 1096, 1096a.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Harry Neumen was convicted of manslaughter, and he appeals.

Affirmed.

Raymond E. Hodge, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for the People.

GRIFFIN, Justice.

Appellant was charged with the crime of murder. A verdict of manslaughter was returned by the jury. He now appeals from the judgment of conviction and from an order denying a new trial.

The only grounds of appeal urged by appellant are (1) that the verdict was contrary to the law and the evidence; (2) that the court misdirected the jury in matters of law.

Appellant was a bartender at the Klondike Bar, located in the city of San Bernardino. The decedent Guy Hough and another man described as somewhat crippled, came into the bar room in the late afternoon and sat down at the bar. They stayed a short time and then left, returning a little later. When the decedent returned the last time he was intoxicated and soon became noisy. The appellant was behind the bar during this time. The decedent tried to purchase drinks from the appellant, but he was told that he had enough and that he, the decedent, had better "get out" and "get moving". Against the west wall near the entrance to the bar were two vending machines, both about head high or perhaps a little higher, and these machines were located about eight inches apart. After some little discussion between appellant and decedent across the bar, the appellant struck decedent in the face with his right hand in which he held a towel that was described as "standing in the air out from his hand". Decedent staggered toward the machines above described and fell or bumped into both of them. Decedent then turned around and started in the direction of the appellant, who was then standing near an opening between the "on sale" and "off sale" bars. Appellant claims that on his way to the north end of the room he picked up a black-jack which was hanging on a rail just under the end of the bar. One witness testified that appellant then struck decedent with a towel in his hand on two occasions; that after the first blow decedent staggered backward for a few

steps, then returned to the place where appellant was standing, when he was struck again with the towel in appellant's hand; that decedent at that time fell against the bar and then to the floor. One other witness testified that after the first altercation above mentioned, appellant came out at the end of the bar and struck decedent only once; that he then fell to the floor; that at that time he saw an instrument in appellant's hand described as "something brown, like a sap" and that thereafter decedent was dragged to the back room of the bar in an unconscious condition by appellant, where he subsequently died.

The autopsy surgeon testified that he found bruises on both sides of the forehead and abrasions; that the largest of those was perhaps three-fourths of an inch across; that he found that there was a bruise that was somewhat depressed, dented inward on the left cheek about midway between the ear and the corner of the eye; that the indentation was from one-eighth to one-fourth of an inch and its length a little over an inch and the width about one-third of an inch; that there were some bruises on the left ear but the skin was not broken; that there was a cut which did not go completely through the skin, about three-fourths of an inch in length, just below the angle of the jaw and that there was a cut a little over an inch long in a half moon shape over the left mastoid. The doctor also testified that there was a hemorrhage and that its source was apparently in the floor of the brain; that the hemorrhage "arose from some injury to the blood vessels along the base of the brain" and that "it would seem that the man had received some blows on his head which accounted for the hemorrhage".

Appellant admits picking up the black-jack at the end of the bar but denies using it in any manner and argues that decedent must have struck the cigarette and digger vending machines and that it was from these injuries or some unknown cause that death ensued. The autopsy surgeon testified that in his opinion the black-jack received in evidence could have caused some of the bruises on decedent's head and that a single fall against the vending machines would not cause all of the bruises pictured because the injuries were too widely distributed.

Appellant contends that there are two *reasonable* deductions that could have been drawn from the evidence: (1) "that the

defendant did strike the decedent either with his fist or with a black-jack or both, and that one or both of these blows caused the bursting of the blood vessel which resulted in the decedent's death"; or (2) "that the decedent in his drunken condition simply lost his balance and fell, first against the cigarette and digging machines and later against the bar and floor, causing an injury to the blood vessel which brought about a hemorrhage and later death, and that under such a situation the jury was compelled to adopt the deduction looking toward the innocence of the defendant.

In answering this argument it is interesting to note in addition to the general instruction given on the doctrine of reasonable doubt and the presumption of innocence, appellant offered and the court gave the following instruction:

"You are instructed that if the facts and circumstances of this case can, by any reasonable construction, be explained or construed consistently with the innocence of the defendant, it is your duty to so construe; and if the facts and circumstances in evidence in this case can reasonably be construed as raising a reasonable doubt as to the defendant's guilt, it is your duty to so construe them; and if the facts and circumstances of this case are susceptible of two interpretations—one interpretation looking toward the guilt of the defendant, and the other interpretation looking toward the innocence of the defendant—it is your duty to give these facts and circumstances in this case the interpretation which makes for the innocence of the defendant, rather than to adopt the one looking toward his guilt, and find the defendant not guilty."

[1-3] Appellate courts are not authorized to reverse a judgment of conviction because of conflicts in the testimony, or because of inconsistencies or disparities in the testimony of any one witness, or because of conflicts between the testimony of different witnesses or because the testimony is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence. The mere fact that there is a conflict in the evidence does not give rise to a reasonable doubt of defendant's guilt as a matter of law. On the contrary, the rule is that the verdict or finding of the jury is conclusive upon appeal, where the evidence is reasonably susceptible of different inferences, or where the evidence is in substantial conflict. *People v. Daniels*, 70 Cal. 521, 11 P. 655; *People v.*

Ah Gee, 37 Cal.App. 1, 7, 174 P. 371; *People v. Dunne*, 80 Cal. 34, 21 P. 1130; *People v. Durrant*, 116 Cal. 179, 48 P. 75; *People v. Lewis*, 141 Cal. 543, 75 P. 189; *People v. Keyes*, 178 Cal. 794, 175 P. 6; *People v. Mooney*, 177 Cal. 642, 171 P. 690; *People v. Hines*, 5 Cal.App. 122, 89 P. 858.

[4] In view of the law and the facts related from the evidence presented, the finding of the jury cannot be disturbed.

The next point raised involves the instructions of the court. There was evidence introduced by the appellant of his good character in respect to peace and quiet. In this connection the court gave the prosecution's requested instruction:

"The defendant has introduced evidence before you tending to show his good character for peace and quiet. If, in the present case, the good character of the defendant for these qualities is proven to your satisfaction, then such fact should be kept in view by you in all your deliberations, and it is to be considered by you in connection with all the other facts and circumstances in the case, and if, after a consideration of all the facts in the case, including that bearing upon the good character of the defendant, you believe and find, beyond a reasonable doubt, that the defendant is guilty, then I charge you that it is your duty to convict him, notwithstanding his good character."

The appellant offered the following instruction which was refused by the court:

"The court instructs the jury that if you find from the evidence that the defendant be a man of good character in the traits involved, to wit: for peace and quiet, such good character may be sufficient to create a reasonable doubt of his guilt, although no such doubt would have existed, but for such good character of the defendant; for the good character of the defendant when established, is itself a fact in the case, and a circumstance tending in greater or lesser degree to establish his innocence and it must not be put aside by you in order to ascertain if the other facts and circumstances considered by themselves do not establish his guilt beyond a reasonable doubt; for evidence of good character is evidence relevant to the question of guilty or not guilty, and it is to be considered by you in connection with all the facts and circumstances of the case.

"One object in laying it before you is to induce you to believe in the improbability

that a person of good character should have conducted himself as alleged, and that there is some mistake or misapprehension in the evidence on the part of the prosecution, and you must take it into consideration, for a person of good character is less likely to commit a crime than a person of bad character."

[5] Appellant contends that the court should have given the instruction offered and refused and should have added to it only the latter part of the one given, citing *People v. Doggett*, 62 Cal. 27. The appellant had the right to have the jury instructed that in determining whether or not he was guilty beyond a reasonable doubt, his good reputation as to traits involved in the charge, if proved, should be weighted as any other fact established, and that it might be sufficient to create a reasonable doubt as to his guilt. *People v. Bell*, 49 Cal. 485, 489; *People v. Raina*, 45 Cal. 292; *People v. Ashe*, 44 Cal. 288, 291.

[6] Portions of the instruction offered and refused covering this subject may well have been given to more adequately express and emphasize the object and purpose of laying reputation evidence of the character of appellant before the jury. However, we are convinced, under the circumstances of this case, that no prejudicial error arose by reason of the failure to give the proffered instruction, in view of the fact that the jury was instructed on the subject as indicated, and the further fact that the overwhelming evidence of appellant's guilt was most clear and convincing. Art. VI, sec. 4½ of the Constitution. The jurors were informed that if they were satisfied of the good character of the appellant for peace and quiet, then such fact should be kept in view in their deliberations and should be considered by them in connection with all the other facts and circumstances in the case. We do not hesitate to say that there has been no miscarriage of justice by reason of the claimed error.

[7] Similar complaint is made of the court's refusal to give the following instructions:

(1) "I hereby instruct you that if you have any reasonable doubt as to what caused the death of Guy Hough, you should find the defendant not guilty."

(2) "You are hereby instructed that if you are unable to determine beyond a reasonable doubt that the defendant did some act that caused the death of Guy Hough,

then in that event you should find the defendant not guilty."

These instructions were sufficiently covered by the giving of the statutory definition of reasonable doubt in the language of section 1096 of the Penal Code. In charging a jury, the court may read to the jury section 1096 of the Penal Code, and no further instruction on the subject of presumption of innocence or defining reasonable doubt need be given. Sec. 1096a, Pen. Code.

For the reasons expressed the judgment and order are affirmed.

We concur: BARNARD, P. J.; MARKS, J.



35 Cal.App.2d 77

**BARTHOLOMAE OIL CORPORATION v.
SEAGER et al.**

Civ. 2446.

District Court of Appeal, Fourth District,
California.

Oct. 6, 1939.

Hearing Denied Dec. 4, 1939.

1. Municipal corporations ⇨621

Where hearing was had and evidence received on application for variance permit under set-back ordinance before city planning commission, variance permit issued pursuant to an order of city council was not void on ground that proper procedure was not taken by the planning commission or by the city council. *St.1929, p. 1805.*

2. Municipal corporations ⇨621

The fact that a certain action is taken by the city planning commission with respect to issuance of building permit raises the presumption that the existence of necessary facts has been ascertained.

3. Municipal corporations ⇨621

Where city planning commission on application for set-back variance upon certain property reported to city council that set-back ordinance requirements had been complied with and that planning commission recommended issuance of building permit, statement that ordinance had been complied with implied that planning commission

found that detriment to neighborhood would not result from the issuance of the permit and report was sufficient, formal findings not being necessary. St.1929, p. 1805.

4. Municipal corporations ⇐621

Where set-back ordinance provided that planning commission, if it found that detriment to neighborhood would not result from issuance of variance permit, "may approve said permit and transmit the same" to the city council, and application for variance permit together with blueprints and all papers in connection therewith were placed in cabinet in city council chamber to knowledge of city clerk who had a key and council had access to papers, substantial compliance with ordinance appeared. St.1929, p. 1805.

5. Municipal corporations ⇐621

Where hearing was had upon required notice and recommendation was made by the planning commission on application for variance permit and application was acted upon by the city council and provisions of set-back ordinance relating to the issuance of variance permits were sufficiently complied with, variance permit was properly issued. St.1929, p. 1805.

6. Appeal and error ⇐781(4)

Where, after judgment denying injunction to restrain defendants from proceeding with erection of a dwelling in accordance with a variance permit issued by municipality, building was completed, question of whether plaintiff was entitled to injunctive relief became "moot" and relief could not be granted.

[Ed. Note.—For other definitions of "Moot Case," see Words & Phrases.]

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Suit by the Bartholomae Oil Corporation, a corporation, against Howard W. Seager and another to enjoin defendants from proceeding with the erection of a dwelling in accordance with a permit issued to them by a municipality. From an adverse judgment, plaintiff appeals.

Affirmed.

Earl D. Killion and Alfred E. Rogers, both of Los Angeles, for appellants.

Forgy, Reinhaus & Forgy, of Santa Ana (C. E. Sprague, of Santa Ana, of counsel), for respondents.

BARNARD, Presiding Justice.

In this action the plaintiff sought an injunction to restrain the defendants from proceeding with the erection of a dwelling in accordance with a permit issued to them by the City of Newport Beach.

The defendants owned and were erecting this house upon lot 7 in a certain block on Balboa Island. The lots in this block face what is known as South Bay, the shore line being an arc instead of a straight line. There is no regular street in front of these lots, there being only a 10-foot sidewalk between the property lines and the beach. The plaintiff owned lot 6, adjoining defendants' lot on the west, and also owned lot 5 to the west of lot 6, upon which was a residence occupied by the plaintiff's president. The front of that residence was within 3 feet 8 inches of the property line.

Pursuant to chapter 838 of the Statutes of 1929, p. 1805, the City of Newport Beach adopted a zoning ordinance known as Ordinance No. 440, which provided that residences on lots in this block should be set back ten feet from the property lines. Section 11 of this ordinance provided that the city council, upon the report and recommendation of the planning commission, should have the power to vary the application of the set-back provisions of the ordinance; and further provided:

"If the Planning Commission finds that detriment or injury to the neighborhood will not result from issuance of a permit as applied for, it may approve said permit and transmit the same, together with a complete report of its findings and recommendations, to the City Council for approval and endorsement. * * *

"In approving any variance or recommending the issuance of any conditional permit under the provisions of this section, the Planning Commission shall designate such conditions in connection therewith as will in its opinion secure substantially the objectives of the regulation or provision to which such variance is granted, or provide adequately for the maintenance of the integrity and character of the district in which such conditional permit is granted, and shall provide the Building Inspector with a copy of the same."

In accordance with this section the defendants made application for such a variance and for permission to erect a dwelling on lot 7, the front of which should be within one foot of the property line. The planning commission approved the variance and

recommended to the city council that it be granted. The city council approved the same and ordered a building permit issued, which was done. Work on the building was commenced and this action followed. The court found in all respects in favor of the defendants and from the ensuing judgment this appeal was taken.

Appellant's contention is that the variance permit issued pursuant to an order of the city council is void because the proper procedure was not taken by the planning commission or by the city council. It is contended that no evidence was taken before the planning commission, and further that this commission did not make a "complete report" to the city council, and did not transmit the respondents' application for a variance to the city council, as required by the ordinance.

[1] The only notice required by the ordinance is notice of the hearing before the planning commission. The appellant's complaint alleges that notice of this hearing "was posted and published in the manner provided by the provisions of said Ordinance No. 440" and that said application came up for hearing by the planning commission at its regular session on August 25, 1937. There is also evidence that notice of this hearing was mailed to the appellant, although it made no appearance. The chairman of the planning commission testified that the respondent Howard W. Seager appeared before the commission at that time and explained his problem, and that the members of the planning commission asked questions and discussed the matter. The chairman further testified that he exhibited to the commission the respondents' application and the accompanying blueprints, and that he reported to the commission that he had visited the premises and viewed the surrounding lots and had found that a great many of the houses on the lots in this block were built up to the property line or within one or two feet thereof. There can be no question that a hearing was had and that considerable evidence was received.

[2,3] It is next contended that the planning commission did not make a complete report to the city council. The report made was addressed to the city council and sets forth that the planning commission "reports the approval of the application of" the respondents for this set-back variance upon lot 7, and further states "the requirements of Ordinance 440 have been complied

with and the Planning Commission respectfully recommend the issuance of the permit". It is argued that this does not conform to the requirements of section 11 of the ordinance, in that it is not a "complete" report. In our opinion, section 11 of the ordinance in question does not require formal findings. The statement in the report that the requirements of Ordinance 440 had been complied with implies that the planning commission had found that detriment or injury to the neighborhood would not result from the issuance of the permit for which application had been made. In connection with the action of such a commission, composed usually of laymen, the fact that a certain action is taken raises the presumption that the existence of the necessary facts had been ascertained and found. *Wolfskill v. City Council of Los Angeles*, 178 Cal. 610, 74 P. 45; *Chase v. Trout*, 146 Cal. 350, 80 P. 81.

[4] It is further contended that the application for a variance made by the respondents was not transmitted by the planning commission to the city council as required by section 11 of the ordinance. It may first be observed that section 11 is ambiguous in that it provides that the planning commission, if it finds that detriment or injury to the neighborhood will not result from issuance of a permit, "may approve said permit and transmit the same" to the city council. Assuming that this requires that the original application be transmitted to the city council, it appears from the evidence that the application, the blueprints and all papers in connection therewith were placed in a cabinet in the city council chamber, that the city clerk had a key to this cabinet, that the city clerk knew that they were there, and that although they were present and available no member of the city council asked to examine these documents. A substantial compliance with this provision of the ordinance appears.

[5] In our opinion, the evidence is sufficient to support the court's findings that the requirements of the ordinance were sufficiently complied with by the planning commission and by the city council, and that the ordinance permitting the variance and ordering a permit to be issued in accordance therewith was not void for the reasons relied upon by the appellant. A hearing was had upon the required notice and a recommendation was made by the planning commission and acted upon by the

city council, and it in no way appears that either of these bodies was deceived or in any way lacking in knowledge of the actual facts.

[6] A motion to dismiss this appeal was made and submitted with the matter on its merits. This motion was based upon the ground that the question involved is now moot since the construction of the residence in question was completed some time since. While this furnishes an additional reason why relief could not be granted to the appellant (*Lansdown v. Smith & Sons, R. Corp., Ltd.*, 1 Cal.App.2d 618, 37 P.2d 127; *Brennan v. American Trust Co.*, 3 Cal.2d 635, 45 P.2d 207; *Faria v. Brandon*, 206 Cal. 730, 276 P. 106), we have preferred to consider the appeal on its merits.

For the reasons given the motion to dismiss is denied and the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



35 Cal.App.2d 61

PEOPLE v. WHITE et al.
Cr. 445.

District Court of Appeal, Fourth District,
California.

Oct. 3, 1939.

1. Larceny $\S$ 64(1)

Possession of stolen property by accused, however soon after crime was committed, is in itself insufficient evidence on which to base conviction for grand theft.

2. Larceny $\S$ 68(3)

Where accused makes an explanation as to the manner in which he came into possession of stolen property, whether he is telling the truth rests solely with the jury.

3. Criminal law $\S$ 1159(4)

Improbability of testimony to sustain conviction must amount to incredibility and must very clearly appear, to justify reversal.

4. Criminal law $\S$ 1159(3)

Where evidence is conflicting, an appellate tribunal may not overthrow a verdict if there is substantial evidence to sustain it.

5. Criminal law $\S$ 511(2)

The testimony of an accomplice is sufficiently corroborated if, after the evidence of the accomplice is eliminated, the remaining evidence is inculpatory; but, if there is no "inculpatory evidence," there is no "corroboration" though the accomplice may be corroborated in regard to any number of facts sworn to by him; "inculpatory evidence" being evidence tending to connect accused with the offense. Pen.Code, $\S$ 1111.

[Ed. Note.—For other definitions of "Corroborate; Corroboration," see Words & Phrases.]

6. Criminal law $\S$ 511(6)

In prosecution for theft of cattle and for conspiracy to commit grand theft, testimony of alleged accomplices was sufficiently corroborated by surrounding circumstances, when considered in connection with apparently false explanation by accused of his possession of the stolen cattle, to sustain conviction. Pen.Code, $\S$ 1111.

7. Criminal law $\S$ 822(6)

Where instructions considered together could be read in complete harmony, and jury was fully instructed as to law applicable to conspiracy count, giving instruction covering the act of aiding and abetting was not error because instruction was allegedly inapplicable to conspiracy count. Pen.Code, $\S$ 971.

8. Criminal law $\S$ 823(4)

An allegedly erroneous instruction with respect to the formation and existence of alleged conspiracy was to be read in connection with other instructions on the subject.

9. Criminal law $\S$ 806(1)

The court was not required, each time that it gave an instruction, to repeat that the testimony of accomplices must be corroborated, but charge was sufficient if, as a whole, it fairly covered all that was pertinent to the case and stated it consistently and harmoniously. Pen.Code, $\S$ 1111.

10. Criminal law $\S$ 423(2)

The declarations of one conspirator to be admissible as against his coconspirator must not only be made when the conspiracy is pending, but also must be in aid of the common purpose of the conspiracy, and declarations by conspirator out of presence of coconspirator after crime has been committed are inadmissible because hearsay.

11. Criminal law ☞1172(2)

In prosecution for theft of cattle and for conspiracy to commit grand theft, where court gave an instruction on the subject of conspiracy which was applicable and covered the evidence, an instruction which when read alone might have indicated that jury could consider declarations made by each coconspirator subsequent to alleged combination was not ground for reversal.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Freddie White, Albert E. Love, and Jake Cohen were indicted for grand theft and for conspiracy to commit grand theft. Love was transferred to the juvenile court and White withdrew his plea of not guilty. Jake Cohen was convicted as charged, and he appeals.

Affirmed.

Lee Nuffer, of El Centro, for appellant.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., of El Centro, for the People.

GRIFFIN, Justice.

The appellant Jake Cohen with two others were indicted by the grand jury of Imperial county in count one of the indictment of the offense of grand theft, charging that they, Jake Cohen, Freddie White and Albert E. Love, on or about September 5, 1938, in that county, wilfully, etc., took eleven head of bovine animals, the property of one John Bulloni. In count two thereof, appellant was charged, along with the two other persons named, with conspiracy to commit grand theft in the same particulars.

Prior to trial, the case against the defendant Love was transferred to the juvenile court for further proceedings, in view of the fact that he was a minor. The defendant White withdrew his plea of not guilty and pleaded guilty to counts one and two of the indictment, and the trial thereafter proceeded as against the appellant Jake Cohen alone. Both of these defendants thereafter testified for the prosecution and against the appellant.

Trial by jury was had and a verdict was returned by the jury finding Jake Cohen guilty as charged in both counts of the indictment. Motion for a new trial was made and denied. Notice of appeal

was given from the order denying the motion for new trial and from the judgment.

Briefly, the grounds of appeal as argued in appellant's opening brief are (1) alleged insufficiency of the evidence to support the judgment in that the testimony of the alleged accomplices was not corroborated and was unworthy of belief and inherently improbable; (2) alleged error by the court in giving certain instructions.

During the months of July, August and September, 1938, John Bulloni lived on a ranch west of the city of Imperial and west of New river, and was engaged in the business of operating a dairy. He owned about 225 head of stock. The defendants Freddie White and Albert E. Love started work for him as milkers on June 23, 1938, and on the same day John Bulloni went to the hospital and was there 12 days. Between the 15th and 20th days of August, 1938, Bulloni missed one white Jersey and 12 or 15 head of Holstein heifers; these heifers were around 16 to 18 months old and were marked with an "underbit" on the left ear. All of the heifers had been raised by Bulloni.

The defendant White testified that he had known appellant Cohen since 1937; that Cohen came to the Bulloni ranch several times during the summer of 1938 while White was employed as a milker and he knew that appellant had bought livestock on several occasions from Bulloni; that during the time Bulloni was in the hospital appellant came to the ranch and was informed by him that Bulloni was in the hospital; that at that time appellant suggested to him that he, White, could sell a number of Bulloni's heifers and cows and that Bulloni would never know it; that from that time on, White had several conversations with appellant Cohen about getting some of Bulloni's heifers, and during the month of August, White and Love drove several head of Bulloni's heifers over to Macie Ferguson's ranch at the suggestion of appellant, where they were kept for about one month. Macie Ferguson testified that White paid him \$5 for the pasturage of 13 head of bovine animals. White further testified that on September 20, 1938, the cattle were removed by White and Love to a place along the east side of New river and left in the shade of some trees near an old deserted ranch located near a basin or bottom land cut out by the New river and containing ap-

proximately 40 acres; that he did not see the cattle again until two days afterward, when he saw them down in the basin about 300 yards from where he had left them; that while the cattle were in the basin and within two or three days following September 20, 1938, White saw appellant Cohen at Bulloni's ranch and told appellant that the heifers were in the basin, at which time appellant stated he would send a truck for them. Subsequently the cattle were hauled out of the basin by one Estrada, in response to orders given by the appellant Cohen. White then stated that he, soon thereafter, saw appellant in El Centro, and appellant asked him if Estrada had obtained the heifers; that White informed him that he had, at which time appellant then told White he would give him one-half of the sale price.

White testified that he had seven separate conversations with Cohen concerning the money from the sale of the cattle, after the cattle had been taken to Los Angeles and there sold by appellant. In the last conversation appellant advised White that he was broke and did not have any money. White, according to his testimony, never received any money from appellant for the sale of the cattle. After White discontinued working for Bulloni, he worked off and on for about a month helping Cohen load calves, for which he received \$15.

Fred Estrada, who resided in El Centro and was in the trucking business, testified that he was acquainted with and knew Freddie White, John Bulloni, and appellant Jake Cohen; that he had a one and a half ton Chevrolet truck equipped for hauling livestock; that at some time between the 25th day of September and October 1, 1938, he saw Cohen in El Centro and he directed him to go out toward John Bulloni's ranch just east of New river and that in a basin north of the road he would find Freddie White, and for him to load up some cattle there and bring them to his (appellant's) corral on the Bradshaw ranch. Estrada went to the place as directed and there met Freddie White and Eddie White, his brother. He loaded 11 bovine animals, consisting of heifers, and when coming out of the river bottom basin his truck became stuck and he had to unload the cattle and be pulled out by a tractor. The following day between 1 and 4 o'clock p. m. he returned to the basin along New river and with the assistance of Freddie and Eddie White, again loaded the cattle, and brought them to Bradshaw's

corral located four miles southeast of El Centro, where appellant had rented space and unloaded the cattle. Appellant Cohen was the party who directed him to the place where the cattle were located and paid Estrada for the hauling.

Henry Shroyer, who lived in Calexico and was engaged in the business of trucking for Carsten Trucking Company during the year 1938, testified he knew appellant Cohen; that on Sunday, October 2, 1938, he hauled a load of 32 head of cattle from the Bradshaw corral for appellant Cohen to Washburn and Condon, livestock commission merchants in Los Angeles; that he had two copies of livestock brand inspection certificates and that he checked through the Trifolium Checking Station at 4:40 p. m., October 2, 1938, with 32 head of cattle from the Imperial Cattle Company, owned by J. D. (appellant) and Harry Cohen.

E. B. Manley testified that he was a brand inspector for the state of California; that on Sunday, October 2, 1938, he inspected 32 head of cattle for appellant at the Bradshaw corral, included within which were 9 unbranded heifers; that on October 3d and 4th, 1938, the shipment of cattle brought in by truck by Henry Shroyer were sold by Washburn and Condon for appellant Jake Cohen; that these nine heifers brought \$287.12, and that appellant did not actually receive this sum of money, but that this sum was credited to his account.

Albert Love, one of the defendants, testified that while he was working at Bulloni's ranch, he saw the appellant there on several occasions, six or seven times, and on one occasion, he overheard part of a conversation ensuing between Freddie White and appellant and he heard appellant Cohen ask White if he wanted to sell some cattle; that at that time Freddie White did not own any cattle; that while he was employed there and during Mr. Bulloni's absence, he and Freddie White, on horseback, moved a number of heifers from the Bulloni ranch and that he was asked by Freddie White to assist him in the moving of them; that approximately 11 heifers were moved and that they started moving them around 6:30 p. m. and moved them to Macie Ferguson's ranch about three or four miles distant; that when they arrived at the Ferguson ranch they took them down into a little gulch and alongside of a little river.

John Bulloni described the missing cattle and testified that after he missed the stock he asked appellant if he (Cohen) had seen any small Holstein heifers and Cohen replied that he had not. Bulloni also testified that on a previous occasion he sold several head of cattle to Cohen. Some of them were earmarked in the same manner as the missing cattle were earmarked.

Alfred Soule testified that he knew the defendant Freddie White and that he resided on the bank of the New river; that on or about September 20, 1938, he saw a number of Holstein heifers being driven by Freddie White and another man; that Freddie White and the other man were on horseback and that they were driving the cattle in a southerly direction.

Appellant took the witness stand and testified in his own behalf. He stated that in the latter part of September or early part of October he purchased 11 head of yearling Holstein heifers from Freddie White; that he went out near the Ferguson ranch when White and Love were not present and looked the heifers over and agreed to pay White \$15 per head; that he sent Fred Estrada to get the cattle; that he himself took these particular cattle to Los Angeles and sold them; that he knew Freddie White for some time; that he knew White worked as a milker for Bulloni off and on for two years and had talked to him on several occasions at the Bulloni ranch; that appellant did not know that White owned any cattle and made no other inquiry about the ownership of the eleven head of cattle other than to obtain a bill of sale from him and pay him the sum of \$165; that about a week prior to the time appellant obtained the eleven head of heifers from White he purchased eight cows and one bull from Bulloni, paying \$550, and that they were sold by Washburn and Condon on September 20, 1938, in Los Angeles. He admitted that E. B. Manley, the brand inspector, inspected all of appellant's cattle; that appellant did not know whether Inspector Manley asked for a bill of sale for the cattle shipped from Bradshaw's corral on October 2, 1938, or not. Appellant testified that White gave him a bill of sale for the cattle; that his room had been ransacked while he was in jail; that after he was released, he stepped into the lavatory of his room and there were some bills of sale in the lavatory and he picked them out. On direct examination appellant was shown several scraps of paper which he

stated he retrieved from the toilet and which he identified as comprising the parts of the bill of sale given to him by Freddie White. He stated that he did not know whether the bill of sale was for the heifers in question. However, there was no evidence of any character that he had, at any time, any other transaction with Freddie White.

On cross-examination appellant was shown the scraps of paper just referred to. They were fitted together before him and he identified the fitted parts. Instead of the pieces comprising one bill of sale from Freddie White, they comprised three bills of sale, two entirely unrelated to the transaction in question and neither bearing White's signature, and the third was a blank bill of sale with no writing thereon.

[1,2] It has long been the rule that possession of stolen property by a defendant, however soon after the crime was committed, is not in itself sufficient evidence on which to base a verdict of guilty to the charge of grand theft. However, should the defendant make an explanation as to the manner in which he came into possession of such property, the question as to whether he is telling the truth in that regard rests solely with the jury. In *People v. McClain*, 115 Cal.App. 505, 508, 1 P.2d 1085, 1087, the court said: "The weight to be given to the testimony was for the jury to decide; but when money is stolen, proof that a part of it, on the following day, was found on the person of another in the vicinity, certainly tends, when not satisfactorily explained, to raise a presumption that he is the guilty party; and if an explanation is attempted by the accused, it is for the jury to judge of its truth and plausibility. [Italics ours.] The corroborating evidence may be slight, and entitled to but little consideration; nevertheless, the requirements of the statute are fulfilled if there be any corroborating evidence which, of itself, tends to connect the accused with the commission of the offense."

To the same effect is the case of *People v. Taylor*, 4 Cal.App.2d 214, 217, 218, 40 P.2d 870; also *People v. Ojeda*, 132 Cal. App. 593, 596, 23 P.2d 316, and *People v. Negra*, 208 Cal. 64, 280 P. 354. There is evidence in the instant case which disputes and contradicts the testimony of the accomplices on material issues. The testimony of the accomplices was impeached by showing that they made different state-

ments on other occasions respecting some facts related at the trial. The testimony of the accomplice Freddie White that he, himself, admittedly took two of the calves from the herd, driven to the Ferguson ranch, and sold them to a Gene Houck, and at the same time asked him if he wanted to buy some more heifers and suggested that he go out and look at them on the Ferguson ranch, tends to negative his story that he had previously arranged with appellant to drive the cattle from the Bulloni ranch and share with appellant in the proceeds of the sale. However, this may be explained by the fact that appellant failed to haul the cattle away from the Ferguson ranch. During this period Ferguson was pressing White to remove the cattle because he, Ferguson, was becoming suspicious of the ownership of them. White claims that he had told Ferguson that they were stolen. The jury was apparently convinced of the truth of the charges, notwithstanding these inconsistencies.

[3,4] It is well settled that improbability of testimony must amount to incredibility and must very clearly appear, in order to justify a reversal. *People v. Dorland*, 2 Cal.2d 235, 40 P.2d 474. Where a conflict appears in the evidence an appellate tribunal is powerless to overthrow a verdict adverse to the appellant provided there is substantial evidence to sustain the judgment. *People v. Murieta*, 1 Cal.App. 2d 727, 37 P.2d 158.

[5] There is, of course, no dispute respecting the provisions of section 1111 of the Penal Code that the testimony of the accomplices must be corroborated and in the absence of any such corroboration a conviction may not stand. The difficulty comes in determining what corroboration is sufficient. First, we must eliminate from the case the evidence of the accomplice, and then examine the evidence of the remaining witness or witnesses with the view to ascertain if there be inculpatory evidence,—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him. *People v. Kazatsky*, 18 Cal.App.2d 105, 110, 63 P.2d 299; *People v. Morton*, 139 Cal. 719, 73 P. 609; *People v. Davis*, 210 Cal. 540, 293 P. 32; *People v. Kempley*, 205 Cal. 441, 271 P. 478.

[6] Defendants White and Love, admittedly accomplices, testified in substance that they were approached by appellant to steal a number of Holstein heifers belonging to Bulloni; that they consented thereto and that appellant suggested that White and Love drive the heifers to the ranch of Macie Ferguson. The testimony of Macie Ferguson corroborated this fact to this extent, that the heifers were driven to his ranch by White and Love, which is undenied. That White and Love intended to and did steal the cattle is uncontradicted. Appellant, by his own admission, was at the Bulloni ranch talking to White and Love on many occasions during the period of their employment. He was quite familiar with the surrounding premises, also the number, weight, and earmarkings of all of Bulloni's cattle. The fact that the heifers taken by Cohen under the circumstances here related from the Ferguson ranch were earmarked in the manner that would identify them as Bulloni's cattle (which special earmark was known to appellant) appears to us would be a circumstance indicating guilty knowledge, and sufficient to cause appellant to become most suspicious, at least of White's claimed ownership. Appellant denied knowing of any missing heifers from Bulloni's ranch when questioned by him. It is also quite apparent that appellant never obtained a bill of sale from White, as was his custom, for the sale of the cattle. Appellant's knowledge of the location of the cattle and his ability to identify them on the Ferguson ranch without assistance from White or Love, was likewise a circumstance that must be considered. These circumstances in themselves, when considered in connection with the apparent false explanation by appellant in accounting for his possession of the stolen cattle by attempting to produce a bill of sale (not signed by White) which proved to have nothing whatever to do with the transaction, seem to us, if believed by the jury, would meet the necessary requirements under the rule above stated, as constituting inculpatory evidence independent of the testimony of the accomplices.

[7] Appellant next complains of the people's usual instruction given, covering the act of aiding and abetting, sec. 971, Pen.Code, and argues that it may be applicable to the offense of grand theft, but is inapplicable to the conspiracy count. From the record it appears that the jury was fully and properly instructed as to

the law applicable to the conspiracy count. Considering the instructions together, they may be read in complete harmony. This same statement and conclusion may well apply to the same claimed error in giving the usual instruction on the distinction between circumstantial evidence and direct or positive testimony, and the instruction which was properly given relating to the testimony of accomplices under section 1111, Penal Code.

[8,9] The next instruction about which complaint is made reads as follows: "You are instructed that the formation and existence of a criminal conspiracy is one of the classes of facts which can seldom be established by direct evidence. In the very nature of the case, such common design can rarely be shown by direct evidence and can only be shown by circumstantial evidence; and therefore a finding of the formation and existence of such a conspiracy may stand upon circumstantial evidence only, if, upon the whole of such evidence, the jury is satisfied, beyond a reasonable doubt, of the formation and existence of the said conspiracy. Therefore, in determining the question of the formation and existence of a conspiracy, it is proper to take into consideration the relation of the parties to one another if any, their personal and business associations with each other, and any and all facts in evidence which may tend to show what transpired between them at or before the time of the alleged combination or agreement, or which tended to show what transpired between them, as well as the acts performed *and the declarations made by each party subsequent to such alleged combination or agreement*, in respect to and in pursuance of furtherance of the alleged conspiracy; *and from these facts and circumstances you may determine whether a combination or agreement did in fact exist and whether the same was illegal in its inception, or became illegal at any subsequent time.* The purpose of the combination is usually known only to those who enter it, and their guilt can generally be proved only by circumstantial evidence. The common design is the essence of the fact, and this may be shown by the steady pursuit of the alleged conspirators of the same object, whether they act separately or together, or by the same or different means, provided all lead to the same unlawful result."

The portion italicized, it is argued, in effect told the jury that they could con-

sider the testimony of the accomplices in determining whether a combination in fact existed and whether the same was illegal in its inception, without stating to the jury that their testimony to that effect must be corroborated by other evidence. It is also contended that the instruction was too general. An instruction in the language of section 1111 of the Penal Code and other instructions relating to the question of the necessity of the corroboration of the testimony of accomplices were fully and fairly stated and given. The questioned instruction must be read in connection with other instructions on the subject. It was not necessary for the court each time that it gave an instruction to repeat the necessity of the corroboration of the accomplices' testimony. It is sufficient if the charge as a whole fairly covers all that is pertinent to the case and is stated consistently and harmoniously. *People v. Brittan*, 118 Cal. 409, 50 P. 664; *People v. Wagner*, 65 Cal.App. 704, 225 P. 464.

[10,11] However, this instruction, in reference to the conspiracy count, when read alone, may have indicated to the jury that they were authorized to take into consideration "declarations made by each party (coconspirator) subsequent to such alleged combination or agreement. * * *" This instruction should have been amplified to the extent that where the evidence as a whole, if believed, is amply sufficient to establish a conspiracy, all statements, acts and declarations by any of the parties pending the commission of the crime, looking towards its consummation, are competent evidence against each and every conspirator. The rule allowing statements or declarations of one conspirator to be given in evidence as against his coconspirator requires not only that the conspiracy be pending and its object not consummated when the statements or declarations are made, but also that such statements, in order to be admissible, must be in aid and furtherance of the common purpose or design of the conspiracy; and declarations made by such coconspirator out of the presence of the defendant on trial, after the crime has been committed, are hearsay and inadmissible. *People v. Oldham*, 111 Cal. 648, 44 P. 312; *People v. Ayhens*, 16 Cal.App. 618, 117 P. 789; *Del Campo v. Camarillo*, 154 Cal. 647, 98 P. 1049; *People v. Smith*, 151 Cal. 619, 91 P. 511; *People v. Lovren*, 119 Cal. 88, 51 P. 22, 638; 5 Cal.Jur., sec. 27, p.

525. If the failure to amplify the questioned instruction was error, this error would not constitute ground for the reversal of the judgment. The court gave another instruction on the subject which was applicable and covered the evidence produced at the trial.

The judgment and order denying the motion for a new trial are affirmed.

We concur: BARNARD, P. J.; MARKS, J.



35 Cal.App.2d 35
NAVARRO et al. v. SOMERFELD.

Civ. 11842.

District Court of Appeal, Second District,
Division 1, California.

Oct. 3, 1939.

Hearing Denied Nov. 30, 1939.

I. Trial ⇨296(4)

In action for injuries sustained in automobile collision, instructions that, if plaintiff requested another to drive plaintiff in automobile, such driver became plaintiff's agent, and that driver's negligence barred recovery, if it contributed to injury in slightest degree or any manner, were not erroneous or prejudicial to defendant, where theory of agency was warranted by evidence and court instructed jury as to meaning of proximate cause and necessity of contributory negligence proximately contributing to accident to be of any consequence.

2. Negligence ⇨138(4)

In action for injuries sustained in automobile collision, evidence held to warrant instructions to jury on theory of agency for plaintiff of driver of automobile in which plaintiff was riding at time of accident.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Carmen Navarro and others against Esther Somerfeld, sometimes known as Mrs. Eugene Ziskind, to recover damages for injuries sustained in an automobile collision. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Hearing denied; CARTER and GIBSON, JJ., dissenting.

Mark F. Jones and W. L. Engelhardt, both of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment entered on the verdict of the jury in favor of defendant, in an action to recover damages alleged to have been sustained by plaintiffs as the result of a collision of two automobiles which occurred on April 7, 1937, at West Silver Lake drive in Los Angeles, a street which extends in a northerly and southerly direction.

The two plaintiffs, Edelmira Navarro and Carmen Navarro, her mother, were riding in a car which belonged to the plaintiff Gilbert Navarro, the brother of Edelmira. Carmen Navarro, the mother, had requested the daughter to take her to visit some friends, the mother being unable to drive. At the time of the accident, plaintiffs were driving in a southerly direction on West Silver Lake drive. The defendant, Dr. Esther Somerfeld (Ziskind), whose residence was on the west side of the street, was likewise driving her car in a southerly direction, and, when she had reached a point opposite the driveway leading to her garage, made a right-hand turn for the purpose of entering the garage. The car in which plaintiffs were riding struck the right side of defendant's car.

Plaintiff Edelmira Navarro testified, in substance, that her mother "wanted to go visiting" (some friends of the mother) "and naturally I had to drive"; that she knew where she was going as she had been to the place before, and it was therefore unnecessary for the mother to direct her; that as she was traveling south on West Silver Lake drive a car passed her about 150 feet from the point of collision; that when her car was about 20 or 25 feet in the rear, the other car slowed down and made a right-hand turn into a driveway; that there were no cars coming north at the time; that when she saw the car making the right-hand turn she blew her horn to warn her and then "put my foot brake on as far as it would go, then reached for my emergency, because she wouldn't stop". Upon cross-examination, plaintiff stated

that although she was 20 or 25 feet in the rear, she had made no attempt to swing out behind the other car as she was "quite close", and that she had continued to drive straight south.

Defendant testified, in answer to the question upon cross-examination: "Did you pass another car in the block north of your house before you made your turn?" that she did not remember having done so. She also testified that before she started to make the turn she stopped the car and put her arm up as a signal for the right-hand turn and started the car in low gear toward her driveway, and that she had gone approximately 5 to 8 feet when there was a collision.

[1] Appellant contends that the "court erred in instructing the jury that if Carmen Navarro requested Edelmira Navarro to drive her in the automobile, Edelmira Navarro became the agent of plaintiff, Carmen Navarro".

The two instructions, of which appellant complains, read as follows:

"No. 6. If, however, you find from the evidence in this case that plaintiff Mrs. Carmen Navarro requested her daughter Edelmira Navarro to drive her in the automobile in which she was riding for the purpose of visiting friends, then the court instructs you that in driving Mrs. Carmen Navarro the plaintiff Edelmira Navarro was acting as her agent."

"No. 7. If you find that at the time of the happening of the accident the plaintiff Edelmira Navarro in driving the automobile in which Mrs. Carmen Navarro was riding was acting as the agent of Mrs. Carmen Navarro, then the court charges you that the negligence, if any, of said Edelmira Navarro in the operation of said automobile would be imputed to the plaintiff Mrs. Carmen Navarro and if you believe from the evidence in the case and under the instructions given you that Edelmira Navarro was guilty of negligence in the operation of said automobile and that such negligence, if any, proximately contributed to the collision in the slightest degree or in any manner whatsoever, then such negligence would prevent a recovery by the plaintiffs Carmen Navarro and Edelmira Navarro and you should return your verdict against them and in favor of the defendant as against both of them."

With regard to the instructions just quoted, appellant argues that there is nothing in the record to justify any instruction upon the subject of the negligence of the daughter being imputed to the mother.

Appellant further contends that "the court erred in instructing the jury that the negligence of the plaintiff would bar recovery if the same contributed to the injuries in the slightest degree or in any manner whatsoever". In this regard appellant argues that "Negligence of the plaintiff, in order to bar recovery, must be a proximate cause of the injury. That is to say, as expressed by some of the courts, it must be such that without it the injury would not have occurred. The courts have repeatedly stated that if the negligence of the plaintiff only remotely contributed to the injury as distinguished from proximately contributing, it does not bar recovery. They have also repeatedly held that the term 'proximately contributing' means that the negligence must contribute to that degree that without it the injury would not have resulted."

It should be noted, however, that the court instructed the jury as to the meaning of "proximate cause" and also further instructed the jury, with regard to contributory negligence, that, "To be of any consequence in such action, it (contributory negligence) must have proximately contributed to the happening of the accident and hence to any injury received therein."

From a review of the entire record and, in particular, from an examination of all of the instructions, it cannot be said that the jury was misled by the alleged faulty instructions which appellants contend were prejudicial.

[2] The theory of agency, in connection with which the court instructed the jury, was warranted by the evidence. (*Gates v. Pendleton*, 184 Cal. 797, 195 P. 664; *Maberto v. Wolfe*, 106 Cal.App. 202, 289 P. 218; *Jacobus v. Brero*, 190 Cal. 374, 212 P. 617); and the instructions given on the subject were adequate.

There being no prejudicial error in the record, the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

35 Cal.App.2d 88

HENDERSON v. BRADEN et al.

Civ. 5965.

District Court of Appeal, Third District,
California.

Oct. 9, 1939.

Rehearing Denied Nov. 9, 1939.

1. New trial ⇨163(2)

Where trial was had before a jury, an order granting plaintiff's motion for new trial in general terms would be presumed not to have been based on insufficiency of evidence to support verdict for defendants. Code Civ.Proc. § 657.

2. Automobiles ⇨244(43)

Evidence held to show that motorist, who was killed when his automobile collided with truck at right angle intersection, was contributorily negligent as a matter of law, on ground that road on which truck approached intersection was visible for a long distance to motorist and that motorist could have seen truck and have avoided collision if motorist had exercised ordinary care in respect to looking ahead.

3. Automobiles ⇨226(2)

Where truck driver entered intersection at lawful rate of speed before motorist entered intersection, motorist's failure to yield right of way precluded recovery for death of motorist in collision with truck, where such failure contributed directly to collision. Vehicle Code, § 550(a), St.1935, p. 186.

4. New trial ⇨27

Where evidence as a whole is insufficient as matter of law to support verdict in favor of moving party, order granting motion for new trial cannot be sustained.

5. Appeal and error ⇨843(2)

Where evidence as a whole was insufficient to support any other verdict than that found by jury, District Court of Appeal would not determine whether trial court erred in giving instruction at request of appellants and whether counsel for appellants was guilty of prejudicial misconduct.

of automobile accident. From an order granting plaintiff's motion for new trial after verdict for defendants, the defendants appeal.

Order reversed.

Honey & Mayall, of Stockton, for appellants.

Darrah & Ellis, of Stockton, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is a wrongful death action arising out of an automobile accident which occurred on September 14, 1936, in San Joaquin county, California. On this day one S. T. Henderson, decedent, seventy-four years of age, and husband of plaintiff herein, was driving an Oldsmobile sedan automobile in a northerly direction on the Lower Sacramento road at a point where the same intersects with a crossroad known as Armstrong lane. Defendant and appellant Eugene Braden was driving and operating a truck in a general easterly direction along Armstrong lane, at the time and place of the happening of the accident, and was driving as the employee of defendant and appellant Neil C. Locke. Both drivers were the sole occupants of their respective vehicles.

[1] The trial was had before a jury, which rendered a verdict in favor of defendant. Plaintiff made a motion for a new trial, and the motion was granted in general terms. Under such circumstances, it will be presumed that the order was not based upon the insufficiency of the evidence. Code Civ.Proc. § 657. The appeal is taken from said order.

It is contended by appellants that the trial court erred in granting the motion for new trial, for the reason that the evidence shows that the deceased was guilty of contributory negligence as a matter of law. The collision occurred at 10 o'clock in the morning on a clear day. The intersection was a right angle one. There is no curve on either road for a distance of a half mile or more from the intersection. There is nothing to obstruct the view of the intersection, and the Armstrong road approaching the intersection is visible for a long distance, in respect to one approaching the intersection on the Lower Sacramento road from either the north or the south. Defendant Braden, called as an adverse witness by plaintiff, testified that he came to a stop when he reached the intersection; that he started up and

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Ada Henderson against Eugene Braden, Neil C. Locke, and John Doe, truck owner, for wrongful death arising out

entered the intersection, and had proceeded to a point where the front wheels of his truck were on the white line making the center of the Lower Sacramento road; that he then saw the deceased approaching, and practically stopped his car; that the deceased was traveling at the rate of fifty-five or sixty miles per hour; that the car of deceased was struck by the front of his truck, damaging the bumper and front fender slightly, that the Oldsmobile skidded for some twenty-five feet, and then turned over twice. Witness Davis, *for plaintiff* (a stranger to both parties), saw the collision as he was driving toward the intersection from the north. He testified that he saw the truck approach the intersection and stop, and then proceed across at the rate of fifteen miles per hour; that he saw the truck enter the intersection, and *at that time* did not see the car of deceased, and that after the collision, the latter car came to rest about one hundred fifty feet from the point of contact. There were no skid marks left by the Oldsmobile as it approached the intersection, and no evidence of any attempt upon the part of deceased to slow down before the collision. On the other hand, the uncontradicted evidence shows that the driver of the truck used considerable care in crossing the Sacramento road. He stopped, and then proceeded at a lawful and reasonable rate of speed as he entered the intersection.

[2] We agree with the contention of appellants that the record shows deceased was guilty of contributory negligence as a matter of law. Under the facts here, the only reasonable inference to be drawn is that if deceased had used ordinary care in respect to looking ahead, he would have seen the truck and, by the exercise of due care, avoided the collision. If he did see the truck, his conduct would clearly amount to negligence, as there is no evidence to show that he slackened his speed or applied his brakes on approaching the intersection. Under the facts and circumstances here proven, the only reasonable inference to be drawn is that if he had looked, he must have seen the truck, not only when it stopped at

the intersection, but also after it had entered the intersection.

[3] There is also the matter of contributory negligence arising out of the violation of statutory law.

Section 550 (a) of the Vehicle Code, St. 1935, p. 186, provides: "The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway."

Giving plaintiff the benefit of every favorable inference, fairly deducible, and every favorable presumption fairly arising from the evidence produced in her behalf, the evidence here shows without contradiction that the driver of the truck entered the intersection, at a lawful rate of speed, prior to and before deceased entered it. The failure upon the part of deceased, to yield the right of way, contributed directly to the injury, and this established a complete defense to the action. 19 Cal.Jur., p. 632, par. 65.

[4] It is well settled that where the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a motion for new trial cannot be sustained. *Moss v. Stubbs*, 111 Cal.App. 359-363, 295 P. 572, 296 P. 86, where numerous cases are cited.

[5] It is urged by respondent that the trial court erred in respect to giving an instruction at the request of appellants, and that counsel for appellants was guilty of prejudicial misconduct. In view of the fact that the evidence as a whole is insufficient to support any other verdict than that found by the jury, we do not deem it necessary to discuss these matters.

We have gone over the entire record, and are satisfied that the jury reached the only verdict possible under the law and the facts.

The order granting the motion for new trial is reversed.

We concur: THOMPSON, Acting P. J.; DEIRUP, Justice pro tem.

35 Cal.App.2d 23

PEOPLE v. ANDERSON et al.

Cr. 3150.

District Court of Appeal, Second District,

Division 2, California.

Oct. 2, 1939.

Hearing Denied Nov. 1, 1939.

1. False pretenses ⇨49(1)

In prosecution for grand theft committed by means of contracts for sale of ore which was never mined or shipped, evidence established guilty connection of accused with those by whom contracts were actually negotiated.

2. Larceny ⇨40(3)

The fact that conspiracy was not pleaded in indictment charging grand theft did not prevent proof by prosecution of existence of a conspiracy, and instruction concerning the applicable law, after such proof was made, was proper.

3. Criminal law ⇨423(1)

The acts and declarations of co-conspirators in furtherance of the object of the conspiracy are admissible as against all the conspirators.

4. Criminal law ⇨673(4), 1169(3)

In prosecution for grand theft, admission of statement made by one of three defendants to district attorney at time of his arrest was not reversible error as to codefendant, where record showed that statement was received in evidence only as against defendant by whom it had been made, and where codefendant while a witness made substantially the same statement.

5. Licenses ⇨18½

A purchase and sale agreement covering a designated commodity is not a "security" under common understanding nor within the Corporate Securities Act requiring a permit to be obtained from the Corporation Commissioner. St.1937, p. 1428, § 2, subd. 7.

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

6. Licenses ⇨18½

Contracts for sale of ore were not "securities" within requirement of Corporate Securities Act that permit be obtained from the Corporation Commissioner, notwithstanding buyers were guaranteed a return of double the purchase price of the ore, so that conviction for violation of the act of one alleg-

edly participating in transaction was unauthorized. St.1937, p. 1428, § 2, subd. 7.

McCOMB, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

L. W. Anderson, A. S. Barricklow, and J. L. Harper were charged in an indictment with violation of the Corporate Securities Act and with grand theft. Anderson and Harper were convicted, and Harper appeals.

Conviction for grand theft affirmed; conviction for violation of the Corporate Securities Act reversed.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

For prior opinion, see 91 P.2d 241.

Harry T. Young, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Warner I. Paul, Deputy Atty. Gen., for the People.

WOOD, Justice.

The defendants, Anderson, Barricklow and Harper, were jointly charged in an indictment containing forty counts with the crimes of violation of the Corporate Securities Act (St.1917, p. 673, as amended) and of grand theft. Defendant Barricklow fled and was not apprehended. Defendants Anderson and Harper were convicted on various counts charging both offenses. Defendant Harper prosecutes this appeal from the judgments and from the order denying his motion for a new trial.

Appellant contends that, even if it be conceded that Anderson and Barricklow are guilty of grand theft, the evidence is insufficient to show his complicity in their criminal transactions. Defendants Anderson and Barricklow were in personal control of an office in the city of Long Beach, which they used as headquarters for making agreements with various persons for the sale of ore to be shipped from mines in San Bernardino county and in the state of Arizona to a smelting company in Salt Lake City. The following is typical of the agreements signed, each of which is entitled, "Bill of Sale": "Know All Men By These Presents: That the Star of Cima Mines, party of the first part, for and in consideration of the sum of One Hundred twenty five dollars (\$125.00) legal tender of the United States of America, to me in hand paid by Nettie A. Barton, party of the second part, the receipt whereof is hereby

acknowledged, do by these presents sell unto the said party of the second part, his executors, administrators and assigns, Fifty (50) tons of ore at the Star of Cima Mines, said ore to be shipped to the American Smelter and Refining Company at Salt Lake City, Utah, within Ninety (90) days from date. It is agreed that the Star of Cima Mines will remit direct to the said Nettie A. Barton the sum of Two Hundred fifty dollars (\$250.00). It Is Further Agreed that should the shipment not be sufficient to bring a net return of the required (\$250.00) the party of the first part agrees to make a further shipment immediately to cover the deficit. Unavoidable Delays. It is further agreed that the obligations imposed upon the first party may be suspended by the elements, accidents, strikes, lock-outs, riots, delays in transportation, or interference by State or Federal action, or causes beyond the control of the first party. Dated this 1 day of December 1934 Witness: (Signed) Georgene Williams (Signed) L. W. Anderson Party of the first part Star of Cima Mines (Signed) Nettie A. Barton Party of the second part". In two of the counts Anderson was named in the bills of sale as first party and the ore was designated as being "at the J and J and Klondyke Mines near the Colorado River, Mojave County, Arizona."

No ore was ever mined or shipped and defendants did not have any facilities for mining or shipping the ore. No mine was in existence bearing the name "Star of Cima". The evidence is overwhelming that Anderson and Barricklow were defrauding the parties with whom the contracts were made and that they were guilty of grand theft in making false representations to prospective purchasers that the ore was available for shipment and was being shipped and that other people had actually doubled their money in similar transactions.

[1] The evidence is sufficient to establish the guilty complicity of appellant in the operations of Anderson and Barricklow. Under date of November 19, 1934 appellant and Anderson signed an instrument concerning the purchase of ore which is as follows: "Know All Men By These Presents: That, whereas, the undersigned, party of the first part, is the owner by location of the Arizona Belle or Tres Hom-bres Malos group of mining claims in the Klondyke district, Mohave county, Arizona, and by lease and bond of the Jim and Jerry

group of mining claims in the same district, county and state, and which said two groups of mining claims contain developed, partly developed, and, in place, a large tonnage of commercial gold ore; and the said party, and his associates, are desirous of developing, mining, extracting, milling and shipping and smelting ore from the said premises, and to that end are in need of funds; and Whereas, the party of the second part, agrees that he is in position, through his resources and resources of certain friends and associates, among them Mr. A. Barricklow, to provide certain funds for the purposes named, and that he will engage to do so provided security be given in the form of a bill of sale of a tonnage of commercial-grade ore sufficient, after all costs of developing, mining, trucking, milling or smelting, and royalty, if any, have been deducted, to yield at least double the amount of purchase price, to provide the said funds as and when needed, it being expressly understood that the said funds are for the purpose of creating mine production and the further purpose of providing milling facilities on the ground. Now, therefore, the party of the first part, for and in consideration of the sum of One Dollar, in hand paid him by the party of the second part, and other valuable considerations, does hereby sell, convey and set over unto the party of the second part, and through him to his associates, five thousand (5000) tons of said commercial ore, and an option for five thousand tons additional, at the price of \$2.00 per ton, against the purchase price of which the party of the second agrees to make certain payments per week or month in a manner best to serve the developing and operating needs of the party of the first part; and that the party of the first part will mine and deliver or cause to be mined and delivered to the order of the party of the second part, such part or all of the above-named tonnage as can be so mined and delivered with the facilities provided, and as can be shipped and smelted, or milled at commercial or leased plants, or treated on the ground, it being understood that the party of the first part will do his utmost in this connection consistent with the means provided but that this obligation shall not prevail as against impracticable or impossible marketing conditions, until our own mill is installed, or against contingencies commonly ascribed to acts of God." Appellant testified that to carry out the terms of this agreement would involve him in a loss

of approximately \$110,000. His only explanation was that he needed the money for operation and considered it good business in the long run.

Appellant's direct connection with the activities of Anderson was otherwise shown by a number of witnesses. J. B. Mighton testified that he was the owner of a mine known as the "Morning Star Mine" in the vicinity of Cima and that in the year 1934, the month not being remembered, appellant and defendant Anderson and one Truax examined his mining property and took samples, but the witness did not give any of them a contract by which they were entitled to operate the property. In answer to the question, "Now do you know when the name 'Star of Cima' was decided upon?" the appellant, while making a statement concerning his contracts, answered, "No, that was Mr. Anderson, he decided upon that, to use that as what I considered at the time, for a covering term for our contracts. I never understood that he assumed it had any direct connection with the Arizona or California property." The letterheads in the Long Beach office carried the names of Anderson, Barricklow and Harper in type of equal size above the words in larger type, "Star of Cima Mines".

Appellant owned no property in the Cima district and his only interest in Arizona property was by way of a so-called "bond and lease" permitting him to operate certain mining property but in which he was in default on his payments to the owners. Appellant claimed to be in need of money to operate the Arizona mine and had no ore ready for shipment or means for mining or shipping ore. According to his statement he depended upon Anderson and Barricklow to provide him the means for mining and shipping the ore but the means adopted turned out to be the fraudulent agreements which they made with their victims in Long Beach, agreements in which by the jury's implied finding, appellant had guilty participation. Appellant was in frequent communication with Anderson by wire and letter. On September 30, 1934 he wrote Anderson as follows: "Dear Mr. Anderson: Responding as to the probable outlook during the month of October, it will be within the capacity of our operations to have say 21 cars during that period. Endeavor will be made to steadiness in output so all commitments made or planned in connection therewith will be promptly met. Sincerely yours, J. L. Harper." Some of the witnesses tes-

tified that they had seen communications to Anderson over the signature of appellant. Since appellant had no facilities for mining and shipping the ore it is reasonable to conclude that fraudulent communications were sent by appellant for the purpose of aiding Anderson and Barricklow in duping the public.

That appellant was informed concerning the type of contract being made with the public by Anderson could readily be inferred from his own testimony in which he admitted a number of his activities set forth herein. He also admitted that he had signed in blank and given to Mr. Truax for the purpose of raising money instruments similar in form to those being used by Anderson. These instruments were as follows: "Know All Men By These Presents: That (blank), party of the first part, for and in consideration of the sum of (blank) dollars, legal tender of the United States of America, in hand paid by (blank), party of the second part, the receipt whereof is hereby acknowledged, does by these presents sell unto the said party of the second part, his executors, administrators and assigns (blank) tons of ore at the Arizona Belle, Tres Hombres Malos Mines, near the Colorado River, Mojave County, Arizona. Said ore to be shipped to a custom smelter or mill where the best treatment rate is procured, within (blank) days from date hereof. The smelter or mill to remit directly to the said (blank) the sum of (blank) dollars. It is further agreed that should the shipment not be sufficient to bring a net return of the expected sum, the party of the first part will make a further shipment required to cover the deficit. Unavoidable delays: It is further agreed that the obligations imposed upon the first party as to manner or time of shipment may be suspended by the elements of accidents, strikes, lockouts, riots, delays in transportation, embargoes, or interference by State or Federal action, or other causes beyond control of parties of first part. Dated this 18th day of December, 1934." Several of these instruments were used and the blank spaces filled out in such manner that the purchasers were guaranteed a return of double the purchase price.

Appellant signed a "Memorandum of Co-Partnership" before a notary and caused it to be recorded in the office of the county recorder of San Bernardino county, in the following language: "Memo of Co-Partnership, This Is To Certify; that the mine

development and mining operations carried on under the name 'J. L. Harper, Managers' in San Bernardino County, California, in the Cima and other districts and in the Klondyke district, of Mohave County, Arizona, is by and for a Co-partnership, composed of J. L. Harper, of Los Angeles, California and his associates: and L. W. Anderson, of Long Beach, California; and his associates; and that the said Co-partnership is for the purpose of examining, optioning, leasing, purchasing, and operating Metal Mines, etc., and that the said Co-partnership is later to be resolved to a Trust Estate or a corporate entity, at which time the respective interests of all concerned will appear in Trust Estate Certificates or Corporate Shares; that the mine control and operations are in the hands of J. L. Harper and the financial matters in the hands and under the direction of L. W. Anderson. Dated this 16th day of September, 1934. (Signed) J. L. Harper."

There is no merit in appellant's contention that the evidence fails to show appellant's guilty connection with the fraud. The jury was justified in finding that he conspired with and aided and abetted the other defendants.

[2,3] Appellant contends that the court erred in admitting evidence to prove a conspiracy and in giving to the jury a number of instructions on the subject of conspiracy. The fact that conspiracy was not pleaded in the indictment did not prevent proof by the prosecution of the existence of a conspiracy and it was proper to instruct the jury after such proof concerning the law applicable. *People v. Tanner*, 3 Cal.2d 279, 299, 44 P.2d 324. It is elementary that the acts and declarations of co-conspirators in furtherance of the object of the conspiracy are admissible in evidence as against all the conspirators.

[4] In his application for a rehearing appellant makes the point that the trial court erred in admitting in evidence the statements of defendant L. W. Anderson made to the district attorney at the time of his arrest. There is no merit in this contention. A search of the record reveals that at the time the statement of Anderson was received in evidence it was admitted as against Anderson only. In disposing of appellant's objection the trial court stated: "The statement of Mr. Harper will be received merely for the purpose of binding Mr. Harper, and not as being binding

on Mr. Anderson. And the same with the statements of Anderson, not in the presence of Harper, it will be received merely for the purpose of binding Anderson and not Harper." Moreover, it appears that Anderson while a witness at the trial made substantially the same statements as those contained in his statement to the district attorney.

Appellant makes several other criticisms concerning the admission of testimony and concerning the instructions to the jury. All of the points advanced have been directly passed upon adversely to his contentions or they are of so little importance as to make discussion inappropriate.

[5,6] A serious question is presented, however, by the contention of appellant that the evidence admitted fails to establish a violation of the Corporate Securities Act. It is conceded that no permit was obtained from the commissioner of corporations but it is argued that no permit was necessary. The prosecution argues that the instruments signed by Anderson and the various residents of Long Beach, which are termed bills of sale, are in fact securities as defined by subdivision 7 of section 2 of the Corporate Securities Act (St.1937, p. 1428), which reads as follows: "7. Security. The word 'security' shall include any stock, bond, note, treasury stock, debenture, evidence of indebtedness, certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining title or lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in title to property, profits or earnings, guarantee of a security and any certificate of deposit for a security." It is apparent that defendants did not sell a "beneficial interest in title to property, profits, or earnings", since the instruments show a direct sale of a definite number of tons of ore located at a designated mine. The fact that defendants guaranteed a return of double the purchase price of the ore does not change the nature of the instrument. The prosecution cites *People v. White*, 124 Cal.App. 548, 12 P.2d 1078; *People v. Claggett*, 130 Cal. App. 141, 19 P.2d 805; *People v. Coyle*, 134 Cal.App. 612, 613, 25 P.2d 991; *Domestic & Foreign Pet. Co. Ltd., v. Long*, 4 Cal.2d 547, 51 P.2d 73, and *People v. Jackson*, 24 Cal.App.2d 182, 74 P.2d 1085. In all of these cases, however, the parties obtained instruments showing that an interest only had been obtained in the prop-

erty being sold or that the transactions evidenced an investment in the concerns operated by the defendants. In the case now before us the parties purchased the ore outright and made no investment in the business conducted by defendants. A purchase and sale agreement covering a designated commodity is not a security under the common understanding of the term or by the definition in the Corporate Securities Act. Since it was not necessary for defendants to obtain a permit from the commissioner of corporations to sell the ore referred to in the indictment, the convictions charging violation of the Corporate Securities Act cannot be sustained.

The judgments and order denying a new trial in respect to the counts charging grand theft, counts III, IV, VII, IX, XII, XXIX, XXXIV, XXXVII, XXXIX, and XXXX are affirmed. The judgments and order denying a new trial with respect to the counts charging violation of the Corporate Securities Act, counts, I, II, V, VI, VIII, X, XI, XIII, XVI, XVII, XVIII, XX, XXI, XXII, XXIV, XXV, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, and XXXVIII, are reversed.

MOORE, Presiding Justice (concurring).

I concur. The testimony of the defendant Anderson, an accomplice, tells the tale of a sordid conspiracy of two life-long friends, formerly united by family ties. Both, without funds, decided upon procuring by some means a mine of some sort to use as a basis for the sale of something to get money. Their working together resulted in appellant's lease of the Arizona property. It is not necessary that the conviction of appellant should have been founded upon the testimony of witnesses other than that of his accomplice. It is sufficient that evidence outside of his confederate's story tend to connect defendant with the commission of the crime. *People v. Cloonan*, 50 Cal. 449; *People v. Zimmerman*, 65 Cal. 307, 4 P. 20; *People v. McLean*, 84 Cal. 480, 482, 24 P. 32; *People v. Davis*, 135 Cal. 162, 67 P. 59; *People v. Watson*, 21 Cal.App. 692, 132 P. 836.

The witness Heldt saw telegrams from appellant stating that a number of tons of ore were available. Appellant admitted that, from time to time, he was expected to ship so many car loads or tons at a certain period; that he knew of the form of contract used by his co-defendants in making sales; that he had signed in blank and

given such a form to the witness Truax for the purpose of raising money after the same fashion; that said form was identical with that used by Anderson and Barricklow in their sale to Schadandorf; that he learned of the sales of ore by his confederates from several sources; that he wired Anderson that he expected to "ship so many car loads or tons within a certain period", and that he knew that Anderson and Barricklow were carrying on "a movement satisfactory to the Securities Commission on selling ore tonnage".

Appellant's letter to Anderson, in the early days of the enterprise, stating that he would be able to get out "twenty-one cars" during the month of October, and of his purpose to make the output steady "so all commitments made or planned in connection therewith will be promptly met", was a potent factor in the proof of his complicity in Anderson's sales of ore. Also, after Anderson, in his anxiety, sought assistance of appellant in improving the form of the bill of sale, appellant procured advice and an improved form, and forwarded it to Anderson with the statement that it was "bullet proof". Moreover, appellant entered into contracts like those used by Anderson and Barricklow while "he had no facilities for fulfilling them".

Although appellant sent money to take up the contracts sold by his co-defendants, no ore was ever mined or shipped. None was ever milled. Equipment for mining and transportation was so insignificant as to make it unworthy of mention.

Having knowledge of the sales campaign carried on by his co-defendants, knowing that only by his work and by the properties under his control were the fulfillment of those contracts possible, and that he had no satisfactory facilities for mining or transporting or milling,—these facts being established outside of the testimony of his confederates, nothing more is required to establish the reasonableness of the inference drawn by the jury.

McCOMB, Justice (concurring and dissenting).

I concur in the judgment reversing counts I, II, V, VI, VIII, X, XI, XIII, XVI, XVII, XVIII, XX, XXI, XXII, XXIV, XXV, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, and XXXVIII. I dissent from the judgment affirming the conviction on counts III, IV, VII, IX, XII, XXIX, XXXIV, XXXVII, XXXIX, and XXXX.

Viewing the evidence most favorable to respondent, the essential facts are:

On November 19, 1934, appellant entered into an agreement to sell defendant Anderson 5000 tons of gold bearing ore at the price of \$2 per ton. He received on account of this contract \$3,400. Thereafter defendants Anderson and Barricklow, without first obtaining a permit from the corporation commissioner, entered into agreements with a number of persons, of which the following is typical:

"Bill of Sale

"Know All Men by These Presents:

"That the Star of Cima Mines, a party of the first part, for and in consideration of the sum of One Hundred twenty five dollars (\$125.00) legal tender of the United States of America, to me in hand paid by Nettie A. Barton, party of the second part, the receipt whereof is hereby acknowledged, do by these presents sell unto the said party of the second part, his executors, administrators and assigns, Fifty (50) tons of ore at the Star of Cima Mines, said ore to be shipped to the American Smelter and Refining Company at Salt Lake City, Utah, within Ninety (90) days from date. It is agreed that the Star of Cima Mines will remit direct to the said Nettie A. Barton the sum of Two hundred fifty dollars (\$250).

"It is further agreed that should the shipment not be sufficient to bring a net return of the required (\$250.00) the party of the first part agrees to make a further shipment immediately to cover the deficit.

"Unavoidable Delays. It is further agreed that the obligations imposed upon the first party may be suspended by the elements, accidents, strikes, lockouts, riots, delays in transportation, or interference by State or Federal action, or causes beyond the control of the first party.

"Dated this 1 day of December, 1934

"(Signed) L. W. Anderson

"Party of the first part

"Star of Cima Mines

"Witness:

"(Signed) Georgene Williams

"(Signed) Nettie A. Barton

"Party of the second part"

Received payment in full

These two defendants represented to the parties with whom they were dealing that they would double their money by entering into the transactions. In each instance charged in the indictment, not only did the parties dealing with defendants Anderson and Barricklow not receive double their money, but neither their investment nor any portion thereof was returned to them.

Appellant relies for reversal of the judgment on this proposition:

There is no substantial evidence to sustain the implied findings of fact of the jury upon which the judgments against him were necessarily predicated, to-wit, that he had conspired with his codefendants to commit the various violations of the Corporate Securities Act and grand thefts charged in the indictment.

This proposition is tenable. An examination of the record fails to disclose any evidence that appellant had knowledge of or participated in any way in the various transactions which took place between his codefendants and the complaining witnesses. The only evidence connecting appellant in any way with the transactions was that he entered into the agreement of November 19, 1934, with defendant Anderson mentioned above and that on several occasions he telegraphed his codefendants that certain quantities of ore had been mined by him, and on September 30, 1934, wrote defendant Anderson the following letter:

"Dear Mr. Anderson:

"Responding as to the probable outlook during the month of October, it will be within the capacity of our operations to have say 21 cars during that period. Endeavor will be made to steadiness in output so all commitments made or planned in connection therewith will be promptly met.

"Sincerely yours,

"J. L. Harper."

It thus appears that the record is devoid of any evidence even slight which connects or tends to connect appellant with any of the crimes of which he was convicted.

For the foregoing reasons the judgments appealed from should in my opinion be reversed and a new trial granted.

35 Cal.App.2d 73

PEOPLE v. SMITH.

Cr. 3256.

District Court of Appeal, Second District,
Division 2, California.

Oct. 5, 1939.

Hearing Denied Nov. 3, 1939.

1. Gaming ☞98(5)

In prosecution for maintaining a place where bets on horse races could be registered, evidence that defendant who maintained a news stand, on his arrest, had a scratch sheet and several betting markers upon his person with various notations of horses and bets and that defendant maintained two telephones at stand was sufficient to justify conviction. Pen.Code, § 337a, subds. 2, 3, 5.

2. Criminal law ☞878(3)

In prosecution for maintaining a place where bets could be registered, fact that defendant was found not guilty on charge of placing a bet did not preclude trial judge from finding defendant guilty of maintaining a place where bets could be registered. Pen. Code, § 337a, subds. 2, 3, 5.

3. Gaming ☞75(1)

In prosecution of a news stand owner for maintaining a place where bets could be registered, it was not necessary for prosecution to establish that primary purpose of maintaining news stand was to register bets, since it was sufficient that defendant maintained place and kept paraphernalia designed for recording bets. Pen.Code, § 337a, subd. 2.

4. Gaming ☞98(5)

In prosecution of a news stand owner for maintaining a place where bets could be registered, defendant's intent to maintain such a place could be properly gathered from all the circumstances as shown in evidence. Pen.Code, § 337a, subd. 2.

5. Criminal law ☞561(1)

In criminal prosecution every factor essential to establishing of complete case must be proved beyond reasonable doubt.

6. Criminal law ☞260(11)

Under rule that in criminal prosecution every factor essential to establishing of complete case must be proved beyond reasonable doubt, it is a matter for the trial judge to be persuaded beyond a reasonable doubt, and not reviewing court.

7. Criminal law ☞1159(2)

On appeal from a conviction, province of reviewing court is to determine whether evidence is of such character as, if believed, justifies conviction.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Harry Smith was convicted of maintaining a place and keeping paraphernalia for purpose of recording bets on horse races, and he appeals.

Affirmed.

Clifford Thoms, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

MOORE, Presiding Justice.

Defendant appeals from a conviction by the court for violating subdivision 2 of section 337a of the Penal Code, which forbids the keeping of any place of any kind with a book, paper or device for the purpose of registering any bet upon the result of any contest between beasts, etc. In the same information, he was accused of violating subdivision 3, that is, of holding money wagered upon the result of such a contest, of which he was found not guilty. Since his appeal is founded upon a contention of the insufficiency of the evidence, a résumé thereof follows:

Defendant operated a news stand in the heart of the business district of the city of Los Angeles at the side of one of the large office buildings. The stand extended from the corner of the building and along its side adjacent to an alley. It consisted of news racks about ten feet high and one hundred fifty feet long. Maintaining an extensive stock of magazines and foreign newspapers, defendant had operated the place for sixteen years. He kept two telephones, one on each side of his cash register, on his desk. The record is devoid of his ever having taken bets before.

[1] On the morning of April 18, 1939, one Dougherty, a police officer of said city, observed an elderly lady enter said news stand, holding a scratch sheet and obviously placing a bet, and at the same time a man did place a bet. Defendant served both parties. The officer then heard defendant converse over his own telephone, giving the numbers of the horses, the amounts

of the bets and the initials of the two persons above mentioned. The numbers given by the two patrons were numbers which represented two different horses running at two different tracks on said day. Returning in the afternoon, said officer observed one Chapman inspecting a scratch sheet on defendant's said desk; heard said Chapman ask defendant to give him "683 to place", accompanying said request with the delivery of a ten-dollar bill to defendant. Upon his arrest, defendant, addressing said Chapman, called out, "Charlie, you didn't make a bet with me, did you?" to which the said Chapman replied: "Well, let's skip it." Upon his arrest, defendant had a scratch sheet and several betting markers upon his person with various notations of horses and bets. The possession of said paraphernalia, namely, the scratch sheet and telephones, taken in connection with the other circumstances above detailed, was sufficient to warrant a conviction. *People v. Carroll*, 54 Cal.App. 684, 202 P. 885; *People v. Sutherland*, 59 Cal.App. 462, 210 P. 965; *People v. Hatfield*, 77 Cal.App. 212, 217, 246 P. 95, 97.

Defendant's contention that there is no evidence that the scratch sheet inspected by said Chapman belonged to defendant is groundless. The sheet lay upon said desk and by said telephones. His explanation of his possession of said markers found upon his person was essentially of little value in the midst of the circumstances above detailed and its ardent recital justifiably failed to excite the credulity of the trial judge. "These documents cast a convincing light upon the transaction, and constituted the major element of the offense charged." *People v. Hatfield*, supra.

[2-4] Defendant asserts that his guilt was not established because the court found in his favor on the charge of placing a bet inhibited by said subdivision 3. Proof of his placing a bet is no more necessary to justify a conviction for maintaining a place where bets can be registered than is a violation of subdivision 3 necessary to a conviction under subdivision 5; otherwise the legislature would have so provided. Also,

the argument that the state must prove that the primary purpose of maintaining the place was to register bets is unreasonable. Such a construction of the statute would afford protection to many persons who would happily carry "book making" as a secondary line. It is sufficient that defendant maintained the place and at it kept paraphernalia for the purpose of recording a bet and his "intent may be gathered from all the circumstances shown in evidence". *People v. Tuttle*, 27 Cal.App.2d 647, 81 P.2d 571.

Defendant earnestly asseverates that the case of *People v. Rabalet*, 28 Cal.App.2d 480, 82 P.2d 707, is authority for reversing this judgment. The chief similarity lies in the fact that this defendant and some person in Rabalet's store, in like manner and by like method, kept at hand paper and device for recording bets. Since any clerk in said store might, as easily as the proprietor, have kept the scratch sheet and have concealed the markers in a book, under the familiar limitations upon the application of circumstantial evidence, he was entitled to an acquittal.

Furthermore, as pointed out in that case, in order to convict upon his utterances, it was necessary for the court to "assume" that defendant was taking a bet as he gave expression to the phrase "242 to show", whereas conviction for crime must be founded upon evidence. Likewise, *People v. Fisk*, Cal.App., 89 P.2d 142, is not in point.

[5-7] With the statement of defendant that every factor essential to the establishment of a complete case must be proved beyond reasonable doubt, we are in accord; but it is a matter for the trial judge to be persuaded beyond a reasonable doubt and not this court. *People v. Bargala*, 81 Cal. App. 381, 253 P. 938. Our province is to determine whether the evidence is of such character as, if believed, justifies conviction. Upon that question, we have no doubt.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

PEOPLE v. KNOTT.

Cr. 1688.

District Court of Appeal, Third District,
California.

Oct. 3, 1939.

Hearing Granted Nov. 1, 1939.

1. Embezzlement ☞35

Under indictments charging county auditor with embezzling money "in her possession or under her control, by virtue of her trust," proof tending to show that county auditor wrongfully drew warrant on special highway fund in actual possession of county treasurer for purported payment of interest coupons of highway bonds which had previously been paid, and that she obtained money from county treasurer by means of presenting false claims to board of supervisors for alleged expenses incurred in installing double entry bookkeeping system in auditor's office, was fatal variance. Pen. Code, § 504.

2. Embezzlement ☞9

The statute providing that any officer of state, county, city, city and county, or other municipal corporation or subdivision thereof, who fraudulently appropriates to any use or purpose not in the due lawful execution of his trust, any property which he has in his possession or under his control, is guilty of embezzlement, refers only to "legal" control of money or property entrusted by law to such officers. Pen.Code, § 504.

3. Embezzlement ☞9

The powers of a county auditor are purely clerical with respect to bookkeeping process of checking on legality of claims presented against public funds in actual custody of county treasurer, and authority of auditor to draw warrants upon treasurer for valid claims previously ordered paid by board of supervisors does not constitute either "possession or control of public funds," within statute providing that public officer who fraudulently appropriates any property which he has in his possession or under his control by virtue of his trust is guilty of embezzlement. Pen.Code, § 504.

Luella Knott was convicted of embezzlement, and she appeals.

Reversed and defendant discharged.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellants.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Acting Presiding Justice THOMPSON delivered the opinion of the court.

Two indictments for embezzlement under section 504 of the Penal Code were returned against the defendant as auditor of Butte county. The first indictment charged her with embezzling \$625, coming into her possession and under her control by virtue of her trust as auditor. This money was drawn from a special highway bond fund in the actual possession of the county treasurer, by means of a warrant wrongfully drawn by the defendant in favor of the Chico branch of the Bank of America for the purported payment of thirty-seven interest-bearing coupons of highway bonds, which had been previously paid. That sum was credited to the private bank account of the defendant, but was subsequently refunded to the county treasury. The second indictment which was couched in two counts charged the defendant with embezzling separate sums of \$110 and \$270 alleged to have come into her possession and under her control by virtue of her trust as auditor. The last-mentioned sums were obtained from the county treasury by means of warrants drawn by the defendant in favor of First National Bank of Oroville and Anglo California National Bank, respectively, in payment of two claims for those amounts which had been previously approved and allowed by the board of supervisors of Butte county, for alleged expenses incurred by the county auditor in installing in the auditor's office a double-entry bookkeeping system. These last-mentioned sums were credited to the defendant's private bank account and appropriated by her to her own use. The claims which were presented to and allowed by the board of supervisors were false, since the expense had not been incurred by the auditor, and no such system was installed in her office. The defendant failed to take the witness stand in her own behalf.

The cases growing out of the two indictments were consolidated for trial. The defendant was convicted by a jury of all the charges against her. Motions for di-

Appeal from Superior Court, Butte County; Ben R. Ragain, Judge.

rected verdicts and in arrest of judgment were denied. From the order denying a new trial and from the judgment of conviction this appeal was perfected.

[1] We are persuaded there is a fatal variance between the allegations of the indictments and the evidence upon which the defendant was convicted. She may have been guilty of procuring from the county treasury the money involved in the last indictment by means of presenting false claims to the board of supervisors contrary to the provisions of section 72 of the Penal Code, or she may have been guilty of grand theft under the provisions of section 484 of that code, but, under the uncontradicted evidence of this case, as auditor of Butte county, she was not guilty of embezzling money in her possession or under her control by virtue of her trust. Clearly she was not entrusted as auditor of Butte county with any of the money she was charged with appropriating to her own use. The special highway bond fund from which she procured the \$625 involved in the first indictment, and the general county fund from which she procured the sums of money involved in the second indictment, were entrusted by law to, and in the actual possession of, the county treasurer. Neither of these funds was in the possession or custody of the auditor by virtue of her trust or otherwise.

[2,3] Nor do we think either of these funds was under her control by virtue of her trust as auditor so as to constitute embezzlement in contemplation of the language of section 504 in that regard. That section provides: "Every officer of this state, or of any county, city, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

We assume the preceding section refers only to the legal control of money or property entrusted by law to the officers and their deputies and agents which are mentioned therein. A county auditor is not vested by law with the control over the

public funds of a county. The powers of an auditor, as defined by the Political Code, are purely clerical or ministerial with respect to the bookkeeping process of checking on the legality of claims presented against the public funds in the actual custody and control of the county treasurer. With respect to such claims as were involved in the second indictment, the auditor is authorized to draw warrants upon the treasurer therefor only after they have been "legally examined, allowed, and ordered paid by the board of supervisors". Sec. 4091, Pol.Code. With respect to the \$625 involved in the first indictment, it is only by virtue of the law which authorized the issuing of the highway bonds and the payment of interest coupons thereof, that the auditor was empowered to draw warrants upon the treasurer for such claims. In no sense is the auditor a trustee of these public funds in the custody of the county treasurer. We are impelled to hold that such mere clerical or ministerial authority for an auditor to draw warrants upon the treasurer for valid claims previously allowed and ordered to be paid by a board of supervisors does not constitute either such possession or control of public funds in the exclusive custody of the county treasurer as is contemplated by section 504 of the Penal Code so as to constitute embezzlement under the circumstances of this case.

In the case of *Ex parte Huston*, 27 Idaho 231, 147 P. 1064, 1066, cited by the appellant in this case, the petitioner, after conviction by a jury, was released from custody. The petitioner, as state auditor, was charged with the wrongful appropriation of a sum of money under section 6975 of the Revised Codes of Idaho, which provides in part:

"Each officer of this State, or any county, city, town, or district of this State, and every other person charged with the receipt, safe keeping, transfer, or disbursement of public moneys, who either:

"1. Without authority of law, appropriates the same or any portion thereof to his own use, or to the use of another; * * *." is guilty of a felony punishable by imprisonment in the state prison, and is disqualified from holding any office in that state.

It is true that the preceding statute is aimed at the appropriation of public money by an officer who is charged with the "receipt, safe keeping, transfer, or disburse-

ment" thereof, as distinguished from an officer having such public funds "in his possession, or under his control by virtue of his trust", as provided by section 504 of the Penal Code of this state. But the language of the Idaho court in the Huston case, with respect to the limitation of authority of an auditor to control or appropriate public funds in the custody of a treasurer, appears to be applicable to this case. The Idaho court said in that regard:

"In our opinion, section 6975, Rev. Codes, supra, was aimed at the crime of embezzlement, and against a particular class of persons who fraudulently appropriate to their own use, or to the use of others, not in the due and lawful execution of their trust, any property which comes into their possession or under their control by virtue of the official position which they hold, or in violation of a trust. Under the law of this state, a state auditor does not come within the class of persons against whom said section is aimed, for the reason that he is not charged, under the statute, with the receipt, safe-keeping, or disbursement of public moneys. He is but one of several whose combined acts are absolutely necessary to ultimately bring about the disbursement of public moneys.

* * *

"When penalties are directed against a particular class, a description of the class and of the defendant as coming therein, are essential elements of the crime and must be charged and proved. * * *

"The statute auditor cannot legally draw a warrant in favor of a claimant, such as the one described in the indictment, except as authorized and directed so to do by the state board of examiners. * * *

"The state treasurer is not only authorized under the law, but it is made his duty, as such officer, to refuse the payment of a state warrant drawn by the state auditor unless he is satisfied that it is a proper and legal charge against the state. * * * A warrant drawn by the state auditor is but prima facie, and not conclusive evidence of the validity of the allowed claim, and unless there is authority of law for the payment of such claim, the treasurer may refuse, and indeed it is his duty to refuse, to pay the warrant, even if funds are appropriated. * * *

"An officer not charged by law to collect, and who has no right to the public money, cannot be convicted of embezzling money received under color of his office,

though he falsely represented that he was entitled by virtue of his office to receive it."

Likewise, the statutes of California specifically limit the authority of a county auditor with respect to the payment of valid claims against either a general or special fund in the custody of the treasurer. The auditor has no authority to collect public money from the treasurer. In the language of the Huston case, supra, "he is but one of several whose combined acts are absolutely necessary to ultimately bring about the disbursement of public moneys". It is only his clerical or ministerial acts, in conjunction with the board of supervisors or other officers which authorizes the owner of the claim, and not the auditor, to gain "possession or control" of the funds. If he fraudulently cashes a warrant without the authority of the owner, he does not obtain possession or control of the money by virtue of his trust. If he is authorized by the owner of the warrant to collect the warrant and pay it to the owner, he does so as the agent of the owner, and not by virtue of his trust. Under such circumstances he would not be guilty of embezzlement for misappropriation of the funds under section 504 of the Penal Code.

In the case of *State v. Raby*, 31 Wash. 111, 71 P. 771, 772, relied on by the attorney-general, Raby, as auditor of Whitman county, was charged and convicted of larceny of a warrant for \$1,753 belonging to American Bridge Company. Section 7119 of 2 Ballinger's Annotated Codes & Statutes of Washington, under which he was indicted, reads as follows: "If any agent, clerk, officer, servant or person to whom any money or other property shall be intrusted, with or without hire, shall fraudulently convert to his own use, or shall take and secrete the same with intent fraudulently to convert the same to his own use, or shall fail to account to the person so intrusting it to him, he shall be deemed guilty of larceny, * * *."

The preceding Washington section of the code is similar to section 484 of the Penal Code of California, under which the defendant in this case might have been successfully prosecuted.

In the Washington case the warrant belonging to American Bridge Company was entrusted by it to the auditor. In affirming the judgment of conviction the court said: "He therefore had the warrant

rightfully in his custody, and also, by operation of law, held it as the agent of the owner."

Raby was charged and convicted of appropriating to his own use a warrant entrusted to him as agent. He was not charged or convicted of embezzling public funds in his possession or under his control by virtue of his trust. We are of the opinion that case is not authority for upholding the judgment in the present case.

In the case of *People v. Tennant*, 32 Cal. App.2d 1, 88 P.2d 937, which is also cited by the respondent, a judgment of conviction of the defendant of three counts of an indictment was sustained. One count was for grand theft under section 484 of the Penal Code. The other two counts were for appropriation of property by an officer and agent of Oakdale Irrigation District under section 504 of the Penal Code. The evidence shows that as an agent of the irrigation district, the defendant was authorized to sell some land belonging to it. He sold the land at \$35 an acre and received as part of the purchase price some lumber to replace a barn which

was to be reserved from the sale. The defendant then appropriated the lumber to his own use contrary to his agency and trust. Under such circumstances the lumber was in his possession and under his control by virtue of his agency and trust. He therefore violated the provisions of section 504, and he was also convicted of grand theft. The *Tennant* case is therefore not authority in support of the respondent's contention in this case.

In view of our conclusion that the appellant is not guilty of embezzlement under section 504 of the Penal Code, under the circumstances of this case, and that there is a fatal variance between the allegations of the indictments and the proof of the alleged crime, which was adduced at the trial, it is unnecessary for us to pass upon the further charge that the trial court erred in the admission of evidence and in misdirecting the jury in its charge.

The judgment is reversed; the defendant is discharged from custody and the bail bond exonerated.

I concur: TUTTLE, J.

14 Cal.2d 437

**HOUSING AUTHORITY OF COUNTY OF
LOS ANGELES v. DOCKWEILER,
Chairman of Housing Authority.**

L. A. 17273.

Supreme Court of California.

Oct. 11, 1939.

1. Constitutional law ⇨66

That power of Housing Authority of the County of Los Angeles, created to transact business in compliance with state statute relating to low-rent housing or slum clearance projects, was dependent on action of county board of supervisors declaring need for such authority to function, was not fatal to existence of authority, since local operation of a general statute may be made contingent upon determination by local authorities that conditions there require its acceptance and operation. St.1938, Ex.Sess., p. 12, § 4.

2. Constitutional law ⇨70(3)

The declared policy of the federal and state low-rent housing or slum clearance statutes, that elimination of substandard dwellings and the providing in their place of safe and sanitary dwellings of low income for those otherwise required by lack of income to remain in substandard dwellings are public uses and purposes and are governmental functions of state concern while not necessarily conclusive upon courts, is entitled to great weight, and it is not court's duty to interfere with such findings unless it clearly appears to be erroneous and without reasonable foundation. United States Housing Act 1937, §§ 1-30, 42 U.S.C.A. §§ 1401-1430; St.1938, Ex. Sess., p. 9.

3. Constitutional law ⇨70(3)

A declaration of policy by the Legislature is not necessarily binding upon the courts but is entitled to great weight, and it is not within the prerogative of courts to interfere with legislative finding unless it clearly appears to be erroneous and without reasonable foundation.

4. Counties ⇨158**Municipal corporations** ⇨861

Under the low-rent housing or slum clearance statutes, a proposed elimination of slums and the erection of safe and sanitary low-rent dwelling units for persons of prescribed restricted income to advance the public welfare and protect the public safety and morals are public uses and purposes for which public money may be expended and private property acquired. St.1938, Ex.Sess.,

p. 9; Code Civ.Proc. § 1238, subd. 21, as added by St.1938, Ex.Sess., p. 6.

5. Eminent domain ⇨17

Slum clearance and public housing projects for low-income families, being public uses, warranted granting of power of eminent domain to housing authority of the county of Los Angeles and other local housing authorities. Code Civ.Proc. § 1237, and § 1238, subd. 21, as added by St.1938, Ex. Sess., p. 6; St.1938, Ex.Sess., p. 12, § 4.

6. Counties ⇨190(1)**Municipal corporations** ⇨967(2)**Taxation** ⇨193

Under state Constitution exempting from taxation property belonging to the state or to any county, city and county, or municipal corporation, exemption of real and personal property of housing authorities from state, county, and local taxation under statute providing for low-rent housing or slum clearance projects is valid. St.1938, Ex. Sess., p. 12, § 4; Const. art. 13, § 1.

7. Counties ⇨190(1)**Municipal corporations** ⇨957(2)**Taxation** ⇨193

The provision of the low-rent housing statute exempting realty and personalty of housing authorities from state, county, and local taxation is not invalid because of the possibility of a foreclosure in which title to the property might be lost, since the status of the property as tax-exempt while in the hands of the Authority is not altered by its possible status after disposition by the authorities. St.1938, Ex.Sess., p. 12, § 4; Const. art. 13, § 1.

8. Municipal corporations ⇨225(1)

The low-rent housing or slum clearance statutes authorizing an Authority to give, its bondholders right of foreclosure does not authorize gift of Authority property, since transfer of title on foreclosure would not be a "gift" but the equivalent of "sale" of authority property. St.1938, Ex.Sess., p. 18, § 14.

[Ed. Note.—For other definitions of "Gift" and "Sale," see Words & Phrases.]

9. Taxation ⇨104, 188

The local housing authorities created under the low-rent housing or slum clearance statutes are not required to pay either income or franchise taxes, since such taxes do not purport to apply to public bodies. St.1938, Ex.Sess., p. 9.

10. Taxation $\S$ 218

The provision of the low-rent housing or slum clearance statutes exempting realty and personalty of housing authorities from taxation includes bonds issued by the authorities and income therefrom. St.1938, Ex.Sess., p. 18, § 14; Const. art. 13, § 14.

11. Counties $\S$ 21½, 22**Municipal corporations** $\S$ 266, 601

The Housing Cooperation Law authorizing any state public body to cooperate in way of zoning or rezoning or furnishing customary facilities to low-rent housing or slum clearance projects is a valid exercise of legislative power. St.1938, Ex.Sess., p. 3, § 4.

12. Counties $\S$ 22

Contract between housing authority of county of Los Angeles and county under which county agreed to eliminate in certain designated ways unsafe and insanitary dwellings was valid. St.1938, Ex.Sess., p. 3, § 4.

13. Counties $\S$ 154(1)**Municipal corporations** $\S$ 873

Under the low-rent housing or slum clearance statutes, appropriation by either city or county to housing authority established within its boundaries and acting as agent in the discharge of public function or purpose of slum clearance is not a "gift" or "loan of credit" in violation of Constitution. St.1938, Ex.Sess., p. 9; Const. art. 4, § 31.

[Ed. Note.—For other definitions of "Loan of Money or Credit," see Words & Phrases.]

14. Counties $\S$ 154(1)**Municipal corporations** $\S$ 873

The low-rent housing or slum clearance statutes are not invalid as authorizing either a city or county "to subscribe for stock or to become a stockholder in any corporation" in violation of constitutional inhibition, where no authority is given for issuance of stock. St.1938, Ex.Sess., p. 9; Const. art. 4, § 31.

15. Counties $\S$ 150(2)**Municipal corporations** $\S$ 864(4)

The low-rent housing and slum clearance statutes authorizing housing authority to issue bonds payable solely from property of the Authority issuing them do not contravene debt limit provisions of Constitution, since no "debt" is imposed on the city or county where the Authority is established. St.1938, Ex.Sess., p. 18, § 14; Const. art. 11, § 18.

[Ed. Note.—For other definitions of "Debt," see Words & Phrases.]

16. Counties $\S$ 150(2)**Municipal corporations** $\S$ 864(4)
States $\S$ 119

Provisions of statutes, authorizing housing authorities to issue bonds for low-rent housing and slum clearance projects and expressly providing that bonds are not to constitute debt of the city, county, state, or any political subdivision thereof if considered as being within the debt limitation provision of Constitution, would not contravene such provision where bonds are payable exclusively from revenues of property of the project and would not constitute a "debt" within the meaning of the provisions. St.1938, Ex.Sess., p. 18, § 14; Const. art. 11, § 18.

17. Counties $\S$ 150(2)

A loan contract between the Housing Authority of the County of Los Angeles and the United States Housing Authority, by which the former agreed to sell and the latter to buy bonds issued by the local authorities which were payable solely out of housing project revenues and any annual contributions made by the federal authority, did not violate the "debt" limitation provision of the Constitution. United States Housing Act 1937, §§ 1-30, 42 U.S.C.A. §§ 1401-1430; St.1938, Ex.Sess., p. 18, § 14; Const. art. 11, § 18.

18. Constitutional law $\S$ 205(2), 208(3)**Municipal corporations** $\S$ 4

The statutes authorizing creation of housing authorities for low-rent housing and slum clearance projects looking to the erection in their place of safe and sanitary dwellings of low rent are not invalid, as class legislation or as granting special privileges or immunities, because of their designation of families or persons of low income as the tenants, since the statutory classification is neither arbitrary nor unreasonable. St.1938, Ex.Sess., p. 9.

19. Constitutional law $\S$ 62**Health** $\S$ 21

The statute providing for elimination of substandard dwellings and the providing in their place of safe and sanitary dwellings of low income for those otherwise required by lack of income to remain in substandard dwellings are not invalid, as an improper delegation of legislative power, because failing to provide definite criterion to guide housing authorities in determining

who would come within the phrase "persons of low income." St.1938, Ex.Sess., pp. 12, 16, 17, §§ 3(j), 9, 10(d).

20. Constitutional law ☞62

The Legislature cannot delegate the power to make a law, but it may delegate to administrative board and agencies the power and authority of ascertaining facts upon which laws are to be applied and enforced.

21. Health ☞32

Statutes ☞5

No deficiency existed in Governor's proclamation calling special session of Legislature or in legislative finding and declaration of urgency underlying statutes relating to low rent housing or slum clearance. St.1938, Ex.Sess., p. 9.

22. Constitutional law ☞63(1)

Municipal corporations ☞4

The low-rent housing or slum clearance statutes providing for local housing authorities which governing body of county or city may empower to act by proper resolution declaring need for such authority do not violate constitutional inhibition against delegation of county and municipal functions to special commissions. St.1938, Ex.Sess., p. 12, § 4; Const. art. 11, § 13.

In Bank.

Mandamus proceeding by the Housing Authority of the County of Los Angeles against Isidore B. Dockweiler, Chairman of the Housing Authority of the County of Los Angeles. On general demurrer.

Demurrer overruled and peremptory writ issued.

J. H. O'Connor, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles (Edward H. Gaylord, of Los Angeles, of counsel), for petitioner.

Faries & McDowell, by Leonard S. Janofsky, all of Los Angeles, for Housing Authority of the City of Los Angeles.

John J. O'Toole, City Atty., by William A. O'Brien, Deputy Counsel, both of San Francisco, for Housing Authority of City and County of San Francisco.

Bernard J. Abrott, of Oakland, for Housing Authority of City of Oakland.

Barry Sullivan, of Los Angeles, amicus curiæ.

Roscoe R. Hess, of Los Angeles, for respondent.

C. M. Walter and Elson Jones, both of Oakland, amici curiæ.

Hugh K. McKeivitt and Joseph F. DeMartini, both of San Francisco, for Apartment House Owners and Managers Ass'n.

Scott & Eberhard, of Los Angeles, and Mary A. Flor, of San Francisco, by Ray C. Eberhard, of Los Angeles, for Apartment Ass'n of Los Angeles County, Inc.

SHENK, Justice.

In this proceeding for a writ of mandamus, petitioner, The Housing Authority of the County of Los Angeles, seeks to compel the respondent, its chairman, to perform certain duties alleged to be enjoined upon him by law. The cause is presented on general demurrer, respondent basing his refusal to act upon the asserted unconstitutionality of the statute under and by virtue of the provisions of which the petitioner was created and vested with power.

In order to properly consider and determine the issues involved in this proceeding it is necessary that some reference be made to the legislative background to which the petitioning authority traces its existence. It appears that congress enacted what is known as the United States Housing Act of 1937, 42 U.S.C.A. §§ 1401-1430, and declared therein that it is "the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation." 42 U.S.C.A. § 1401. Pursuant to this declaration of policy, the remaining sections of the chapter set up a plan or method of slum clearance and erection of low-rent dwellings in their place and stead. Generally, the act provides that dwellings in low-rent housing projects shall be available solely for families whose net income at the time of admission thereto does not exceed five times the rental thereof, including the value or cost to them of heat, light, water and cooking fuel, except that in families with three or more minor dependents, such ratio shall not exceed six to one. To accomplish the an-

nounced objective there is set up in the department of interior a body corporate of perpetual duration to be known as the United States Housing Authority, which is declared to be an agency and instrumentality of the United States. The authority so created is authorized to make loans to public-housing agencies of the several states or their political subdivisions with a view to assisting in the development, acquisition or administration of low-rent housing or slum-clearance projects. In no event shall such loans exceed ninety per cent of the development or acquisition cost of a project. It is provided that annual contributions, authorized for the purpose of assisting local public-housing agencies in achieving and maintaining the low-rent character of projects, shall not be made available to a project "unless and until the State, city, county, or other political subdivision in which such project is situated shall contribute, in the form of cash or tax remissions, general or special, or tax exemptions, at least 20 per centum of the annual contributions * * *." 42 U.S.C.A. § 1410(a). The act provides for a contract guaranteeing payment of such annual contributions over a fixed period but precludes such contributions or execution of a contract guaranteeing same in the case of a low-rent-housing or slum-clearance project calling for the construction of new dwellings "unless the project includes the elimination by demolition, condemnation, and effective closing, or the compulsory repair or improvement of unsafe or insanitary dwellings situated in the locality or metropolitan area, substantially equal in number to the number of newly constructed dwellings provided by the project", 42 U.S.C.A. § 1410(a), except that such elimination may be deferred where there is an acute shortage of livable dwellings. Such annual contributions are to be applied first toward payment of the principal or interest on any loan due to the authority by the local housing agency. If shown to be better suited to a project than annual contributions thereto, an alternative method of assistance is provided in the form of capital grants which are not to exceed 25 per cent of the development or acquisition cost of a project and which are not to be made unless and until provision is made substantially as already mentioned by the political subdivision wherein the project is situated for demolition, etc., of an equal

number of unsafe and insanitary dwellings and for the granting by the political subdivision of cash, land, or the value of community services or facilities for which a charge is usually made, or tax remissions or exemptions in an amount not less than 20 per cent of the development or acquisition cost of the project. In order to insure the low-rent character of the project it is provided, among other things, that no contract for any loan, annual contribution or capital grant shall be entered into with respect to any project costing more than \$4,000 per family-dwelling-unit or more than \$1,000 a room (excluding land, demolition and nondwelling facilities). In the case of cities with a population in excess of 500,000 the amounts are fixed at \$5,000 per family-dwelling-unit or \$1,250 a room. To achieve the purpose of the act the authority is authorized to issue obligations in the form of notes or bonds in an amount not to exceed \$800,000,000 and maturing not to exceed sixty years from date of issuance.

In order to make the benefits of the federal statute available to this state and its political subdivisions and in order to eliminate, wherever possible, insanitary and unsafe dwelling accommodations and to replace them with modern and livable low-rent dwellings, the legislature of this state at the special session of 1938 enacted what is known as the Housing Authorities Law. St.1938, Ex.Sess., p. 9, 2 Deering's Gen. Laws Supp., Act 3483. In its early provisions there appears a declaration of the existence in this state of insanitary and unsafe dwelling accommodations in which those of low income are required to reside because of a shortage of livable low-rent dwellings. Such condition, with its consequent overcrowding and congestion, is declared to cause an increase in and spread of disease and crime which, in turn, are declared to constitute a menace to the health, safety, morals and welfare of the residents of the state necessitating excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety. It is also declared that the clearance, replanning and reconstruction of such areas are public or governmental uses and purposes for which public money may be spent and that the same is not competitive with private enterprise because of the latter's inability to cope with or to overcome such conditions.

To accomplish its objective, the act thereupon creates in each city and in each county of the state "a public body corporate and politic to be known as the 'housing authority' of the city or county", St.1938, Ex.Sess., p. 12, § 4, which authority, however, is not to transact any business or exercise the powers granted to it under the act unless and until the governing body of the city or county, as the case may be, by proper resolution declares the need for such an authority to function therein. Upon the adoption of such resolution by a city, it is provided that the mayor shall appoint five persons as commissioners of the authority who serve without compensation and receive only their expenses in connection therewith. In the case of a county resolution declaring the necessity for a housing authority, the governing body or board of supervisors shall appoint the five commissioners. An authority so created is given power to investigate living conditions in its area; to sue and be sued; to prepare and carry out, acquire, lease, operate, construct, reconstruct, improve, repair, or alter housing projects within its area of operation; to arrange or contract for the furnishing by any person or agency of services, works or facilities for or in connection with a housing project; to provide in any contract for compliance with any conditions which the federal government may have attached to its financial aid of the project; and to own, hold, lease and improve real and personal property. It is declared that projects are not to be operated for profit and the rents are to be fixed at the lowest possible figure consistent with the furnishing of decent, safe and sanitary dwellings. In conformity with the federal act, it is provided that such low-rent dwellings may be rented only to persons of low income and whose annual income does not exceed five times the annual rental of the dwelling, including in the latter the annual average cost of heat, water, electricity, gas and other necessary facilities. As to families having three or more minor dependents, the ratio is increased to six to one, as authorized in the federal act. The act confers upon local housing authorities the right to acquire by eminent domain such property as is necessary to their low-rent dwelling projects. All of the property of such authorities is made subject to the planning, zoning, sanitary and building laws applicable to the particular locality.

Section 14 of the act confers upon the authorities therein created the right to issue bonds and refunding bonds from time to time in their discretion for any of their corporate purposes. Bonds so issued may be of the type on which the principal and interest are payable (a) exclusively from the income and revenues of the housing project financed with the proceeds of such bonds or with such bond proceeds and a grant of federal aid; or (b) exclusively from the income and revenues of certain housing projects whether financed by said bonds or not; or (c) from the authority's revenues generally. It is also provided that such bonds may be additionally secured by a pledge of any revenues or a mortgage of one or more projects or other property of the authority. It is declared that neither the commissioners nor any person executing the bonds shall be personally liable thereon. It is further provided that the bonds and other obligations of an authority (and they shall so declare on their face) shall not be a debt of the city, the county, the state or any political subdivision thereof and none of such entities shall be liable thereon, the same being payable only out of the funds or property of the authority issuing them. The act unequivocally declares that such bonds shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction. The issuance of bonds may be authorized by resolution of the authority and may be issued in one or more series and have such dates, denominations, maturity, interest rate (not to exceed 4½ per cent), priority, and may be payable in such manner or medium as the resolution, trust indenture or mortgage may provide. They are declared to be fully negotiable and may be sold at public sale, after publication, at not less than par, except that they may be sold to the federal government at not less than par at private sale without prior publication. The act declares that in any suit involving the validity or enforceability of any bond, a recital therein that it was issued to aid in financing a housing project shall give rise to a conclusive presumption that the bond had been issued for said purpose and it shall be conclusively presumed that the project was planned, located and constructed in accordance with the provisions of the act.

All real property of the authority is declared to be exempt from levy and sale by way of execution but an obligee of an au-

thority may pursue his remedies on any mortgage or pledge executed by the authority. The authorities created by the act are empowered to borrow money or accept grants from the federal government for and in aid of their housing projects and may take over, lease, etc., any federal housing project in their area of operation. In addition to other matters not here necessary to mention, the act concludes with the usual severability and urgency clauses.

To foster the purposes of the foregoing act, the legislature at the same session enacted the Housing Cooperation Law, St. 1938, Ex.Sess., p. 2, 2 Deering's Gen.Laws Supp., Act 3484, wherein it is declared that it is a proper public purpose for any state public body to aid any housing authority operating within its boundaries or jurisdiction and that in furtherance of such aid any public body may upon such terms, with or without consideration, as it may determine, dedicate, sell, convey or lease any of its property to a housing authority or the federal government; furnish facilities (water, recreational, etc.) otherwise furnished by it; dedicate, pave, zone and rezone streets; purchase or invest in housing authority bonds; and may appropriate as a loan or donation the money necessary for the administrative expense of the authority during the first year of its existence.

There was also enacted by the legislature at the same session an act, St.1938, Ex. Sess., p. 1, Deering's Gen.Laws Supp., Act 3485, which, after proclaiming the existence of unsafe and insanitary dwellings and the public purpose underlying their elimination as contemplated in the preceding two acts, declared that all property of housing authorities "shall be exempt from all taxes and special assessments" of the state or of any political subdivision thereof, provided, however, "that in lieu of such taxes or special assessments a housing authority may agree to make payments [to any political subdivision] for services, improvements or facilities furnished [by such political subdivision] for the benefit of a housing project owned by the housing authority", not to exceed the estimated cost of such services, improvements or facilities. Section 2. The act also provides that "the bonds of a housing authority are declared to be issued for an essential public and governmental purpose and, together with interest thereon and income therefrom, shall be exempt from all taxes". Section 3.

In concluding the legislative history underlying this litigation, it is well to point out that the legislature at the same special session also amended section 1238 of the Code of Civil Procedure by adding thereto subdivision 21 which enumerates the erection of housing projects as a purpose for which the power of eminent domain may be exercised. St.1938, Ex.Sess., p. 6.

[1] The Housing Authority of the County of Los Angeles, petitioner herein, was created and authorized to transact business in compliance with the provisions of the state statute. In this connection, it should be stated that the fact that its right to transact business and to exercise the powers granted to it under the statute were dependent upon action of the county board of supervisors, is not fatal to its existence. It has been recognized that the local operation of an act of general state-wide scope may be made contingent upon determination by the local authorities that conditions there require its acceptance and operation. Board of Law Lib. Trustees v. Bd. of Supervisors, 99 Cal. 571, 573, 34 P. 244; Davis v. County of Los Angeles, 12 Cal.2d 412, 84 P.2d 1034. In discharge of its functions and on September 6, 1938, petitioner entered into a contract with the county whereby the latter agreed to eliminate unsafe and insanitary dwellings at least equal to the number of new dwellings to be provided in the low-rent housing projects to be developed by petitioner. At its regular meeting held on December 14, 1938, the petitioner by the affirmative vote of four of its five members, one being absent, adopted a resolution approving a loan contract between it and the United States Housing Authority and authorizing and directing its chairman, respondent herein, to execute the same on its behalf. Among other things, the contract, as amended, provided that the United States Housing Authority agreed to assist the petitioner in the development of a described low-rent housing project in the county of Los Angeles consisting of substantially 606 dwelling units by purchasing bonds of the petitioner, which the latter agreed to sell, in the aggregate principal amount of \$2,331,000, but not to exceed in any event 90 per cent of the development cost of the project. The contract further provided that upon request of the petitioner, and upon a satisfactory showing of the necessity therefor, the United States Housing Authority for certain preliminary expenses incidental to

the project might make advances on account of the agreed loan upon receipt from petitioner of evidences of indebtedness exchangeable for an equal principal amount of bonds when issued by petitioner. In due course, this contract was executed by the United States Housing Authority and The Housing Authority of the County of Los Angeles, petitioner herein. Thereafter, however, the respondent, as chairman of petitioner, refused to execute a duly authorized note which, pursuant to the terms of the aforesaid loan contract, was intended to serve as evidence of petitioner's indebtedness to the United States Housing Authority for certain advances on the loan contemplated by said contract, and which advances were essential to carry on certain preliminary work of the proposed project. The note was a demand note in the principal amount of \$10,000, bearing interest at 3 per cent. It provided that the holder thereof could demand payment in cash or could accept, in exchange therefor, an aggregate principal amount of definitive bonds of the petitioner when issued. On its face the note indicated that it was issued in furtherance of a low-rent housing project of petitioner and it expressly declared, in conformity with the statute, that it was not a debt of the county of Los Angeles or of the state of California or of any political subdivision thereof and that said entities should not be liable thereon. It was further declared that in any event the note should not be payable out of any funds or property other than those of the petitioning housing authority, a first lien therefor being impressed upon all of petitioner's revenues. Also in conformity with the provisions of the statute, the note was declared not to be an indebtedness "within the meaning of any constitutional or statutory debt limitations or restrictions".

As stated at the beginning of this opinion, respondent's refusal, as chairman, to execute this note for and on behalf of petitioner was based solely upon the asserted unconstitutionality of our statutes, supra, which created and empowered petitioner and other similar local housing authorities for the purpose of slum-clearance and construction of safe and sanitary low-rent dwellings for persons of low income. Respondent's attack upon said statutes is many-sided and, in the main, follows closely the assaults that have been made in other jurisdictions upon statutes of similar import and purpose. In this connection, it is interesting to note that thirty-two

states, desiring to avail themselves of the aid proffered by the federal statute, supra, have enacted legislation substantially identical with ours. It is also of significance that whenever and wherever such statutes have been challenged (thirteen or fourteen jurisdictions in all) they have been fully sustained as against onslaughts similar in character to those here urged. Such statutes have been held to be constitutional in the following jurisdictions:

Alabama—*In re Opinion of the Justices*, 235 Ala. 485, 179 So. 535, Mar. 17, 1938;

Florida—*Marvin v. Housing Authority of Jacksonville*, 133 Fla. 590, 183 So. 145, July 27, 1938;

Georgia—*Williamson v. Housing Authority of Augusta*, 186 Ga. 673, 199 S.E. 43, Sept. 21, 1938;

Illinois—*Krause v. Peoria Housing Authority*, 370 Ill. 356, 19 N.E.2d 193, Jan. 26, 1939;

Indiana—*Edwards v. Housing Authority of City of Muncie*, Ind.Sup., 19 N.E.2d 741, Mar. 13, 1939;

Kentucky—*Spahn v. Stewart*, 268 Ky. 97, 103 S.W.2d 651, Mar. 26, 1937;

Louisiana—*State ex rel. v. Housing Authority of New Orleans*, 190 La. 710, 182 So. 725, June 27, 1938;

Montana—*Rutherford v. City of Great Falls*, 107 Mont. 512, 86 P.2d 656, Jan. 21, 1939;

Montana—*State ex rel. Helena Housing Auth. v. City of Helena*, 90 P.2d 514, May 10, 1939;

New York—*New York Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E.2d 153, 105 A.L.R. 905, Mar. 17, 1936;

North Carolina—*Wells v. Housing Authority of Wilmington*, 213 N.C. 744, 197 S.E. 693, June 15, 1938;

Pennsylvania—*Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 200 A. 834, June 30, 1938;

South Carolina—*McNulty v. Owens*, 188 S.C. 377, 199 S.E. 425, October 13, 1938;

Tennessee—*Knoxville Housing Authority v. City of Knoxville*, Tenn.Sup., 123 S.W.2d 1085, Jan. 21, 1939;

West Virginia—*Chapman v. Huntington W. Va. Housing Authority*, 3 S.E.2d 502, June 13, 1939.

[2-4] It must be admitted that the questions involved in this litigation are of great public concern and importance. While

there are a number of issues presented, the one of fundamental importance, and upon the determination of which several of the lesser and incidental issues will turn, is whether slum clearance and public housing projects for low-income families are public uses and purposes for which public money may be expended and private property acquired. Preliminarily, it should be recalled that the federal statute and our state statutes are premised upon the expressly declared policy that elimination of substandard dwellings and the providing in their place and stead of safe and sanitary dwellings of low rental for those otherwise required by lack of income to remain in the substandard dwellings are public uses and purposes and are governmental functions of state concern. While such a declaration of policy by the legislative branch of the government is not necessarily binding or conclusive upon the courts, it is entitled to great weight and it is not the duty or prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation. *Levy Leasing Co. v. Siegel*, 258 U.S. 242, 246, 42 S.Ct. 289, 66 L. Ed. 595; *Block v. Hirsh*, 256 U.S. 135, 154, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; *Oklahoma City v. Sanders*, 10 Cir., 94 F.2d 323, 326, 115 A.L.R. 363; *McNulty v. Owens*, supra, 199 S.E. 428; *Spahn v. Stewart*, supra, 103 S.W.2d 656; *New York City Hsg. Auth. v. Muller*, supra; *Rutherford v. City of Great Falls*, supra, 86 P.2d 658. However, aside from the respect to be accorded the legislative declaration of the public purpose underlying the statutes here challenged, it is our view, and we are satisfied that both reason and authority support us that the proposed elimination of slums and the erection of safe and sanitary low-rent dwelling units for persons of the prescribed restricted income will do much to advance the public welfare and to protect the public safety and morals and are in fact and law public purposes. Through the projects contemplated by the above statutes elimination of insanitary and unhealthy conditions is brought about by clearing premises of unfit dwelling buildings, and removing the degrading and unwholesome conditions existing in such surroundings, thereby reducing or preventing disease and crime and aiding and benefiting the health, morals and safety of the community. The United States Supreme Court in *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 43 S.Ct. 689, 693, 67 L.

Ed. 1186, declared that "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment".

In our determination that the type of statute here involved concerns a public purpose, we find support not only in the authorities of other jurisdictions but also in *Willmon v. Powell*, 91 Cal.App. 1, 266 P. 1029, 1031, wherein in 1928, long prior to the enactment of the legislation involved in the present case, it was held that the creation of a municipal housing commission for the purpose of eliminating overcrowded tenements, unhealthy slums and congested areas, thereby tending to ward off disease and preserve the public health, constituted a public purpose and municipal affair. There, as here, it was substantially urged, but without avail, that the undertaking resembled a commercial enterprise rather than a public use or function. Among other things, it was there stated that "The fact that in the course of administration of the affairs of the commission private persons will receive benefit, as tenants or otherwise, of houses constructed by the commission, is not sufficient to take away from the enterprise the characteristics of a public purpose". See, also, *Veteran's Welfare Board v. Jordan*, 189 Cal. 124, 145, 208 P. 284, 22 A.L.R. 1515.

Turning now to the decisions of other jurisdictions passing upon the validity of statutes creating and empowering housing authorities for purposes of slum-clearance and erection of low-rent dwelling projects, and which statutes are practically identical with those of this state here brought into question, we find that they are in unanimous accord upon the proposition that the purpose underlying such legislation is unquestionably governmental and public in character. These decisions are cited at length above. It would be repetitious to quote from all of them. We quote but two. The views and reasoning underlying all of such cases are reflected in *Spahn v. Stewart*, supra, 103 S.W.2d 657, where in rejecting the assaults of certain taxpayers and owners of rentable property upon the Kentucky statute creating and empowering municipal housing commissions possessing substantially the powers invested in the petitioner here, the court declared that "The use here proposed, as argued by appellee and admitted by appellants, may be more beneficial in the way of direct aid to a par-

ticular class, but it also operates to the benefit of the general public and its welfare. The act limits the ultimate use of the improved property to such persons as may be selected to occupy. This does not brand the purpose as class or special legislation. Whether or not the persons chosen to occupy are to be ultimately benefited more than those who are not, is a sociological question because of differing circumstances. Who can say that in the long run those who live in sumptuous residences envired by the elite may not account themselves still more blessed, if by improved conditions of housing in another section they are relieved from the probabilities or possibilities of an epidemic of smallpox, typhoid fever, or other diseases, or that they may sleep more serenely because of a lessened fear of the commission of crime against their persons or property. 'The essential purpose of the legislation is not to benefit that class or any class; it is to protect and safeguard the entire public from the menace of the slums.' * * * The fact that all individuals may not be elected to occupy the reconditioned premises is not material. A power plant, because of limited equipment, may not be able at all times to serve all the public but it is none the less rendering public service. It is not essential to the validity of the proposal that all the public reap like direct benefits. * * * The fact that those who may ultimately occupy the premises may have a preference is immaterial. * * * It is not material that some reap more benefit than others. * * * Nor is the government competing with private enterprise. * * * To the same effect is *Knoxville Housing Authority v. City of Knoxville*, supra, 123 S.W.2d 1087, wherein it appears: "The courts reason that the primary object of all government is to foster the health, morals and safety of the people. That slum districts with their filthy, congested, weather-exposed living quarters are breeding places of disease, immorality and crime. The character of the houses in such districts make of them a fire hazard. The existence of such districts depresses the taxable value of neighboring property and deprives the State of revenue. The State is also put to great expense in combating disease, crime and conflagration originating in such localities. They menace not only the health, safety and morals of those living therein, but since disease, crime, immorality and fires can with difficulty be confined to points of origin, these districts are a men-

ace to the whole community—indeed, a menace to the State." See, also, *Green v. Frazier*, 253 U.S. 233, 40 S.Ct. 499, 502, 64 L.Ed. 878, where, among other things, it is declared that "With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire." As stated, we are satisfied that the statutes of this state creating and empowering housing authorities for the purpose of slum clearance and erection of low-cost housing projects represent the exercise of a proper governmental function for a valid public purpose.

[5] Our determination that the use to which such housing projects are devoted is a public one, necessarily answers the contention addressed to the exercise of the right of eminent domain by the authorities created to carry on such projects. Investing petitioner and similar authorities with the right of eminent domain does no violence to either the state or federal Constitution, assuming just compensation be made to owners. Section 1237 of the Code of Civil Procedure declares that "Eminent domain is the right of the people or government to take private property for public use". The public purpose served by the petitioner and other local housing authorities warrants the grant of such right to them. *University of So. Cal. v. Robbins*, 1 Cal. App.2d 523, 37 P.2d 163, certiorari denied in U. S. Supreme Court, 295 U.S. 738, 55 S.Ct. 650, 79 L.Ed. 1685; *Fallbrook Irrig. Dist. v. Bradley*, 164 U.S. 112, 161, 17 S. Ct. 56, 41 L.Ed. 369. Such is the unanimous holding of the several decisions from other jurisdictions above cited wherein similar housing statutes were involved. The point is succinctly disposed of in *Williamson v. Housing Authority of Augusta*, supra, as follows [186 Ga. 673, 199 S.E. 55]: "If the use is a public use, the power of eminent domain conferred by the act is legitimate."

[6] Nor can we find any meritorious constitutional objection against the expressed statutory exemption of the real and personal property of housing authorities from state, county and local taxation. Among other things, section 1 of article XIII of the state Constitution exempts from taxation property belonging to "this state, or to any county, city and county, or municipal corporation within this state". Section 4 of the Housing Authorities Law,

supra, defines an authority as "a public body, corporate and politic". Such an authority is not unlike an irrigation district which, though held not to be a municipal corporation within the meaning of the quoted constitutional provision, has been held to be a public corporation for municipal purposes whose property is exempt from taxation. *Turlock Irrig. Dist. v. White*, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72; *Anderson-Cottonwood Irrig. Dist. v. Klukkert*, Cal.Sup., 88 P.2d 685. Similarly reclamation districts have been declared to be public agencies whose properties are likewise exempt from taxation. *Reclamation Dist. v. County of Sacramento*, 134 Cal. 477, 66 P. 668. In *Laguna Beach Water Dist. v. Orange County*, Cal.App., 87 P. 2d 46, 47, it is stated that "It must be conceded that it has always been the policy of the law in California since the adoption of the present Constitution, to exempt from taxation property of the state and *state agencies* generally classified as public corporations". Moreover, while provisions exempting private property from taxation are to be strictly construed, the rule is otherwise as to public property which is to be taxed only if there is express authority therefor. *Pasadena v. County of Los Angeles*, 182 Cal. 171, 174, 187 P. 418.

Exemption of housing authority property was upheld under constitutional provisions substantially similar to ours in *Wells v. Housing Authority*, supra, 197 S.E. 698; *Knoxville Housing Authority v. City of Knoxville*, supra; *State v. Housing Authority of New Orleans*, supra, 182 So. 737; *McNulty v. Owens*, supra, 199 S.E. 425; *Marvin v. Housing Authority of Jacksonville*, supra, 183 So. 156; *Dornan v. Philadelphia Housing Authority*, supra, 200 A. 843; *Krause v. Peoria Housing Authority*, supra, 19 N.E.2d 199; *Rutherford v. City of Great Falls*, supra, 86 P.2d 659; In re *Opinion of Justices*, supra, 179 So. 536. Even if we assume, as respondent urges, that the ultimate title to the property of the housing authority of a city is vested in the city, as distinguished from the state, and may therefore enjoy tax exemption only when situated within the municipal boundaries of the city—the 1914 amendment of section 1 of article XIII of the Constitution expressly abolishing the tax exemption as to county, city and county or city property situated beyond their respective boundaries—we fail to perceive therein any effect upon the right to tax exemption as to the property of the authorities of any

such entities when situated within their respective boundaries. Moreover, the denial of exemption to property beyond the boundaries of the political subdivisions mentioned is confined to the real estate, the improvements thereon being accorded exemption. *Pasadena v. County of Los Angeles*, supra, 182 Cal. 174, 187 P. 418.

[7, 8] Nor do we believe that the right of tax exemption fails because of the possibility of a foreclosure in which title to the property might be lost. The status of the property as tax-exempt or nontax-exempt while in the hands of an authority is not altered by its possible status after disposition by the authority. Nor does the fact that the statute authorizes an authority to give its bondholders the right of foreclosure constitute a gift of authority property. Presumably consideration passes for such a mortgage and any transfer of title thereunder is not a gift but the equivalent of a sale of authority property. The right to sell its property should not preclude a tax exemption thereon prior to such sale.

[9] In passing, we are likewise of the opinion that petitioner and other local housing authorities are not required to pay either income or franchise taxes for the reason that the statutes imposing the same do not purport to apply to public bodies. In *City of Idaho Falls v. Pfost*, 53 Idaho 247, 23 P.2d 245, 246, it was held, on the authority of *Pasadena v. County of Los Angeles*, supra, and other cases, that a public body is exempt from an excise tax unless the act specifically includes it.

[10] The tax exemption available to the property of housing authorities includes, in our opinion, bonds issued by them and the income therefrom. The legislature has expressly so declared in Act 3485, supra, cited above. A similar exemption was upheld in *Williamson v. Housing Authority*, supra, 199 S.E. 54, in the following language: "If the project under attack is for public purposes, and the property about to be acquired by it is for public purposes, then the property may be exempted from taxation, and its bonds, being instrumentalities of government, are nontaxable." See, also, to same effect, *Rutherford v. City of Great Falls*, supra, 86 P.2d 659; *Spahn v. Stewart*, supra, 103 S.W.2d 658; *Knoxville Housing Authority v. City of Knoxville*, supra, 123 S.W.2d 1087; *State v. Housing Authority of New Orleans*, supra, 182 So. 737. In *Pacific Co. v. Board of Supervisors of Los Angeles County*, 8 Cal.2d 611,

613, 67 P.2d 335, this court held that all bonds are now exempt from taxation by virtue of the provisions of section 3627a of the Political Code and the passage of the Personal Income Tax Act, St.1935, p. 1090, Deering's Gen.Laws, Act 8494. Though not mentioned in the cited case, such exemption would also appear to be permitted by that portion of section 14 of article XIII of the Constitution which declares that the legislature "may exempt entirely from taxation any or all forms, types or classes of personal property". As already stated, it has done so as regards the bonds of housing authorities and the income therefrom.

[11, 12] For the purpose of aiding in the planning and construction of housing projects; section 4 of the Housing Cooperation Law, St.1938, Ex.Sess., p. 3 (Act 3484, supra) authorizes any state public body to cooperate in the way of zoning and rezoning or furnishing customary facilities, etc., to such projects. We find no substantial objection to this provision nor to section 13 of the contract between petitioner and the county executed pursuant thereto and for the purpose of aiding and fostering the housing project above described. In *Edwards v. Housing Authority of the City of Muncie*, supra, 19 N.E.2d 746, objections to similar legislation and a similar agreement were rejected. It was there said that "The City of Muncie merely agrees with the other body corporate that it will exercise certain powers, which it now holds with respect to certain matters, in co-operation with, and in aid of, the housing authority in the accomplishment of the public purpose contemplated by the legislation in question. It is as though a civil city agreed with the school city to furnish police, fire, and sanitary services in school or playground territory, or agreed with a park board to furnish such services in connection with public parks. No reason is seen why it may not be done if the Legislature authorizes it as it has done here; and no authority to the contrary is called to our attention."

Similarly, the subject is discussed in *McNulty v. Owens*, supra, 199 S.E. 430, where the following appears: "It is next charged * * * that the City of Columbia by its contract will attempt to bind the future exercise of the governmental powers with regard to fixing water rates, maintaining streets, etc. An examination of the contract will show that the City is merely ob-

ligating itself to furnish municipal services and facilities for these tenants of the same character as those furnished other tenants in the City of Columbia. A municipal corporation is so obligated and this provision in the contract is merely an acknowledgment of the existing law on this point. * * * The proposed contract between the City of Columbia and the Columbia Housing Authority whereby the City will bind itself to demolish unsound and insanitary dwellings equal in number to the number of dwellings constructed by the Authority less the number of unsafe and insanitary units demolished by the Authority constitutes merely an agreement on the part of the City to exercise a power which it already has in such a manner as to co-operate with the program of the Housing Authority. Any action taken by the City in fulfilment of this contract will be subject to all of the limitations to which such actions are subjected under the constitution and laws of the State; and this contract neither increases [nor] decreases the protection afforded to citizens by those limitations. The contract does not constitute an attempt by the City to bind itself in its exercise of governmental functions. It is merely an agreement to cooperate in the use of those functions and as such is valid." To the same effect see *Rutherford v. City of Great Falls*, supra, 86 P.2d 661; *Marvin v. Housing Authority of Jacksonville*, supra; *Williamson v. Housing Authority of Augusta*, supra, 199 S.E. 50; *Krause v. Peoria Housing Authority*, supra. We think that the foregoing shows ample justification for that part of the contract between the petitioner and Los Angeles county by which the latter agrees to eliminate in certain designated ways unsafe and insanitary dwellings. This provision of the contract satisfies the requirements of the federal act.

[13] In our opinion, the Housing Cooperation Law, supra, does not authorize a city or county to make a gift or a loan of its credit in violation of section 31 of article IV of the Constitution. Any appropriation by a city or county will be used by the authority therein established as an agency of the city or county to perform a city, county or state purpose, namely, the elimination of slums. Under substantially similar constitutional provisions, it was so held in *State v. Housing Authority of New Orleans*, supra, 182 So. 733, wherein it was stated that "The primary purpose of housing authorities is to eradicate the slum

menace. In doing so, they lighten the burden of cities in discharging the municipal duty of protecting all citizens indiscriminately against disease, crime and immorality. It is therefore perfectly clear that, when a city [or county] uses public funds for the establishment of a housing authority, whether the funds be used for organization expenses or in the purchase of a small percentage of the housing authority's bonds, the city [or county] is performing, indirectly through a public agency created by the State and sanctioned by its own governing authority, one of the primary functions of municipal government." Other decisions to this effect are: *Rutherford v. City of Great Falls*, supra, 86 P.2d 659; *State v. City of Helena*, supra, 90 P.2d 518; *McNulty v. Owens*, supra, 199 S.E. 430. In *County of Los Angeles v. Riley*, 6 Cal.2d 625, 628, 59 P.2d 139, 106 A.L.R. 903, it was held that the appropriation of state funds to a county for highway purposes was not a gift to the county for the obvious reason that the building of highways was a state purpose in which the county was acting as its agent. By analogy, the same reasoning is applicable to an appropriation by either a city or county to a housing authority established within its boundaries, such authority acting as agent in the discharge of the public function or purpose of slum clearance. See, also, *City of Oakland v. Garrison*, 194 Cal. 298, 228 P. 433.

[14] Nor do we think the statutes authorize either a city or county "to subscribe for stock, or to become a stockholder in any corporation", in violation of the inhibition contained in section 31 of article IV, of the Constitution. Authorities created under the statutes are public corporations and do not issue stock. In rejecting a contention that the housing statute there involved authorized an investment by political corporations in stock in violation of a constitutional provision substantially the same as ours, it was declared in *State v. Housing Authority of New Orleans*, supra, 182 So. 733, that "The act provides that municipal corporations 'may legally invest funds within their control in bonds of an authority when they are secured by a pledge of the revenues of, or a first mortgage lien on, property' of housing authorities. Housing authorities created by the act are public corporations which have no capital stock."

[15] Section 18 of article XI of the Constitution precludes any political subdivision of the state, without the assent of two-thirds of the electors thereof, from incurring any indebtedness or liability exceeding in any year its income and revenue provided for such year. In other states it has been uniformly held that slum-clearance and low-rent housing project statutes authorizing, as does our statute, the issuance of bonds by a housing authority do not contravene such constitutional limitation, for no debt or liability is thereby imposed on the city or county wherein the authority is established. *Edwards v. Housing Authority of Muncie*, supra, 19 N.E.2d 745; *Krause v. Peoria Housing Authority*, supra, 19 N.E.2d 201; *Williamson v. Housing Authority of Augusta*, supra, 199 S.E. 50; *Dornan v. Philadelphia Housing Authority*, supra, 200 A. 845; *McNulty v. Owens*, supra, 199 S.E. 430; *Marvin v. Housing Authority of Jacksonville*, supra, 183 So. 152; *State v. Housing Authority of New Orleans*, supra, 182 So. 740; and *Rutherford v. City of Great Falls*, supra, 86 P.2d 659. In the *Krause* case, supra, the following appears: "Appellants contend that the bonds to be issued by the Peoria Housing Authority are obligations of the city of Peoria and are subject to section 12 of article 9 of the State constitution * * *. We cannot agree with this contention. By the terms of the Illinois Housing Authorities Act, bonds or obligations issued by such an authority are not 'payable out of any funds or properties other than those of said Authority,' and they are explicitly declared not to constitute 'an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction.' * * * While the provision that the bonds are not to constitute an indebtedness within the meaning of any constitutional debt limitation is not binding on us, it is clear that the debt here created is not one coming within the constitutional limitation. We have held that obligations which are secured only against the revenues of specific revenue-producing properties are not within the constitutional restrictions on municipal indebtedness."

[16, 17] On the whole, the statutes involved in all of the above cited cases generally provide, as does our statute, that the bonds issued thereunder are payable solely from the funds or property of the authority issuing them. The statutes also declare,

as does ours, that such bonds do not impose any liability on any person or political subdivision of the state. In fact, as already indicated, our statute also requires the bonds to state on their face that they do not constitute a debt of the city, county, state or any other political subdivision thereof. It also provides, as stated above, that such bonds do not constitute an indebtedness within the meaning of any constitutional debt limitation or restriction. While this latter declaration is not binding in a judicial proceeding, it is clear that any debt of an authority evidenced by bonds of the character authorized by the act does not come within the meaning of the constitutional inhibition. Such debt is clearly the debt of the issuing authority alone—"a public body corporate and politic"—and is not the debt of the state or of any political subdivision thereof to whom the debt limitation provision of the Constitution is applicable. In support thereof we need look not alone to the decisions of other jurisdictions, supra, construing similar housing statutes. We find ample authority for our conclusion in the decisions of this state. *Joint Highway Dist. v. Hinman*, 220 Cal. 578, 587, 32 P.2d 144; *Bliss v. Hamilton*, 171 Cal. 123, 133, 152 P. 303; *In re Madera Irr. Dist.*, 92 Cal. 296, 342, 28 P. 272, 675, 14 L.R.A. 755, 27 Am.St. Rep. 106; *Strain v. East Bay Municipal Util. Dist.*, 21 Cal.App.2d 281, 284, 69 P.2d 191. However, even if it were assumed that housing authorities are subject to the debt limitation provision of the Constitution, its bonds being payable exclusively from the revenues or property of the project or projects which are constructed with their proceeds and with federal aid, would not constitute a debt within the meaning of the provision. *California Toll Bridge Auth. v. Kelly*, 218 Cal. 7, 14, 21 P.2d 425; *Department of Water & Power v. Vroman*, 218 Cal. 206, 217, 22 P.2d 698; *California Toll Bridge Authority v. Wentworth*, 212 Cal. 298, 302, 298 P. 485; *Mesmer v. Board of Pub. Service Com'rs*, 23 Cal.App. 578, 583, 138 P. 935; 11 So.Cal.L.Rev. 444, 469. It necessarily follows from what has been said that no violation of the debt limitation clause results from the loan contract between petitioner, The Housing Authority of the County of Los Angeles, and the United States Housing Authority by which the former agrees to sell and the latter to buy bonds issued by the local authority which are payable solely out of housing project revenues and any annual

contributions made by the federal authority.

[18] The state statutes here involved looking to the elimination of slums and the erection in their place and stead of safe and sanitary dwellings of low rent are not fatally defective because of their designation of families or persons of low income as the tenants thereof. The legislation does not thereby become class legislation and result in the improper granting of special privileges or immunities to a favored few. The statutory classification is neither arbitrary nor unreasonable. On the contrary, it is logical and natural. In *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 161, 17 S. Ct. 56, 64, 41 L.Ed. 369, it is stated that "It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use." In *Williamson v. Housing Authority of Augusta*, supra, 199 S.E. 47, the point is disposed of in the following manner: "The argument is that the actual benefits to be derived from the proposed slum-clearance and low-cost housing project are limited to those individuals or families 'who lack the amount of income which is necessary to enable them, without financial assistance, to live in safe and sanitary dwellings without over-crowding,' and that thus the housing act provides special privileges and advantages for a particular group to be selected from persons occupying a certain economic and financial status, to the exclusion of other citizens who by arbitrary standards occupy a different situation. It might also be claimed that the actual benefits derived from maintaining the * * * Academy for the Blind are limited to blind children; or that the actual benefits of the * * * State Sanitarium are limited to those mentally diseased; or that adults are denied the actual benefits of the public school system because the schools are maintained only for children between certain ages; and that therefore, since they provide privileges and advantages only for a particular group, their maintenance by the State is contrary to our organic law. It is no violation of the constitutional guaranty here invoked for the State to provide direct benefits for a certain group, to the exclusion of other citizens, unless done by arbitrary standards. The governing authorities were well justified in limiting to those of moderate income the benefits of the legislation under

discussion. The statute makes a classification and states the basis thereof, which can not be said by this court to be unreasonable." Identical reasoning was applied to a similar contention advanced in *Dornan v. Philadelphia Housing Authority*, supra, 200 A. 840, where it was added that "An occupancy by some may promote, or even be vital to, the welfare of all." The contention was also rejected in *Rutherford v. City of Great Falls*, supra, 86 P.2d 660; *Spahn v. Stewart*, supra, 103 S.W.2d 656; and others of the above cited cases dealing with similar statutes.

[19, 20] The argument is advanced that no definite criterion or specific standard is set up by the housing act to guide the authorities created thereunder in uniformly determining with certainty who will come within the phrase "persons of low income". It is urged that the vesting of this power of determination in the authorities constitutes an improper delegation of the legislative function. We cannot uphold the contention. The standards specified in the act are sufficiently definite. Section 3, subdivision (j), defines persons of low income as "persons or families who lack the amount of income which is necessary * * to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding". Section 9 declares that projects shall not be operated for profit but shall be rented "at the lowest possible rates" and section 10, subdivision (d), precludes authorities from accepting as a tenant any person having an annual net income in excess of five times the annual rental of the quarters, unless there are three or more minor dependents in which event the ratio shall not exceed six to one. As stated, these standards are sufficiently certain. The statute is complete in itself. While the legislature cannot delegate the power to make a law, it cannot now be seriously disputed that it may delegate to administrative boards and agencies the power and authority of ascertaining and determining the facts upon which the laws are to be applied and enforced. In rejecting a similar contention directed against a substantially identical statute, the court in *Edwards v. Housing Authority of Muncie*, supra, 19 N.E.2d 746, declares that "The overseer of the poor selects the objects of the public bounty; local officers determine who shall be admitted to poorhouses and public hospitals. It is obvious that the Legislature could not itself select

the tenants in these public projects, nor could it accomplish its purpose by fixing arbitrary income limits, since income requirements necessarily vary in different communities. * * * We believe that the act provides sufficient standards and rules for the determination of the facts, and that it is not unconstitutional in this respect." The issue likewise was found to be without merit in *Rutherford v. City of Great Falls*, supra, 86 P.2d 661; *Krause v. Peoria Housing Authority*, supra, 19 N.E.2d 202; *Williamson v. Housing Authority of Augusta*, supra, 199 S.E. 49; *State v. Housing Authority of New Orleans*, supra, 182 So. 739; *Knoxville Housing Authority v. Knoxville*, supra, 123 S.W.2d 1087; *Dornan v. Philadelphia Housing Authority*, supra, 200 A. 844; and *Chapman v. Huntington W. Va. Housing Authority*, supra, 3 S.E.2d 510.

In view of the recent decisions of the United States Supreme Court, we do not entertain any doubt as to the power of congress to provide federal aid for housing projects of the type authorized and contemplated by our statute and the statutes referred to in the cited decisions of other states. Nor do we entertain any doubt as to petitioner's ability to acquire ten per cent of the development cost of its proposed project required as a condition to federal aid. It may well be assumed that the federal agency is capable of protecting its own interest in this respect.

[21, 22] What we have said sufficiently disposes of the many contentions urged by respondent in support of his demurrer, including any contentions not expressly mentioned herein. Many of the arguments of amici curiae are the same as those advanced by respondent and are answered herein. Contrary to the additional contentions of one of the amici curiae, we find no deficiency in the governor's proclamation calling the special session of the legislature at which the statutes here involved were enacted nor in the legislative finding and declaration of the urgency underlying such legislation. Nor do we find any merit in the contention that the legislature has delegated county and municipal functions to special commissions in violation of section 13 of article XI of the Constitution. As already pointed out, an authority created under the act "shall not transact any business or exercise its powers hereunder until or unless the governing body of the city or

the county, as the case may be, by proper resolution shall declare at any time hereafter that there is need for an authority to function in such city or county". In view of this provision of the act, it must be concluded that it is the local governing body, and not the legislature, that confers upon the authority the right to exercise its functions.

As this opinion has progressed, it must have been evident that all of the objections here raised against the constitutionality of the slum-clearance and low-rent housing project statutes here involved have been passed upon by the supreme courts of other jurisdictions with respect to similar legislation and under substantially similar constitutional provisions. In every instance the legislation has been upheld. As stated in *Dornan v. Philadelphia Housing Authority*, supra, 200 A. 836, legislation of this type naturally invites "the attack of those who are inclined to regard all experiments in our social and economic life as presumptively unconstitutional. Such challenges must fail, however, if, upon analysis, it appears that the only novelty in the legislation is that approved principles are applied to new conditions. Neither our state nor our federal constitution forbids changes, merely because they are such, in the nature or the manner of use of methods designed to enhance the public welfare; they require only that the new weapons employed to combat ancient evils shall be consistent with the fundamental scheme of government of the Commonwealth and the nation, and shall not violate specific constitutional mandates. * * * Here * * * the construction and the operation of housing projects are merely ancillary to the underlying purpose of slum clearance. The elimination of unsafe and dilapidated tenements is a legitimate object for the exercise of the police power. Apart from the declarations in the Housing Authorities Law itself, the veriest tyro in the study of social conditions knows that the existence of slums is a menace to the health and happiness of the community in which they exist."

For the foregoing reasons, respondent's demurrer to the petition is overruled. Let a peremptory writ of mandate issue as prayed.

* We concur: CARTER, J.; CURTIS, J.; HOUSER, J.; PULLEN, Justice pro tem.; SPENCE, Justice pro tem.

4 Cal.2d 288

HART v. JORDAN, Secretary of State, et al.
S. F. 16296.

Supreme Court of California
Sept. 14, 1939.

1. Statutes $\S$ 35½

The constitutional provision relating to referendum and initiative petitions leave it with discretion of Governor whether to call special election to consider measures which have qualified under provision, but, when he acts on such discretion, all measures which are qualified must be placed upon the ballot. Const. art. 4, § 1.

2. Statutes $\S$ 35½

Under Constitution providing that issues raised by a referendum petition must be submitted to the people at the next succeeding general election at any time subsequent to 30 days after filing of petition, or at any special election called by Governor in his discretion, a proposed referendum on "The California Oil and Gas Control Act," which qualified for submission to voters, must be presented at special election called by Governor for purpose of presenting an initiative constitutional amendment entitled "Retirement Warrants." St.1939, c. 811; Const. art. 4, § 1.

3. Statutes $\S$ 35½

The constitutional provision that failure to submit any referendum measure at election specified by such provision shall not prevent its submission at a succeeding general election is intended to safeguard the power reserved by the people by providing that, if for any reason a referendum measure is not submitted to the voters as required, it shall not thereby fail but must be placed before them at a succeeding general election. Const. art. 4, § 1.

4. Statutes $\S$ 35½

The statutory provisions in regard to submission of argument for or against referendum measures prior to election on such measures have for their purpose giving voters information concerning measures on ballot, and, where they conflict with constitutional provisions, the latter must prevail. Pol.Code, §§ 1195-1195c; Const. art. 4, § 1.

5. Constitutional law $\S$ 38

Where statutes conflict with constitutional provisions, the latter must prevail.

In Bank.

Mandamus proceeding by Blair Hart, Jr., against Frank C. Jordan, as Secretary of State of the State of California, and George H. Moore, as Superintendent of State Printing of the State of California, to compel the respondents to desist from taking any further steps in the matter of preparing for the ballot and submitting to the voters at the special election to be held on November 7, 1939, a proposed referendum on "The California Oil and Gas Control Act" enacted at the last session of the Legislature.

Alternative writ heretofore issued discharged, and preemptory writ denied.

Gregory, Hunt & Melvin and Darwin Bryan, all of San Francisco, and Hanna & Morton, of Los Angeles, for petitioner.

Earl Warren, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondents.

PER CURIAM.

By this proceeding in mandamus the petitioner seeks to compel the respondents, as Secretary of State and State Printer, respectively, to desist from taking any further steps in the matter of preparing for the ballot and submitting to the voters at the special election to be held on November 7, 1939, a proposed referendum on "The California Oil and Gas Control Act" enacted at the last session of the legislature. Stats.1939, ch. 811. The question presented for determination is whether a referendum which has qualified for submission to the voters must be presented at a special election called for the purpose of presenting a particular initiative measure.

On July 1st the governor of California by proclamation fixed November 7th as the date of a special election at which there shall be submitted to the voters for adoption or rejection an initiative constitutional amendment entitled "Retirement Warrants". It appears that on July 27th the attorney-general prepared a title and summary of the chief purpose and points of a referendum petition against "The California Oil and Gas Control Act", supra, and since that time this petition has been signed by approximately twice the number of persons required by the Constitution to submit the measure to the electors. If on or before September 18th this petition, certified as having been signed by "qualified electors equal in number to five per

cent of all the votes cast for all candidates for Governor at the last preceding general election", is presented to the Secretary of State, the challenged enactment of the legislature shall be submitted to the electors "at the next succeeding general election occurring at any time subsequent to thirty days after the filing of said petition or at any special election which may be called by the Governor, in his discretion, prior to such regular election * * *". Const., art. IV, sec. 1. As the petitioner asserts that there are now on file the names of sufficient electors to qualify the referendum petition, the question for decision primarily concerns the construction of the constitutional provision in connection with certain statutes relating to elections.

Article IV, section 1, of the Constitution relates not only to referendums but also to initiative petitions. It specifies with particularity the requirements of each of such classes of petitions, and also the elections at which proposed or challenged laws are to be submitted to the voters. An act proposed by an initiative petition for submission directly to the electors must be presented "at the next succeeding general election occurring subsequent to 130 days after the presentation aforesaid of said petition, or at any special election called by the Governor in his discretion prior to such general election". This differs from the provision concerning initiative measures to be first submitted to the legislature, in that the general election must occur ninety days after the presentation of the petition and the special election need not be one "called * * * for such purpose". Issues raised by a referendum petition must be submitted to the people at the next succeeding general election occurring at any time subsequent to thirty days, after the filing of the petition or at any special election called by the governor in his discretion.

[1,2] In considering these different provisions, the petitioner contends that because the Constitution provides that "no law or amendment to the Constitution, proposed by the Legislature, shall be submitted at any election unless at the same election there shall be submitted all measures proposed by petition of the electors, if any be so proposed", in all other cases it is discretionary with the Governor which qualified initiative or referendum measures shall be submitted at a special election called for a particular

purpose. There are two answers to this contention. In the first place, the Constitution, for obvious reasons, provides that in the particular situation specified, all qualified measures must be submitted to the People at one time. This requirement does not apply when initiatives to be submitted directly to the People and referendums are the only measures which have qualified for submission to the People. In the second place, the legislature in providing that a special election may be called by the governor, left it within his power, as a matter of discretion, whether to call such an election. But when he has acted in the exercise of discretion, all measures which are qualified to go before the People by the constitutional provisions must be placed upon the ballot. This is the plain mandate of the Constitution and a court has no authority to change the requirements which the People have imposed.

[3] The petitioner places considerable reliance upon the provision of the Constitution that the failure to submit any referendum measure "at the election specified in this section" shall not prevent its submission at a succeeding general election. This can only mean that if for any reason a referendum measure is not submitted to the voters as required by the Constitution, it shall not thereby fail but must be placed before them at a succeeding general election. This provision safeguards the power reserved by the People.

[4,5] As against this construction, however, are certain statutory provisions fixing times for the doing of acts in connection with an election on a referendum measure greater than the constitutional period of thirty days. For example, the Constitution provides that "all measures submitted to a vote of the electors, under the provisions of this section, shall be printed, and together with arguments for and against each such measure by those in favor of, and those opposed to, it shall be mailed to each elector in the same manner as now provided by law as to amendments to the Constitution, proposed by the Legislature; and the persons to prepare and present such arguments shall, until otherwise provided by law, be selected by the presiding officer of the Senate". Art. IV, sec. 1. Under section 1195 of the Political Code, arguments for or against a proposed constitutional amendment or other proposition to be submitted to the People "shall be submitted to the secretary

of state within ninety days after the adjournment of the legislature". A succeeding section authorizes the Secretary of State, in the event the argument for or against a referendum measure is not filed as required by the Constitution, to make a general press release eighty-five days prior to the date of the election, inviting electors to submit such arguments within sixty-five days prior to the election. Sec. 1195c, Pol.Code.

Another requirement laid upon the Secretary of State is that not less than forty-five days before the election he shall furnish each county clerk and registrar of voters a stated number of pamphlets containing the text of the measures to be submitted at such election, with the ballot titles and arguments thereon. The pamphlets are to be mailed to the voters not more than forty days nor less than fifteen days prior to the election. Sec. 1195b, Pol. Code.

The essential purpose of these provisions is to give the voters information concerning the measures on the ballot. It does not appear that the statutory requirements cannot be either fully or substantially complied with by the respondents in preparing material for the coming election, but wherever they conflict with constitutional provisions, the latter must prevail.

The alternative writ of mandate heretofore issued herein is discharged and a peremptory writ is denied.



14 Cal.2d 355

THOMAS v. THOMAS.

L. A. 16055.

Supreme Court of California.

Oct. 2, 1939.

I. Divorce ⇐243

An ordinary "judgment" does not order defendant to pay anything, but simply adjudicates amount owing, while an award of "alimony," though partaking of nature of a judgment, goes further and is a direct command to defendant to pay the sums therein mentioned.

[Ed. Note.—For other definitions of "Alimony" and "Judgment (In Law)," see Words & Phrases.]

2. Divorce ⇨269(2)

An order to pay alimony may be enforced by contempt proceedings.

3. Divorce ⇨331

A local judgment based on a foreign decree of alimony will be enforced in California by equitable remedies as by contempt.

4. Divorce ⇨331

The full faith and credit clause of the Federal Constitution does no more than protect right to obtain a money judgment for accrued alimony due under a foreign decree, and does not give a party the right to equitable remedies for the enforcement of a foreign alimony decree. U.S.C.A.Const. art. 4, § 1.

5. Divorce ⇨331

The rule that a local judgment based on a foreign decree of alimony will be enforced by equitable remedies is based not on the full faith and credit clause of Federal Constitution, but rather on the equitable consideration which favors an effective weapon for enforcement of alimony award where debtor has moved from state where award was made. U.S.C.A.Const. art. 4, § 1; Code Civ.Proc. 1913.

6. Judgment ⇨900

A party has a right in California to maintain an action on a domestic judgment when the plaintiff will secure some advantage thereby. Code Civ.Proc. §§ 685, 687.

7. Judgment ⇨909

An action upon a judgment is transitory and not local and may be brought wherever requisite jurisdiction may be obtained. Code Civ.Proc. §§ 395, 685, 687.

8. Divorce ⇨245(1)

The establishment of a Butte county divorce decree in Los Angeles county for purposes of its enforcement would not effect a transfer of action to Los Angeles county, nor vest in courts of Los Angeles county concurrent jurisdiction with Butte county court to modify decree to meet changed conditions. Code Civ.Proc. §§ 395, 685; Civ.Code § 139.

9. Divorce ⇨245(1)

In action to establish a Butte county divorce decree in Los Angeles county for purposes of its enforcement, if Butte county decree is subject to modification, the power of the Los Angeles court is limited to adjusting its judgment to conform to changes made by the court which had jurisdiction

of divorce action. Code Civ.Proc. §§ 139, 395, 685.

10. Divorce ⇨271

In action to establish Butte county divorce decree ordering payment of alimony, in Los Angeles county for purposes of its enforcement, question of ability of husband to make alimony payments was immaterial.

11. Divorce ⇨271

In action to establish a Butte county divorce decree ordering payment of alimony, in Los Angeles county for purpose of its enforcement, there was a sufficient finding that plaintiff had not remarried since rendition of decree where the complaint so alleged and court found that all allegations of complaint were true.

12. Divorce ⇨271

In action to establish a Butte county divorce decree ordering payment of alimony, in Los Angeles county where both parties lived, plaintiff was entitled to a decree directing payment of alimony due and to become due under former divorce decree. Code Civ.Proc. §§ 395, 685.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry M. Willis, Judge.

Action by Suzette Thomas against Clyde Thomas to establish a decree of divorce which had theretofore been obtained in Butte county, Cal., as a judgment against defendant in Los Angeles county. From the judgment, the plaintiff appeals.

Reversed, with directions.

Superseding opinion in 88 P.2d 183.

William Ellis Lady and H. Dexter McKay, both of Los Angeles, for appellant.

Horowitz & McCloskey, of Los Angeles, for respondent.

PULLEN, Justice pro tem.

By a divorce decree of the superior court of the county of Butte, defendant was ordered to pay to plaintiff the sum of \$50 a month as alimony for her support and maintenance until she remarried. In Thomas v. Superior Court, 9 Cal.App.2d 383, 49 P.2d 898, and in Thomas v. Superior Court, 129 Cal.App. 282, 18 P.2d 755, other issues concerning this decree have been before the courts.

For over five years defendant defaulted in these payments, and this action was

brought in the county of Los Angeles, where both plaintiff and defendant now reside, to obtain a judgment for the accrued alimony and also to incorporate therein the provision for the payment of \$50 monthly as contained in the original decree.

The trial court granted plaintiff an ordinary money judgment for the amount of the accrued alimony, unpaid for the five years preceding action brought, with interest, but refused to order defendant to pay the sum found due, and refused to incorporate in the judgment any provision concerning the future instalments of alimony. From this judgment plaintiff now prosecutes this appeal upon the judgment roll.

[1,2] The difference between the judgment as entered and that prayed for is pointed out in *Miller v. Superior Court*, 9 Cal.2d 733, 72 P.2d 868, 870, where it is said: "One difference between an award of alimony and an ordinary money judgment is that the ordinary judgment does not order the defendant to pay anything, it simply adjudicates the amount owing, while the award of alimony, though partaking of the nature of a judgment, goes further and is a direct command to the defendant to pay the sums therein mentioned." An order to pay alimony may be enforced by contempt proceedings.

[3] As to the attitude of the courts toward those seeking aid in the enforcement of payments of alimony under decrees of sister states, there is now no question but that the better considered recent cases adhere to the view that a local judgment based on a foreign decree of alimony will be enforced by equitable remedies as by contempt. This is the rule in California. *Bruton v. Tearle*, 7 Cal.2d 48, 59 P.2d 953, 106 A.L.R. 580; *Creager v. Superior Court*, 126 Cal.App. 280, 14 P.2d 552; *Straus v. Straus*, 4 Cal.App.2d 461, 41 P.2d 218, 42 P.2d 378; *Palen v. Palen*, 12 Cal.App.2d 357, 55 P.2d 228. See, also, *Cousineau v. Cousineau*, 155 Or. 184, 63 P.2d 897, 109 A.L.R. 643.

[4,5] This principle is based not alone upon the full faith and credit clause of the federal Constitution, U.S.C.A.Const. art. 4, § 1, which does no more than protect the right to obtain a money judgment for accrued alimony due under the foreign decree, enforceable by execution as an ordinary money judgment, *Lynde v. Lynde*,

181 U.S. 183, 21 S.Ct. 555, 45 L.Ed. 810; *German v. German*, 122 Conn. 155, 188 A. 429, but rests rather on the equitable consideration which favors an effective weapon for enforcement of the terms of the award of alimony where the debtor has moved from the state where the award was made.

Appellant does not question this rule, but contends that decrees of other states are not authority in the instant case, which is upon a domestic decree, and points out that a foreign decree can be enforced here only by an action, sec. 1913, Code Civ. Proc., whereas under a domestic decree execution may be had throughout the state without any proceeding on the decree, sec. 687, Code Civ.Proc., and payment enforced by contempt in the county wherein the award was originally made.

[6] The right to maintain an action on a domestic judgment has long been recognized in this state and is not disputed by appellant. Sec. 685, Code Civ.Proc.; *Atkinson v. Adkins*, 92 Cal.App. 424, 268 P. 461; *Howell Co. v. Corning Irr. Co.*, 177 Cal. 513, 171 P. 100; 2 *Freeman on Judgments*, 5th ed., 2211.

That an action could be maintained in this state upon a domestic judgment was first held in *Ames v. Hoy*, 12 Cal. 11. It was there suggested, as it is here, that repeated judgments would create inconvenience, unnecessary expense, and be vexatious; but these objections were brushed aside, the court stating that an effectual remedy against such annoyances would be the payment of the debt. That this right is not limited to money judgments alone is indicated in *Rowe v. Blake*, 99 Cal. 167, 33 P. 864, 37 Am.St.Rep. 45, where the action was upon a judgment for the sale of property subject to a lien. In *Brewster v. Ludekins*, 19 Cal. 162, a judgment was obtained in the Sixth Judicial Dist. (Sac.). Thereafter an action was brought upon the judgment in the Twelfth District (S. F.). That question being raised, the court said: "There is nothing in the point that suit could not be brought in one District Court on a judgment recovered in another."

[7] In the instant case the purpose of the action upon the Butte county decree was to obtain a continuing judgment enforceable by contempt in Los Angeles county, where both parties now reside. An action upon a judgment is in its nature

transitory and not local, and may therefore be brought wherever the requisite jurisdiction may be obtained. Sec. 395, Code Civ.Proc.; 2 Freeman on Judgments, 5th ed., p. 2251. And, as pointed out by the same author (p. 2212 et seq.), actions are allowed on domestic judgments when the plaintiff will secure some advantage thereby. The advantage here for plaintiff is that she may prosecute her action in the county of her residence rather than proceed to a distant county, and it can scarcely be said that defendant may legitimately object to proceedings in the county of Los Angeles which for several years has also been the county of his residence.

The provision in the Butte county interlocutory decree was as follows: "It is further ordered, adjudged and decreed that the defendant pay to the plaintiff the sum of fifty (\$50.00) dollars per month as *alimony* for the support and maintenance of said plaintiff until such time as the plaintiff may remarry." (Italics supplied.) This decree made no reference to a property settlement, although the complaint in the divorce action alleged the making of such an agreement. See *Ross v. Ross*, 1 Cal.2d 368, 35 P.2d 316, and *Armstrong v. Armstrong*, 132 Cal.App. 609, 23 P.2d 50, as to effect of such a decree. The final decree contained the following provision: "It is further ordered, adjudged and decreed that the defendant herein pay to the plaintiff herein the sum of Fifty (\$50.00) Dollars per month as *alimony* for the support and maintenance of said plaintiff until such time as the said plaintiff may remarry, in accordance with property settlement entered into between plaintiff and defendant under date of Sept. 12, 1928." *Thomas v. Superior Court*, 9 Cal.App.2d 383, 49 P.2d 898, 899.

Whether or not a decree in such form would be subject to modification in Butte county to meet changed circumstances, sec. 139, Civ.Code, or is governed by the law as announced in *Ettlinger v. Ettlinger*, 3

Cal.2d 172, 44 P.2d 540, and *Baxter v. Baxter*, 3 Cal.App.2d 676, 40 P.2d 536, we do not here decide in the absence of a complete record before us.

[8,9] The establishment of the Butte county decree in Los Angeles for purposes of enforcement would not effect a transfer of the action to Los Angeles county, nor vest in the courts of Los Angeles concurrent jurisdiction which the Butte county court to modify the decree to meet changed conditions. If the Butte county decree is subject to modification, a matter which we do not here decide, the power of the Los Angeles court is limited to adjusting its judgment to conform to changes made by the court which had jurisdiction of the divorce action. *Cousineau v. Cousineau*, supra. Section 139, Civil Code, cannot be construed as vesting a power of modification in the first instance except to the court granting the divorce.

[10,11] Neither are we concerned with the ability of defendant to make such payments. Some question is raised that the Los Angeles court failed to find that plaintiff had not remarried, but the complaint so alleged, and the court found that all of the allegations thereof were true. If a marriage by plaintiff has occurred between the filing of the complaint and the entry of judgment, the trial court can take that matter into consideration in its entry of judgment.

[12] Being of the opinion that as a cumulative right plaintiff is entitled to a decree directing payment of the amounts due and to become due under the former judgment, the judgment appealed from must be reversed, and the trial court directed to enter judgment in accordance with the views expressed herein. It is so ordered.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SPENCE, J. pro tem.

35 Cal.App.2d 109

SIMMONS v. LAMB et al.

Civ. 11827.

District Court of Appeal, Second District,
Division 1, California.

Oct. 11, 1939.

Rehearing Denied Nov. 6, 1939.

1. Appeal and error ⇐977(3)**New trial** ⇐6

The granting of a new trial rests largely in discretion of trial court, and its action will not be disturbed in the absence of a showing of manifest and unmistakable abuse of discretion.

2. Automobiles ⇐246(42)

In action for injuries sustained in automobile collision, instruction that jury should not discuss nature and extent of the plaintiff's injuries until determining liability of defendant was erroneous, where major issue was whether the plaintiff or a passenger who allegedly was intoxicated was driving automobile at time of collision, and it was necessary for jury to consider the evidence with reference to plaintiff's injuries in order to determine whether plaintiff was driving the automobile at time of the collision.

3. Trial ⇐253(4)

In action for injuries sustained in automobile collision, instruction advising jury that the plaintiff could not recover if she were negligent in any way, without requiring that such negligence must have proximately contributed to the accident which caused the plaintiff's injury, was erroneous.

4. New trial ⇐39

In action for injuries sustained in automobile collision, wherein the court gave instruction that nature and extent of plaintiff's injuries could not be discussed by jury until jury determined liability of defendant, which was erroneous under the circumstances, and erroneously omitted element of proximate cause in instruction relating to contributory negligence, the granting of motion for new trial was not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Lenna E. Simmons against Benjamin W. Lamb and another, individually and as copartners doing business under the firm name and style of Lamb Transfer Company, and another, for injuries sustained in collision between an

automobile and a truck and trailer. Verdict was for the defendants. From an order granting motion for a new trial on ground of errors in law, the defendants appeal.

Affirmed.

Joseph A. Ball, of Long Beach, and Fred O. Reed, of Los Angeles, for appellants.

Russell H. Pray, of Long Beach, for respondent.

YORK, Presiding Justice.

In a dense fog around 10 o'clock on the evening of November 6, 1936, the respondent, who was driving her own car containing three other persons, collided with the rear end of a truck and trailer belonging to appellant transfer company. At the time of the collision the truck was loaded with oil pipe and was standing on the highway; both vehicles were headed in a northerly direction on Avalon boulevard in the county of Los Angeles. As result of the accident, respondent sustained severe injuries, to-wit: a long jagged cut in her throat below the chin and fractures of the fifth, sixth and seventh ribs below the left breast and above the waistline. Upon trial of the cause, the jury rendered its verdict in favor of appellants, whereupon respondent made a motion for a new trial, which motion was granted "on grounds of errors in law". From the order which was thereafter entered, appellants prosecute this appeal, claiming that the transcript discloses no errors in law justifying the said order granting a new trial; and urge that "three instructions were given to which respondent's counsel addressed his attack on the motion for new trial, and as no other 'errors in law' appear in the record, it must be assumed that the trial judge based his order upon these instructions", to-wit, appellants' numbers 8, 31 and 32.

The evidence produced by respondent at the trial of this cause reveals that said respondent, a nurse, aged 40 years, left her home on the day of the accident, accompanied by her daughter, to go to the San Pedro dock to meet M. D. Burroughs and his shipmate, Mike Donovan, both sailors attached to the tugboat Sonoma; that respondent had known Burroughs since he was 7 or 8 years of age and had known Donovan for six or seven years; that she met the boys around 7 o'clock in the evening, after which driving her Chevrolet car

she made two calls on patients of hers in Wilmington, and then proceeded north on Avalon boulevard on her way to her home in North Long Beach; that Burroughs was sitting to her right on the front seat of the automobile; that her daughter was sitting directly behind her on the rear seat with Donovan seated to the right of the daughter; that around 10 or 10:30 o'clock in a dense fog she collided with the allegedly unlighted truck and trailer of appellants which was standing on the boulevard headed north, loaded with oil pipe which extended approximately five to eight feet to the rear of the trailer; that respondent's throat was cut from ear to ear below the chin, and she also received fractures of her fifth, sixth and seventh ribs below the left breast and above the waistline, about the point where the lower part of the steering wheel of the car would touch her body; that after the accident respondent's daughter was found in the front seat suffering from a severe laceration of the scalp above the hairline; after the accident blood and pieces of flesh and hair were found in the jagged pieces of glass on the edge of a large hole in the right side of the windshield of respondent's automobile, and another small hole was made in the windshield in front of the driver's seat on the left side of the car.

There was a conflict in the evidence as to just where on the highway the truck and trailer was standing at the time of the collision. Respondent contended that it was parked without lights in the center of the paved portion of the highway, while the appellants offered testimony tending to prove that the marks of dual tires were on the soft shoulder, south of the impact and continued far up the highway; that the right headlight of the Chevrolet was found on the east edge of the pavement; that there was broken glass from the headlight and windshield of the Chevrolet scattered on the east side of the pavement and on the soft shoulder; that there were blood spots on the soft shoulder and respondent's teeth were found there, also. Appellants offered evidence that both Burroughs and Donovan were intoxicated and that a broken whiskey bottle was found in the Chevrolet, and also that all the lights on the truck and trailer were lighted.

The major issue in the case was whether respondent or Burroughs was driving the Chevrolet at the time of the accident, it being contended by appellants that Burroughs was the driver and that he was in-

toxicated; and the second contested issue was the location of the truck on the highway.

Appellants here urge that the jury was not misdirected in the law so as to materially prejudice the rights of the respondent, especially calling attention to the three instructions which respondent attacked in her argument for a new trial and upon which it is apparently conceded the trial court based its order granting the new trial, to-wit:

"Defendants' Instruction #8. You are not to base your decision in this matter, or on any issue thereof, upon guesswork, and if, after a consideration of all the facts in this case, it is a matter of conjecture or guesswork on your part as to whether or not the defendants were negligent in any manner, then plaintiff is not entitled to recover from the defendants, or if, after a consideration of the whole case, you find that the evidence is evenly balanced as to the defendants, or that it preponderates in their favor, or that it convinces you that the plaintiff, Lenna Simmons, was negligent, then plaintiff cannot recover, and your verdict will be in favor of the defendants.

"Defendants' Instruction #31. You are instructed that it would be a violation of your duty as jurors to discuss the nature and extent of plaintiff's injuries, if any, until you shall have first determined the question of whether or not the defendant is liable. The question of liability should first be determined by you before it would be proper for you in any wise to discuss the nature and extent of the plaintiff's injuries, if any, because unless the defendant is liable, the nature and extent of the plaintiff's injuries, if any, shall not enter into your deliberations. The fact that I have instructed, or may instruct you, upon the rules governing the measure of damages is not in any wise to be taken as an admission or indication upon my part that I believe or do not believe that the plaintiff, Lenna Simmons, is entitled to recover damages, for you are the sole judges of the facts. Such instructions are given you solely to guide you in arriving at the amount of your verdict only in case you find, from a preponderance of the evidence that the plaintiff, Lenna Simmons, is entitled to recover. If, from the evidence and the instructions I give you, you find that the plaintiff, Lenna Simmons, should not recover, then you are to disregard entirely the instructions which I gave you

governing the measure of damages and you should not consider the nature and extent of the plaintiff's injuries, if any, at all.

"Defendants' Instruction #32. If you find that some other person than Mrs. Lenna Simmons was driving her automobile with her permission and in her presence, such person is presumed to be her agent, and she is required to use such care as is reasonably necessary to prevent the driver from negligent acts which may endanger another.

"Under such circumstances, the negligence, if any, of the driver would be imputed to Lenna Simmons, and if such negligence, if any, of the driver contributed proximately in the slightest degree to the accident and the injuries, if any, suffered by Lenna Simmons, then your verdict must be for the defendants upon the complaint."

[1] It is well settled that the granting or refusing to grant a new trial rests very largely in the discretion of the trial court, and its action will not be disturbed in the absence of a showing of manifest and unmistakable abuse of discretion. *Fennessey v. Pacific Gas & Elec. Co.*, 10 Cal.2d 538, 544, 76 P.2d 104; citing *Sheets v. Southern Pacific Co.*, 212 Cal. 509, 516, 299 P. 71; *Thompson v. California Const. Co.*, 148 Cal. 35, 82 P. 367; *Manufacturers' Finance Corp. v. Pacific Wholesale Radio, Inc.*, 130 Cal.App. 239, 19 P.2d 1013; *Babcock v. Pacific Gas & Elec. Co.*, 120 Cal.App. 218, 7 P.2d 736; *Stoneburner v. Richfield Oil Co.*, 118 Cal.App. 449, 5 P.2d 436. See, also, *Pope v. Wenisch*, 109 Cal.App. 608, 611, 293 P. 622; *Harveld v. Milani*, 1 Cal. App.2d 157, 160, 36 P.2d 393; *Pozzobon v. O'Donnell*, 1 Cal.App.2d 151, 156, 36 P.2d 236.

[2] Although in some cases instruction numbered 31, as above quoted, would be proper, nevertheless, in the circumstances here presented, it was prejudicial error to instruct the jury not to consider the nature and extent of respondent's injuries until they had determined the question of liability therefor. Before the jury could decide whether respondent or appellants were responsible for the collision, it was necessary to determine whether respondent or her companion Burroughs was driving the Chevrolet, and in order to do that, it was necessary for the jurors to consider the nature and extent of respondent's injuries. There was direct evidence that respondent was driving her own car. Appellants argue that respondent was not driving the

Chevrolet because her throat was cut and because after the accident flesh, blood and hair were found on the broken windshield on the right side of respondent's car just about in front of the place where a passenger would be sitting. However, it was shown that respondent had three ribs fractured on her left side at about the point where the lower part of the steering wheel of the car would touch her body if she were sitting in the driver's seat. She testified that she was not cut by glass, her theory being that the oil pipe extending from the rear of the truck pierced the windshield in front of the driver's seat and cut her throat. It was also shown that there was dirt in the cut in her throat, which was entirely below her hairline; that her daughter, who had been sitting in the back seat of the automobile, was thrown into the front seat by the impact and that she received a laceration of the scalp above her hairline.

It was therefore necessary for the jury to consider all of this evidence with reference to respondent's injuries in order to determine whether or not she was driving her car at the time of the collision. To say the least, it was circumstantial evidence of some value.

The instruction as given, to-wit: "* * * it would be a violation of your duty as jurors to discuss the nature and extent of plaintiff's injuries, if any, until you shall have first determined the question of whether or not the defendant is liable", withdrew from the consideration of the jury certain facts which they should have had before them when they fixed the liability for the accident. In order to properly determine such liability, it was incumbent upon them to decide who was driving respondent's car when the impact occurred.

[3] Instruction numbered 8, as given to the jury, erroneously omitted the element of proximate cause, in that it advised the jury that respondent could not recover if she were negligent in any way, without requiring that such negligence must have proximately contributed to the accident which caused her injuries.

[4] It is conclusive that there was no abuse of discretion on the part of the trial court in granting the motion for a new trial.

The order appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

35 Cal.App.2d 104

WILLIAMS v. FREEMAN et ux.

Civ. 11840.

**District Court of Appeal, Second District,
Division 1, California.**

Oct. 11, 1939.

1. Brokers ⇨88(2)

In broker's action to recover \$2,000 as his commission under written contract to sell property owned by defendants, defendants' motion for nonsuit on grounds that a new agreement for payment of \$1,000 commission which was partly executed by payment of \$400 superseded original contract was properly denied, where broker testified that payment of \$400 was "on account" of his commission and defendants did not accept broker's offer to take \$1,000 in settlement of his claim for commission.

2. Trial ⇨165

Upon a motion for nonsuit, particularly when made at close of plaintiff's case, all evidence must be construed most strongly against defendant and every favorable presumption fairly arising from evidence produced must be considered in favor of plaintiff.

3. Trial ⇨165

On a motion for nonsuit, if evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to plaintiff and all evidence in favor of plaintiff must be taken as true and if contradictory evidence has been given it must be disregarded.

4. Trial ⇨165

On motion for nonsuit, plaintiff's evidence which is relevant to issues is to be given its full probative strength whether or not it has been erroneously admitted.

5. Brokers ⇨53

A broker is the procuring cause of a transaction and entitled to agreed commission when he has found a purchaser ready, able, and willing to buy property on terms fixed, and either has procured from a person a valid contract binding him to purchase property upon those terms, or has brought vendor and proposed purchaser together so that vendor might have secured such contract if he desired.

6. Brokers ⇨63(1)

A broker had earned his commission under a written contract to sell property when he had arranged a meeting between owners of property and prospective buyers, both of whom were financially responsible as well as ready and willing to purchase property especially where vendors refused to consummate transaction because they wished to reserve to themselves oil rights of which no mention was made in written agreement with broker.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by R. J. Williams against Rega D. Freeman and Dovie Freeman (husband and wife) to recover broker's commissions and to recover a sum of money allegedly due on an account stated. Defendants by cross-complaint sought recovery of \$400 paid to plaintiff. From a judgment for the plaintiff on his cause of action to recover broker's commissions and against defendants on their cross-complaint, defendants appeal.

Affirmed.

W. J. Minville, of San Luis Obispo, for appellants.

Albert Nelson, of San Luis Obispo (Augustus Castro, of San Luis Obispo, of counsel), for respondent.

YORK, Presiding Justice.

Respondent, a licensed real estate broker, on August 29, 1936, entered into an exclusive listing contract in writing with the appellants, a farmer and his wife, by which the latter agreed to pay to respondent the sum of \$2,000 if, within thirty days thereafter, he sold upon the terms therein expressed certain ranch property owned by appellants.

The complaint herein set up two causes of action: The first was based upon the contract for the payment of \$2,000 as commission, and the second alleged that on October 6, 1936, an account was stated between the parties for the sum of \$1,000 upon which \$400 had been paid. The prayer of the complaint was for the sum of \$1,600.

The answer denied generally and specifically all the allegations of the complaint, and in addition appellants set up an amended cross-complaint for the recovery of \$400 which they alleged they paid to respondent

in consideration of which he agreed to refrain from bringing suit against them for the sum of \$1,000 for commission due for services rendered in connection with the sale of real property.

The court found in favor of respondent broker on his first cause of action. With respect to the second cause of action, it found that no account was stated between the parties, and concluded that respondent was entitled to a judgment for the sum of \$1,600.

Upon the issues framed by the cross-complaint, it was found, among other things, as follows:

"1. That plaintiff was at all times herein mentioned a duly licensed real estate broker * * * that on August 29th, 1936, plaintiff and cross-complainants entered into a certain agreement in writing by which the latter employed said (plaintiff) to sell said real property for the price therein stated and agreed to pay plaintiff the sum of Two Thousand Dollars for his said services in the event said property was so sold by him within thirty days. That on or about the 15th day of September, 1936, plaintiff pursuant to said agreement duly sold said real property and produced the purchasers thereof to said cross-complainants * * * who thereupon refused to sell said real property to said purchasers. That said purchasers were at all times ready, willing and able to buy said property pursuant to said agreement; that plaintiff performed all the conditions of said agreement on his part and demanded of said (cross-complainants) payment of said Two Thousand Dollars and that neither the whole nor any part of said Two Thousand Dollars has been paid except the aforesaid sum of Four Hundred Dollars which said Four Hundred Dollars was paid by cross-complainants to plaintiff * * * on account of said (plaintiff's) claim for said Two Thousand Dollars and as a part payment thereof, and that cross-complainants refused to pay the balance of said Two Thousand Dollars remaining unpaid.

"2. That on or about October 6th, 1936 * * * plaintiff * * * demanded of said cross-complainants * * * the payment of the sum of Two Thousand Dollars, then due, owing and unpaid to said (plaintiff) from said (cross-complainants) as a commission on the sale of the real property described in said cross-complaint, which he had sold for them, and upon the refusal of said cross-complainants to pay

said Two Thousand Dollars said (plaintiff) informed cross-complainants he would bring suit against them * * * if the same was not paid, and thereupon said cross-complainants paid said (plaintiff) the aforesaid sum of Four Hundred Dollars as a part payment of said indebtedness."

As a conclusion of law based upon its findings of fact, the court found that cross-complainants were not entitled to recover anything as against plaintiff and that the cross-complaint should be dismissed.

[1-4] At the conclusion of respondent's case the court denied appellants' motion for nonsuit as to the first cause of action. It is now maintained by appellants that said motion for nonsuit should have been sustained for the reason that respondent in his testimony on his first cause of action claimed he had secured buyers for the property and that he had earned his commission therefor, after which he testified in support of his second cause of action that an entirely new agreement was made for the payment of \$1,000 which was partly executed by the payment to and the acceptance by him of the sum of \$400. While it is true that respondent admitted the acceptance by him of the \$400, he testified upon cross-examination that it was a payment "on account" of his commission. Appellants' motion for nonsuit was properly denied for the reason that respondent produced substantial evidence tending to establish the allegations of his first cause of action. Moreover, it was later proved by the testimony of appellants that they did not accept the offer of \$1,000 in settlement of respondent's claim. It is well settled that "upon a motion for nonsuit, particularly when made at the close of plaintiff's case, all the evidence must be construed most strongly against the defendant. (Citations of cases.) Every favorable inference, fairly deducible, and every favorable presumption fairly arising from the evidence produced must be considered as facts in favor of the plaintiff. If the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. All the evidence in favor of the plaintiff must be taken as true, and if contradictory evidence has been given it must be disregarded. (Citations of cases.) * * * On such motion the court * * * has nothing to do with any apparent disagreement as to the facts among plaintiff's witnesses, nor with any conflicts between the

evidence brought out on direct and cross-examination. The evidence of the plaintiff which is relevant to the issues is to be given its full probative strength, whether or not it has been erroneously admitted." 9 Cal.Jur. 551.

At the time the motion was presented, it was necessary for the court to consider not only the testimony of plaintiff, but also the testimony of the prospective buyers which was to the effect that they not only were ready and willing to buy, but that they were financially able to do so, all of which evidence tended to establish the allegations of respondent's first cause of action.

Appellants also contend that the findings of fact to the effect that "respondent sold the property in question, or secured purchasers at the times mentioned ready, able and willing to buy, are not sustained by the evidence".

In order to earn his commission under the terms of the contract of August 29, 1936, it was incumbent upon respondent to produce within thirty days of its date, a purchaser financially able to pay \$70,375 for 2815 acres of farm land upon terms as follows: \$20,000 in cash and the balance of \$50,375 to be secured by a first mortgage or deed of trust, payable \$8,396 annually thereafter until paid in full, with interest on all deferred payments at the rate of five per cent per annum. The record reveals that on or about September 10, 1936, respondent interested Dwight Kuhnle and Ed Borchert in the purchase of the ranch and that on September 28, 1936, the appellants, respondent and the two prospective purchasers all met in respondent's office at which time the appellant Rega D. Freeman refused to carry out the terms of the contract because he wanted to reserve the oil rights in the said property, although no mention of such reservation was made in the written contract. The testimony of the so-called purchaser Kuhnle was that he had \$10,000 cash in bank, farming implements valued between \$5,000 and \$6,000, and grain on hand of the value of \$1,800 to \$2,000. The testimony of the witness Borchert shows that he was able to purchase for the reason that he had between \$2,000 and \$3,000 cash in bank, had \$2,500

in an open account with the Farmers' Alliance, \$2,000 in notes collectable on one day's notice, and negotiable securities valued at \$16,000 upon which he could secure cash on very short notice.

It appears to be appellants' theory that "the readiness and willingness of a person to purchase property can be shown only by an offer on his part to purchase, and that unless he has actually entered into a contract binding upon him to purchase, or has offered to the vendor, and not merely to the broker, to enter into such contract, he cannot be considered a purchaser."

[5] *Gunn v. Bank of California*, 99 Cal. 349, 33 P. 1105, the leading case in this state on the subject of performance by a broker, holds that the broker is the procuring cause of a transaction when he has proved that he found a purchaser ready, able and willing to buy the property on the terms fixed, and either that he procured from the person a valid contract binding him to purchase the property upon those terms, *or that he brought the vendor and the proposed purchaser together, so that the vendor might have secured such contract if he desired.* (Emphasis added.)

[6] The contract between appellants and respondent authorized the latter "to act as our agent and to accept a deposit to be applied on the purchase price, and to execute a binding contract of sale on our behalf". As a matter of fact, respondent accepted from one of the prospective purchasers a check drawn to appellants' order for the sum of \$100 as a deposit to be applied on the purchase price, but irrespective of this fact, when respondent arranged the meeting between appellants and the prospective buyers, both of whom were financially responsible, as well as ready and willing to purchase the land, he had earned his commission, especially in view of the fact that the vendors refused to consummate the deal because they wished to reserve to themselves the oil rights in the land of which no mention was made in the written agreement between them and respondent broker.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

35 Cal.App.2d 128

**HEROUX v. ATCHISON, T. & S. F. RY.
CO. et al.
Civ. 11815.**

District Court of Appeal, Second District,
Division 2, California.

Oct. 13, 1939.

Rehearing Denied Oct. 27, 1939.

1. Appeal and error ☞1218

Where aggrieved party is cognizant of fraud or mistake upon which appellate court has based its decision unless such party acts promptly, order will not be made recalling remittitur.

2. Appeal and error ☞1218

Where plaintiff was familiar with alleged fraud and mistakes upon which motion to recall remittitur was based, but filed petition for rehearing with Supreme Court instead of filing petition for rehearing with appellate court, plaintiff moving for recall of remittitur after Supreme Court had denied rehearing petition was guilty of laches requiring denial of motion.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

On motion to recall remittitur, after case had been transferred from Supreme Court. Motion denied.

For opinion of Supreme Court, see 93 P.2d 805.

Robert Brennan, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellants.

Russell H. Pray and Mason & Windham, all of Long Beach, Henry F. Walker, of Los Angeles (Roy J. Brown, of Long Beach, of counsel), for respondent.

McCOMB, Justice.

This is a motion by respondent for an order recalling the remittitur heretofore issued herein on the grounds (1) that the judgment of this court was improvidently entered upon false suggestions and under a mistake as to the facts of the case, and (2) that fraud and imposition have been practiced upon this court in procuring its judgment and upon counsel representing respondent.

We denied this motion on January 24, 1939. 86 P.2d 841. Thereafter upon peti-

tion of respondent the Supreme Court granted a hearing of the motion. September 6, 1939, that court, after hearing argument and submitting the matter, retransferred the motion to this court for disposition, saying in part with reference to the order granting a hearing:

"The order of transfer was made because of what was deemed at the time to be an erroneous statement of law on the face of the opinion. Later examination disclosed that there were no exceptional circumstances which would require the granting of the petition and that the denial of the motion by the District Court of Appeal was regular and should have been permitted to stand." *Heroux v. Atchison, Topeka & Santa Fe Railway Company*, Cal.Sup., 93 P.2d 805.

In view of the foregoing, our prior opinion is hereby adopted. It is as follows:

"The undisputed facts are:

"Respondent obtained a judgment against defendants after trial before a jury in an action to recover damages for personal injuries. From this judgment defendants appealed to this court, and, after a hearing upon the merits, we reversed the judgment of the lower court on September 8, 1938. *Heroux v. Atchison, Topeka & Santa Fe Railway Company*, [28 Cal.App.2d 401], 82 P.2d 620. No application for a rehearing was filed by respondent with us. However, on October 10, 1938, she filed a petition with the Supreme Court for a hearing, which petition was denied November 7, 1938. November 9, 1938, remittitur issued from this court to the Superior Court.

"This is the sole question necessary for us to determine:

"Will this court issue an order recalling its remittitur when the moving party, fully cognizant thereof from the time of the filing of the opinion of this court, has failed to call the alleged fraud and imposition upon which the motion is based to our attention by way of a petition for rehearing?"

[1] "This question must be answered in the negative. The law is established that, where an aggrieved party is cognizant of fraud or mistake upon which an appellate court has based its decision, unless such party acts promptly and at the first opportunity to call the court's attention thereto, an order will not be made recalling the remittitur after the same has been issued. *Haydel v. Morton*, [28 Cal.App.2d 383], 82 P.2d 623.

[2] "Applying this rule to the facts of the instant case, it appears that on September 8, 1938, respondent was familiar with the alleged fraud and mistakes upon which the present motion is based; that a petition for rehearing was not filed in this court; and that thereafter a petition for hearing was filed with the Supreme Court setting forth substantially the same grounds for a hearing by that court as are now urged for an order of this court recalling the remittitur. It is therefore evident that respondent is guilty of laches in making the present motion, and under the law above stated the order prayed for should be denied."

The motion is denied.

I concur: WOOD, Acting P. J.



35 Cal.App.2d 116

PEOPLE v. PERCE.

Cr. 526.

District Court of Appeal, Fourth District,
California.

Oct. 11, 1939.

Appeal and error ☞434, 773(4)

Where record on appeal was filed on August 15, 1939, and cause was placed on calendar of October 10, 1939, and no one appeared for appellant and he filed no brief, judgment was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding by the People of the State of California against Loren Twyman Perce. From an unsatisfactory judgment, defendant appeals. On respondent's motion to affirm the judgment or to dismiss the appeal under provisions of the Pen.Code, § 1253.

Judgment affirmed.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

MARKS, Justice.

Respondent has moved to affirm the judgment or to dismiss the appeal under the provisions of section 1253 of the Penal Code.

The record on appeal was filed in the office of the clerk of this court on August 15, 1939. The cause was placed on the calendar of October 10, 1939. No one appeared for defendant and he has filed no brief nor otherwise made any appearance herein.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIF-FIN, J.



35 Cal.App.2d 95

In re STEINMAN'S ESTATE.

STEINMAN et al. v. SCANDINAVIAN

FAITH MISSION et al.

Civ. 12289-S.

District Court of Appeal, Second District,
Division 1, California.

Oct. 11, 1939.

1. Wills ☞16

The statute providing that no estate may be bequeathed to any charitable or benevolent society or corporation by testator who leaves a spouse or other person who under will or law of succession would otherwise have taken property so bequeathed, unless the will was executed at least 30 days before death of testator, does not place limitation upon gifts in general for charitable purposes, but places such limitation only upon gifts to charitable corporations or societies or in trust for charitable uses. Probate Code, § 41.

2. Wills ☞14

To constitute a "charitable society" or "corporation" within statute placing limitation upon gifts to charitable corporations or societies or in trust for charitable uses, it is essential that a number of persons unite together for some common purpose. Probate Code, § 41.

[Ed. Note.—For other definitions of "Charitable Corporation," see Words & Phrases.]

3. Wills Ⓒ14

Where mission was conducted by founder as her own private enterprise, and if she were eliminated the mission would cease to exist, mission was not a "charitable or benevolent society or corporation," within statute placing limitation upon gifts to charitable organizations or societies, or in trust for charitable uses, as respects validity of legacy to mission in will executed eight days before testator's death. Probate Code, § 41.

4. Wills Ⓒ13(2)

In order that a charitable use may come into existence, the will itself must provide that the money or property of the trust shall be used for public benefit or for some particular class of persons indefinite in number who are to be benefited by such charitable use.

5. Wills Ⓒ520

A charitable gift will not be permitted to fail because of misnomer, misdescription or ambiguity of description. Civ.Code, § 1340.

6. Wills Ⓒ520

Where testator bequeathed his estate to the "Scandinavian Faith Mission, 121 E. Second Street, Los Angeles, California," and trial court found that the mission was operated, maintained, and conducted as private enterprise by founder as she saw fit, court did not err in ruling that description of legatee be corrected and decreed to be the founder conducting the mission at the given address.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Justice.

Proceeding in the matter of the estate of Philip Steinman, deceased, by George Philip Steinman and another against the Scandinavian Faith Mission and another to set aside a bequest and for determination of heirship. From an adverse judgment plaintiffs appeal.

Affirmed.

Charles R. Thompson and Henry N. Cowan, both of Los Angeles, for appellant George Philip Steinman.

Frank L. Richardson, of San Diego, for appellant Virginia Steinman.

N. B. Nelson, of Los Angeles, for respondents.

YORK, Presiding Justice.

On November 5, 1937, while waiting to have an abdominal operation performed at the Naval Hospital in San Diego, Philip Steinman executed an olographic will by the terms of which he bequeathed his entire estate to the Scandinavian Faith Mission and appointed the Bank of America National Trust and Savings Association executor of said will. Testator died on November 13, 1937, the executor qualified and the will was duly admitted to probate on December 3, 1937. On June 17, 1938, the appellants, who are a nephew and a niece of the testator, both residents of Kansas City, Missouri, filed their joint petitions to cancel the bequest to the Mission and to determine heirship, upon the grounds, among others, that the said Mission was a charitable or benevolent society or corporation; that the will was executed less than thirty days before the death of the testator; that petitioners were the proper, legal and so, so far as known, the only living heirs of decedent, and therefore the bequest to the Mission failed because it fell within the purview of section 41 of the Probate Code, to-wit:

"No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws, of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least thirty days before the death of the testator. * * *

It was stipulated between counsel that appellants would not be required to introduce evidence of their relationship to decedent, and also that the deposition of Hanna B. Moe might be taken by both parties. This deposition was practically the only evidence presented at the trial. The cause having been argued and submitted, judgment was thereafter ordered denying said petition to determine heirship, from which judgment this appeal is prosecuted by the heirs.

By the terms of his will dated November 5, 1937, testator disposed of his property as follows:

"Second: I give everything of which I am possessed at the time of my death to the Scandinavian Faith Mission, 121 East Second St., Los Angeles, California.

"Third I have no wife or living issue and no living parents and I have not see or heard from any of my relatives for about thirty-five years and for that reason make no provision for them."

Filed as the residuary legatee's exhibit No. 1, is a letter addressed to The Scandinavian Faith Mission, 121 East 2d Street, Los Angeles, California, reading as follows:

"San Diego, California, Naval Hospital,

"November 6, 1937

"The Scandinavian Faith Mission,

"Dear Superintendent

"I the undersigned have made my will to the Scandinavian Faith Mission, yesterday November 5, 1937, and the will is located at the Bank of America, 6th and Broadway, San Diego, Calif.

"I am in the Naval Hospital waiting an abdominal operation, in the next few days. So please pray for me, for I know the prayers of holy people availatheth much.

"My will, will always remain the same regardless of the results of this operation.

"Yours in Christ,

"Philip Steinman."

The deposition of Hanna B. Moe shows that she organized the Scandinavian Faith Mission on February 27, 1936, using for that purpose \$400 which she had received from her father in Sweden; that no other person, church or organization is connected with her in the management, control or maintenance of the said Mission; that said affiant is a tailoress and has been employed as such for the past seven years by Mullen & Bluett of Los Angeles; that she pays the rent, owns the furniture and furnishings in the Mission; that the Mission operates under no by-laws or other regulation; has no board of directors or other managing board; that six meetings a week are held at which "we sing some songs and have prayer and read the Bible. Somebody gives message from the Bible, and people give testimony telling how they have been converted and got on all right. Some have been converted in the Mission and some outside of the meeting;" that the people who attend the Mission meetings are "more the floating population that are traveling around and men usually without work, and some of them are drunkards". In re-

sponse to the question "And what work do you do there personally, Mrs. Moe?" she replied: "I am usually there early to see that it is nice and clean and that the Mission is open, and then I usually help to begin the meetings and I am taking part in the meetings often, and then I see that the right leaders are there and if they aren't there I take the meeting myself. And I talk to the people and get acquainted with the people and try to encourage them."

It is also shown by the deposition that a free-will offering is taken at each meeting and that the funds so received are taken and paid out by Hanna B. Moe, personally, without consultation with anyone else; that most of the time such collections are insufficient to meet the expenses of the Mission and such deficit is made up by the affiant; that no funds are solicited from any persons or organizations and no funds are received from the Community Chest or any other organization. In answer to the question, "What charitable activities, if any are conducted at the Mission?" she replied: "We do not do any charity work, only giving beds or meals like any one of you would do. And sometimes we give—if we give anyone anything I usually ask one of the men, in case somebody is asking for help or is hungry, I usually give them some money to some of the men at the Mission that I know and they go and buy a meal for them, or a bed. I don't dare to give the money because they might go and buy a drink instead." She also testified: "The work that is done at the Mission * * * that was just trying to help the people to be better, and to be Christians and good citizens, and to support themselves and support their families if they have any." On cross-examination she said she ran the Mission just exactly as she wanted to; that she had no title; that the meetings consisted of prayers and a religious message from the Bible and singing; that the attendance was about one hundred persons per week and the meetings were open to all of Christian faith; that she selected a leader to conduct each meeting, occasionally a group from some particular church would take charge of the meeting; that she did not know the testator personally and the first she knew about the will was when she received the letter, hereinbefore set out; that affiant's maiden name was Hanna Andreen, and that while some people referred to the Mission as the Scandinavian Faith Mission,

others referred to it as Miss Andreen's Mission; that the people at the Mission referred to her both as Mrs. Moe and as Miss Andreen; that her husband took no part in the management of the Mission; that the expenses of the Mission ran around \$50 per month and that she made up the difference between the collections and the expenses; that she owned her own property and worked as a tailoress; that neither she nor her husband ever used any of the funds collected for the Mission for their personal use, and that her husband was a janitor in the Times building and worked nights.

In answer to the petition it was alleged as follows: "That at all times in said petition mentioned Hanna B. Moe was, and now is personally and exclusively conducting, operating and maintaining a private mission at No. 121 East Second Street, Los Angeles, California, under the name of Scandinavian Faith Mission, also known as the Scandinavian Christian Faith Mission the residuary legatee herein; that the said Mission so operated, maintained and conducted by the said Hanna B. Moe, is not affiliated or connected with any church or other religious organization; that it does not have any members or associates; that it does not have any board of directors, trustees or other managing board of any sort or description; that it is governed exclusively by the will of the said Hanna B. Moe; that all moneys received and disbursed by said Mission are received and disbursed solely and exclusively by the said Hanna B. Moe for whatever purposes she deems best."

Based upon the evidence adduced at the hearing of the petition, which consisted of the deposition, as aforesaid, the court, among others, made the following findings of fact:

"6. That it is not true that the Scandinavian Faith Mission now is, or was at any time in said petition mentioned, or ever was, at any time, a charitable or benevolent society * * * or ever was at any time, a charitable or benevolent corporation. * * *

"8. That the legacy bequeathed by said will to the Scandinavian Faith Mission was not bequeathed or devised to the said Scandinavian Faith Mission in trust for charitable uses, or in trust at all.

"9. That the legacy bequeathed by said will to the Scandinavian Faith Mission was not bequeathed or devised to Hanna B.

Moe, or to any other person or persons in trust for charitable uses, or in trust at all. * * *

"11. The Court further finds that at all times in said petition mentioned Hanna B. Moe was, and now is, personally and individually conducting, operating and maintaining a private mission at No. 121 East Second Street, Los Angeles, California, under the name of Scandinavian Faith Mission, the residuary legatee herein; that the said Mission so operated, maintained and conducted by the said Hanna B. Moe is not a church, nor is it affiliated or connected with any church or other religious organization; that it does not have any members or associates; that it does not have any board of directors, trustees or other managing board of any sort or description; that it is governed solely and exclusively by the said Hanna B. Moe; that all moneys received and disbursed by said Mission are received and disbursed solely and exclusively by the said Hanna B. Moe for whatever purposes she deems best."

The trial court thereafter entered judgment decreeing the bequest in the will to the Scandinavian Faith Mission to be valid and in full force and effect, and that "the description of the residuary legatee Scandinavian Faith Mission be, and the same is hereby corrected and decreed to be 'Hanna B. Moe, conducting the Scandinavian Faith Mission, 121 East Second Street, Los Angeles, California'."

Appellant heirs here insist that (1) the Mission is a charitable or benevolent society within the meaning of section 41 of the Probate Code; (2) assuming that the bequest was intended to be made to an individual instead of to the Mission, the gift would be in trust for charitable uses (3) the court erred in substituting for a specifically named legatee an individual not named in the will.

[1-3] From those portions of the deposition hereinbefore quoted, it clearly appears that Mrs. Moe is the alter ego of the Scandinavian Faith Mission which she has conducted at all times as her own private enterprise. Construing section 1313 of the Civil Code upon which section 41 of the Probate Code is based, the court in the Estate of Hamilton, 181 Cal. 758, at page 772, 186 P. 587, 592, said: "Section 1313, Civil Code, provides no limitation upon gifts in general for charitable purposes. *It places such limitation only upon gifts*

to charitable corporations or societies or in trust for charitable uses." By no stretch of the imagination could the Scandinavian Faith Mission be termed either a corporation or a society. To constitute the latter, it is essential that a number of persons unite together for some common purpose. It clearly appears from the record herein that Mrs. Moe was the moving spirit of the Mission, and if she were eliminated, the Mission would cease to exist; not only has she maintained full control and management of the activities of the Mission, but she has used her own money in carrying out her own plans with reference to such activities. It is therefore obvious that the findings of the trial court that the Mission is neither a charitable or benevolent society nor a corporation are fully sustained by the evidence.

In so far as the legacy to the Mission is concerned, by its terms it is absolute. No restrictions of any sort are imposed upon the legatee with reference to the manner in which the property bequeathed to it shall be used. For all that appears either on the face of the will or in the letter transmitted to the legatee by the testator just prior to his death, his intention may have been to reimburse the legatee for expenses previously incurred in carrying on the work of the Mission, rather than to continue such work in the future.

In Estate of Dol, 182 Cal. 159, at page 167, 187 P. 428, at page 432, it is stated:

"The bequest under consideration here does not by its terms create any trust whatever. It reads as follows: 'Fourth. I give and bequeath unto the French Hospital of the City of Los Angeles, the sum of five thousand dollars.'

"It is admitted that by the term 'French Hospital' the testator intended to designate the respondent. The legal effect of the bequest is to make the money the absolute property of the respondent, and the language does not impose upon it any trust."

[4] In order that a charitable use may come into existence, the will itself must provide that the money or property of the trust shall be used for the public benefit, or for some particular class of persons, indefinite in number, who are to be benefited by such charitable use. Estate of Hinckley, 58 Cal. 457, 488; Estate of Dol, 182 Cal. 159, 164, 187 P. 428.

Appellants cite the Estate of McDole, 215 Cal. 328, 10 P.2d 75, 77, as authority for their contention that it is not necessary

to the creation of a valid charitable trust that express words of trust be used. The cited case holds that a "devise to a *society or corporation organized for a charitable purpose* without further declaration of the use to which the gift is to be put, is given in trust to carry out the objects for which the organization was created." It is obvious that the cited case is not in point for the reason that it has reference only to a society or corporation organized for a charitable purpose, while the legatee in the instant case does not fall within either the classification of a society or of a corporation, and the purpose for which this meeting place is maintained can be ascertained only from the testimony of Hanna B. Moe, the alter ego of the said legatee.

Therefore, the said Scandinavian Faith Mission does not come within the purview of section 41 of the Probate Code.

With respect to appellants' third point, to-wit: that the court erred in substituting for a specifically named legatee an individual not named in the will, the trial court found upon competent evidence that "Hanna B. Moe was, and now is, personally and individually conducting, operating and maintaining a private mission * * * under the name of Scandinavian Faith Mission * * * that the said Mission so operated, maintained and conducted by the said Hanna B. Moe * * * is governed solely and exclusively by the said Hanna B. Moe; that all moneys received and disbursed by the said mission are received and disbursed solely and exclusively by the said Hanna B. Moe for whatever purposes she deems best." In accordance with said finding, it was adjudged that "the description of the said residuary legatee be corrected and decreed to be 'Hanna B. Moe, conducting the Scandinavian Faith Mission at 121 East Second Street, Los Angeles, California'."

[5] It is well-established law in this state that a gift will not be permitted to fail because of misnomer, misdescription, or ambiguity of description. Apropos of this, it was stated in Estate of Brehm, 116 Cal. App. 206, at page 208, 2 P.2d 402, at page 403: "The mere fact that in drafting her will and in designating the several beneficiaries thereunder the testatrix used the name by which the corporation legatee was ordinarily and commonly described, rather than the true or official name of such legatee, cannot defeat the wishes of the testatrix in that regard. Where, by com-

petent evidence, the identity of the legatee is made to appear, the authorities are numerous in the declaration of the law that the intention of the testatrix as expressed in her will must prevail. Section 1340, Civ. Code; *In re Gibson*, 75 Cal. 329, 17 P. 438; *Estate of Dol*, 182 Cal. 159, 187 P. 428; *Estate of Moeller*, 199 Cal. 705, 251 P. 311; and see, *Gilmer v. Stone*, 120 U.S. 586, 7 S.Ct. 689, 30 L.Ed. 734 [see, also, *Rose's U. S. Notes*]."

In *Estate of Moeller*, 199 Cal. 705, at page 715, 251 P. 311, at page 315, the testatrix made a bequest in favor of the Mountmellick Union Workhouse and upon hearing of petition for distribution it was found by the court that there never was any person, firm, entity, body, or corporation by that name, or bearing any similar name or title, capable under the law of taking by will any property of said decedent. The decree of distribution based upon these findings distributed all the property of said deceased to the heirs at law of said decedent, from which the Laioghis Hospital and Homes Committee of Portlaoighis appealed. It was there held: "While the

Mountmellick Union Workhouse is in itself incapable of taking or holding property, as we may assume from the affidavit of Thomas Reilly, it being merely a building and the premises used in connection therewith wherein the inmates are cared for, the appellant, according to said affidavit, is the agency established by the government, whose legal duty it is to direct and carry on the affairs of said workhouse and to have charge and dominion over its property. As such, there is no question but that it would be the proper and legal body to receive said bequest. The mere fact that the testatrix made the bequest in favor of the workhouse and not in favor of the committee legally in charge of said institution should not defeat said bequest."

[6] It is therefore the conclusion of this court that the trial court did not err in its ruling that the description of the residuary legatee be corrected and decreed to be Hanna B. Moe, conducting the Scandinavian Faith Mission.

The judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

14 Cal.2d 464

BRIDGES v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY.

S. F. 16174.

Supreme Court of California.

Oct. 16, 1939.

Rehearing Denied Nov. 13, 1939.

1. Contempt ⚡41, 50

Proceedings against a person charged with contempt of court under the provisions of the Penal Code should be entitled and prosecuted in the name of the People of the State of California, and by their authority. Pen.Code, § 166; Const. art. 6, § 20.

2. Contempt ⚡41, 50

If contempt proceeding was strictly a "criminal prosecution," it should have been entitled in the name of the People of the State of California, and should have been prosecuted by their authority. Pen.Code, § 166; Const. art. 6, § 20.

3. Contempt ⚡41, 50

Contempt proceedings instituted under provisions of the Code of Civil Procedure are not "strictly criminal actions," but are "special proceedings of a criminal character," and as such are not within, nor governed by, requirements of section of Constitution providing that the style of process shall be "The People of the State of California," and all prosecutions shall be conducted in their name and by their authority. Code Civ.Proc. §§ 170, 1209, 1211; Const. art. 6, § 20.

[Ed. Note.—For other definitions of "Criminal Action" and "Special Proceeding," see Words & Phrases.]

4. Contempt ⚡54

The statute providing that, when a contempt is not committed in immediate view and presence of the court, judge, or justice at chambers, an affidavit shall be presented to the court, judge, or justice of the facts constituting the contempt, is not violative of section of the constitution providing that the style of process shall be "The People of the State of California," and all prosecutions shall be conducted in their name and by their authority. Code Civ.Proc. § 1211; Const. art. 6, § 20.

5. Contempt ⚡41

In contempt proceedings which are not strictly criminal proceedings, it is immaterial who institutes the proceedings, since alleged contemner is not prejudiced in his

defense by particular mode in which facts are brought to court's attention. Code Civ. Proc. §§ 170, 1209, 1211; Const. art. 6, § 20.

6. Contempt ⚡41, 50

Contempt proceedings, against one who sent and caused to be published the contents of a telegram criticizing court's decision and making threats in case decision should be enforced, were properly instituted by filing of affidavits entitled "In the Matter of H. R. Bridges, sometimes known as Harry R. Bridges. In Contempt," filed by an officer and three members of bar association, as against contention that proceedings should have been entitled and prosecuted in the name of the people of the state. Code Civ.Proc. §§ 170, 1209, 1211; Const. art. 6, § 20.

7. Jury ⚡21(4)

In proceedings for contempt committed out of court's presence, alleged contemner had no constitutional right to trial by jury. Code Civ.Proc. §§ 1211, 1217.

8. Jury ⚡21(4)

A respondent in contempt proceedings is not entitled to trial by jury except where it is expressly provided for by statute, and then only in the particular cases to which the statute applies, and the fact that the act constituting contempt may also be an indictable offense does not affect the rule where the proceeding is not by indictment.

9. Constitutional law ⚡273

Jury ⚡21(4)

The power of a court to punish summarily for contempt is not within application of constitutional provisions guaranteeing a trial by jury, or providing against depriving persons of their liberty without due process of law.

10. Contempt ⚡54(3)

In proceedings for contempt committed out of court's presence, the fact that affidavit accusing alleged contemner contained allegations made on information and belief did not deprive trial court of jurisdiction. Code Civ.Proc. § 1211.

11. Constitutional law ⚡52

Contempt ⚡5

The statutory provision, that no speech or publication reflecting on or concerning any court or any officer thereof shall be treated or punished as contempt unless made in the immediate presence of such court while in session and in such manner as actu-

ally to interfere with its proceedings, is unconstitutional, and hence did not preclude proceedings for contempt against one who sent and caused to be published the contents of a telegram criticizing the court's decision and making threats if the decision should be enforced. Code Civ.Proc. § 1209, subd. 13.

12. Certiorari ⇨64(2), 69

On petition to review trial court's judgment, sole question before reviewing court is one of trial court's jurisdiction to render judgment under review, and if it had jurisdiction, its judgment will be affirmed, and if not, the proceedings will be annulled. Code Civ.Proc. § 1075.

13. Contempt ⇨67

In passing on question of trial court's jurisdiction of contempt proceedings, reviewing court may, on writ of review, consider evidence before trial court to determine whether it was sufficient to give that court jurisdiction to render its judgment finding accused guilty, and, in case reviewing court finds evidence insufficient, it will annul the judgment. Code Civ.Proc. § 1075.

14. Contempt ⇨67

In passing on question of trial court's jurisdiction in contempt proceedings, reviewing court's review of evidence on writ of review is limited to determining whether there was any substantial evidence before trial court to sustain its jurisdiction.

15. Contempt ⇨67

The power to weigh the evidence in a contempt proceeding rests with the trial court.

16. Contempt ⇨60(3), 67

In contempt proceedings originally brought in an appellate court, rule that alleged contemner must be proved guilty beyond a reasonable doubt applies as in contempt proceedings in a trial court, but such rule has no application on writ to review a trial court's judgment finding an alleged contemner guilty of contempt.

17. Contempt ⇨67

On writ to review trial court's judgment finding petitioner guilty of contempt, the Supreme Court, in determining whether there was any substantial evidence to sustain trial court's jurisdiction, had the sole duty to determine whether evidence was of sufficient substantiality to sustain the trial court's jurisdiction.

18. Contempt ⇨60(3)

In proceedings for contempt against one who sent and allegedly caused to be published contents of telegram which criticized decision of court in labor dispute and threatened certain action if decision was attempted to be enforced, evidence sustained trial court's finding that alleged contemner gave copy of telegram to another with intent that the contents thereof would be furnished to and published in newspapers. Code Civ. Proc. § 1211.

19. Contempt ⇨9

The fact, that judgment had been entered in action before alleged contemner caused libelous matter to be published concerning court's decision in that action, did not prevent the publication from constituting contempt, where the time for moving for new trial had not yet expired, since the action was still a "pending action." Code Civ.Proc. §§ 1049, 1211.

[Ed. Note.—For other definitions of "Pending," see Words & Phrases.]

20. Contempt ⇨9

Publication of contents of telegram, stating that court's decision in labor dispute was outrageous, and, in effect, that if attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up by strike, constituted "contempt of court." Code Civ.Proc. § 1211.

[Ed. Note.—For other definitions of "Contempt," see Words & Phrases.]

21. Contempt ⇨2

If a publication or act has a "reasonable tendency" to interfere with the orderly administration of justice in pending actions before judicial tribunals, it amounts to "contempt of court."

22. Constitutional law ⇨90

The right of free speech is not an absolute one, and the state, in the exercise of its police power, may punish the abuse of that freedom.

23. Constitutional law ⇨90

The constitutional guaranties of freedom of speech and of the press did not protect one who sent and caused to be published contents of telegram which criticized decision of court in labor dispute and threatened certain action if decision was attempted to be enforced. Code Civ.Proc. § 1211.

24. Contempt ⇨29

The fact that alleged contemner did not personally publish telegram containing state-

ments criticizing court's decision and threatening certain action if decision was attempted to be enforced, but that it was published by his agent, would not relieve him from guilt of contempt of court, where he caused the agent to make the publication. Code Civ.Proc. § 1211.

25. Courts ⇨489(I)

Federal legislation establishing the National Labor Relations Board and conferring on that Board certain powers respecting labor disputes did not take jurisdiction away from state court in action between labor unions over possession of the hiring hall maintained at certain port for longshoremen, and hence state court's order, finding individual guilty of contempt of court for criticizing decision in that action and threatening certain conduct if decision should be attempted to be enforced, was not invalid on ground that court had no jurisdiction. Code Civ.Proc. § 1211.

EDMONDS, J., dissenting.

In Bank.

Certiorari proceeding by Harry R. Bridges, petitioner, against the Superior Court of the State of California, in and for the County of Los Angeles, to review a judgment of the respondent finding the petitioner guilty of contempt of court.

Judgment affirmed.

Rehearing denied; EDMONDS, CARTER, and GIBSON, JJ., dissenting.

Gallagher, Wirin & Johnson, of Los Angeles, Gladstein, Grossman & Margolis, of San Francisco, and Charles J. Katz and A. L. Wirin, both of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, Allen W. Ashburn, Michael G. Luddy, and Arnold Praeger, all of Los Angeles, for respondents.

CURTIS, Justice.

This proceeding was instituted for the purpose of reviewing a judgment of the Superior Court of the County of Los Angeles whereby the petitioner, Harry R. Bridges, was found guilty of contempt of court. Upon the filing of the petition herein, an order was made that the proceedings before the trial court be certified to this court in order that the same might be reviewed and such action taken therein as is by law required. The basis of the con-

tempt proceeding was the alleged publication of a portion of a telegram sent by petitioner to the secretary of labor which, it is claimed, contained statements calculated to, and which had an inherent tendency to, interfere with the proceedings of a certain action then pending before the Honorable Ruben S. Schmidt, a judge of the Superior Court of said County of Los Angeles. That action was entitled *P. W. Walker et al., v. International Longshoremen's Association, District Local 38-82, Inc. et al.*, and carried the number, 420356.

The proceedings against petitioner involving said charge of contempt were commenced by the filing of four affidavits, each entitled, "In the Matter of H. R. Bridges, sometimes known as Harry R. Bridges. In Contempt", and were verified respectively by J. Louis Elkins, executive secretary of the Los Angeles Bar Association; L. E. Lampton, clerk of the Superior Court of the County of Los Angeles; Charles E. Sharritt, and A. G. Stanham, deputy county clerks of said court. After proceedings duly had, the petitioner appeared in said court, filed an answer to the charge made against him in said affidavits and the matter was heard by the Honorable Edward T. Bishop, a judge of said superior court. At the close of said hearing, the petitioner herein was found guilty of contempt of court upon the second count set forth in the affidavit of J. Louis Elkins, and not guilty as charged in the third count of said affidavit. The trial court had theretofore sustained a demurrer of petitioner to the charge as set forth in the first count of said affidavit. In adjudging the petitioner herein guilty of contempt of court, the trial court made findings of fact which we set out in full as follows:

"That on or about the 18th day of September, 1937, an action was commenced in the above entitled court by the filing of a complaint and the issuance of a summons entitled, '*P. W. Walker et al., plaintiffs, v. International Longshoremen's Association—Local 38-82, Inc., a corporation et al., defendants*', which said action is known as action number 420356 in said court.

"That said action was tried in the above entitled court before the Honorable Ruben S. Schmidt, as judge thereof, and on the 21st day of January, 1938, the said Ruben S. Schmidt, as judge of said court, made, signed and filed his findings of fact and conclusions of law in said action.

"That thereafter, but on the same day, a judgment and permanent injunction in said action were made and filed, in and by the terms of which a receiver was appointed over said International Longshoremen's Association, Local 38-82, Inc., and said receiver on said date qualified by filing a bond required by said judgment to be filed by him, and by making and filing his oath as such receiver.

"That on the next day, to-wit, the 22nd day of January, an order was made and entered by the court, staying the execution of said judgment and said injunction to the 29th day of January, 1938; that said judgment and permanent injunction were entered by the clerk of this court, on the 24th day of January, 1938, in the judgment book kept by him for that purpose, and that on said date all the defendants in said action, against whom judgment had been rendered and said permanent injunction issued, made and served a notice of intention to move for a new trial and a notice of motion to vacate the judgment and decision in said action.

"That from the time of the filing of said action, to and including the time of the events hereinafter referred to, the existence of said action and of the controversy involved therein received wide and general publicity in the Pacific Coast states of the United States of America. That almost daily during said period news items respecting the controversy involved in said action, and respecting conditions in the maritime industry on the Pacific Coast as a result of said controversy, appeared in the daily newspapers published and circulated in the City of Los Angeles, and that the existence of said controversy and of the fact that the said controversy was pending in the courts for determination was a matter of great public interest and general public discussion.

"That on the 24th day of January, 1938, the defendant Harry R. Bridges dispatched a telegraphic message to Frances Perkins, Secretary of Labor in the Cabinet of the President of the United States, at Washington, D. C., which telegram contained words and figures as follows, to-wit: 'This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen Union has 3000. International Longshoremen-Warehousemen Union has petitioned the labor board for certification to represent San Pedro longshoremen with

International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending; Attempted enforcement of Schmidt decision will tie-up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board.' That the words 'this decision' and the words, 'Schmidt decision', as used in the telegram, referred to the judgment and permanent injunction in which was contained an order appointing a receiver, as hereinabove noted. That the initials 'I. L. A.' referred to in said telegram, referred to International Longshoremen's Association, Local 38-82, Inc., hereinabove referred to.

"That at or about the time of the sending of said telegram the defendant Harry R. Bridges caused a copy thereto to be given to one James D. O'Neil, for the purpose and with the intent that the contents of said telegram should, and would be, furnished to and published in newspapers on the Pacific Coast and elsewhere, and said James D. O'Neil did give said telegram to newspaper reporters, and on the 24th and 25th days of January, 1938, the portion of said telegram above set forth was published in newspapers of wide and general circulation in the cities of San Francisco and Los Angeles, in the State of California, and the sending of said telegram and the contents thereof were thus made public and received wide and general publicity in the County of Los Angeles and elsewhere.

"That the statements contained in said telegram, and the publication of the fact of the sending of said telegram, and the publication of the contents thereof, all as aforesaid, were in and of themselves calculated, and had, an inherent tendency to interfere with the orderly and due administration of justice in said action No. 420356, and to interfere with, influence, sway, and control the proceedings in said action, and to embarrass and influence the actions and decisions of the judge before whom said action was pending."

As we view the proceeding before us, it involves three major questions which call for answers. There are also questions of minor importance which will be discussed

briefly at the close of this opinion. These three questions, first, one of procedure, second, the constitutionality of the last sentence of subdivision 13 of section 1209 of the Code of Civil Procedure, and third, whether the petitioner was responsible for the publication of the telegram sent to the secretary of labor, or that portion thereof which found its way into the public press, and if so, was the subject-matter thereof of such a character that the publication thereof would subject petitioner to punishment for contempt of court?

At the inception of the proceeding against petitioner, he objected to the procedure by means of which he was brought before the court and prosecuted on the charge of which he was subsequently found guilty. As we have seen, this proceeding was initiated by the filing of four affidavits each of which was entitled, "In the Matter of H. R. Bridges, sometimes known as Harry R. Bridges. In Contempt." Upon these affidavits being filed, the trial court issued its order and directed petitioner to show cause why he should not be punished for contempt. The petitioner appeared and both by motion to quash the order to show cause and by demurrer, raised the procedural question and contended that the proceeding against him was a criminal proceeding and should have been brought in the name of the People of the State of California, as plaintiff, and prosecuted by the district attorney of the county, or the attorney-general of the state, instead of being entitled as indicated above, and prosecuted as it was by three private attorneys purporting to represent the Los Angeles bar association. Both the motion and demurrer were held to be without merit, and accordingly the motion was denied and the demurrer was overruled. The petitioner thereupon filed a verified answer to the charge against him, and the case was then set for trial upon the issues made by said answer and the affidavits of Elkins, and others.* Before trial of said cause, the petitioner filed a demand for a jury to try said issues, which demand was denied, and said trial was held and the cause decided by the court without a jury. Petitioner therefore contends that said proceedings were fatally defective, (1) because they were not entitled and prosecuted in the name of the People of the State of California, (2) because they were prosecuted by private attorneys and not by the district attorney of said county of Los Angeles, or by the attorney-general of the state, and (3) because petitioner was denied a jury trial.

[1] We shall first direct our attention to the first of these three questions, that is, as to the procedure followed in this proceeding by which petitioner was charged, prosecuted and found guilty of contempt of court in the manner stated above. We find that both the Penal Code and the Code of Civil Procedure contain provisions defining certain acts which they respectively denounce as contempts of court. By section 166 of the Penal Code it is provided that every person guilty of contempt of court of the kinds therein enumerated is guilty of a misdemeanor. Section 1209 of the Code of Civil Procedure provides that certain acts or omissions in respect to a court of justice enumerated therein are made contempts of court. There is a general similarity between acts set forth in either of these code sections to those embraced in the other although in some respects the provisions of one of said sections differ from those contained in the other. Undoubtedly proceedings against a person charged with contempt of court under the provisions of the Penal Code should be entitled and prosecuted in the name of the People of the State of California, and by their authority. Art. VI, sec. 20, Const. of California. By section 1211 of the Code of Civil Procedure it is provided that, "When the contempt is not committed in the immediate view and presence of the court, or of the judge or justice at chambers, an affidavit shall be presented to the court, judge, or justice, of the facts constituting the contempt." Provisions are made by section 1212 of the Code of Civil Procedure for process to bring the accused person before the court where a trial is had before the court. The person charged may challenge the judge of the court before whom he is brought for trial under section 170 of the Code of Civil Procedure. In the proceeding under review herein, the petitioner herein challenged Judge Schmidt under said section of the code, and by stipulation of the parties to said proceeding, the trial of said contempt proceedings was had before Judge Bishop of said superior court. In said proceeding, the procedure provided by the sections of the Code of Civil Procedure above cited was followed rather than that applicable to strictly criminal prosecutions.

It is the position of the petitioner that the proceeding against him is a criminal prosecution, and therefore should be entitled, "The People of the State of California", and should be conducted in the name and by the authority of the People

as provided by article VI, section 20, of the Constitution, which reads as follows: "The style of process shall be 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority."

[2] If therefore the contempt proceeding against petitioner was strictly a "criminal prosecution", it should have been entitled in the name of the People and prosecuted by their authority, that is, it should have been entitled not only in the name of the People but should also have been conducted by the duly constituted prosecuting officers of the county in which the action was tried.

The precise character of a proceeding in contempt of court under the sections of the Code of Civil Procedure cited above and similar statutes of other states has received frequent attention from the court of this and other jurisdictions.

In *re Morris*, 194 Cal. 63, 227 P. 914, was a habeas corpus proceeding brought to test the validity of petitioner's conviction of the charge of contempt of court. The petitioner had been prosecuted under the provisions of the Penal Code and found guilty as charged. He contended that his imprisonment under the judgment of conviction in said action was illegal for the reason that the court had no jurisdiction to punish him for contempt of court under the provisions of the Penal Code, as the exclusive jurisdiction to punish for contempt of court was vested in the court whose order petitioner was charged with violating. After reviewing certain features of the case, the court stated (194 Cal. page 68, 227 P. page 916): "From these premises petitioner deduces the conclusion that the jurisdiction to punish as a contempt the violation of an order issued by the superior court of Sacramento county is vested solely and exclusively in that court. If we were to regard petitioner's act solely as an offense against the dignity and authority of that court, we would agree with this conclusion, and the cases so hold. [Citing cases.] But these cases do not hold that, when an act which is a contempt of court is at the same time a specific criminal offense, denounced as such in the Penal Code, it will not be punishable as such. It was the plain intent of the Legislature expressed in the cited code sections to give a double aspect to the wrongful acts there enumerated. In one aspect they are to be regarded as offenses against the dignity and authority

of the court, remediable in accordance with the rules prescribed in the Code of Civil Procedure. In the other aspect they are to be regarded as offenses against the peace and dignity of the people of the state of California, and remediable as such in accordance with the rules prescribed in the Penal Code. * * * Plainly the Legislature did not intend to take away from the court contemned the power to punish a violator of its orders, but intended rather to provide an additional remedy which should be in a sense cumulative, and which should be available in the courts possessing the appropriate criminal jurisdiction. These remedies were not intended to be concurrent, but rather cumulative in character * * *." That case quotes with approval the following statement of the law from the supreme court of Montana (194 Cal. page 71, 227 P. page 917): "'When prosecuted under the Code of Civil Procedure, a contempt of court is not to be regarded as a criminal offense, to be prosecuted only by complaint, information, or indictment, as laid down by section 8 of article 3 of the state Constitution, but, rather, as a special proceeding of a criminal character. * * * Furthermore, the same acts which may be punished in the summary proceeding are characterized by the lawmaking power as criminal, and the additional remedy by an ordinary criminal action is provided for in Pen. Code, § 293.' This is the same as our Penal Code, § 166." *State v. Clancy*, 30 Mont. 193, 76 P. 10.

The supreme court of Montana has further held that: "When prosecuted under the Code of Civil Procedure, a contempt of court is not to be regarded as a 'criminal offense,' to be prosecuted only by complaint, information or indictment, as laid down by section 8, art. 3, of the state constitution, but, rather, as a special proceeding of a criminal character. In that sense, it is a public offense, yet it is not one a prosecution for which is exclusively controlled by constitutional limitations circumscribing methods of prosecution of strictly criminal offenses." *State ex rel. Flynn v. District Court*, 24 Mont. 33, 60 P. 493, 494.

The court in *In re Morris*, supra, 194 Cal. page 70, 227 P. page 916, also cites the case of *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 330, 24 S.Ct. 665, 666, 48 L.Ed. 997, wherein is to be found the following statement: "A contempt proceeding is *sui generis*. It is criminal in its nature, in that the party is charged with doing something

forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action."

The precise point here involved was before the supreme court of Illinois and it was stated, "section 33 of article 6 of the Constitution [provides that] 'all prosecutions shall be carried on: *In the name and by the authority of the People of the State of Illinois, and conclude: Against the peace and dignity of the same*'. The court then held, "The word 'prosecutions,' as used in the constitutional provision invoked, signifies only prosecutions of a public or criminal character and concerns the formal accusation of offenders by presentment or indictment by a grand jury or by information. *State of Illinois v. Froelich*, 316 Ill. 77, 146 N.E. 733. Contempts are not crimes within the meaning of the statute defining misdemeanors. * * * The particular constitutional provision has no application to a proceeding to punish for contempt." *People v. Jilovsky*, 334 Ill. 536, 166 N.E. 108, 109. See, also, *In re Nevitt*, 8 Cir., 117 F. 448; *McDougall v. Sheridan*, 23 Idaho 191, 128 P. 954; *State v. American-News Co.*, 62 S.D. 456, 253 N.W. 492.

The Supreme Court of the United States in *In re Debs*, 158 U.S. 564, at page 596, 15 S.Ct. 900, at page 911, 39 L.Ed. 1092, makes the following statement: "In brief, a court, enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."

While in some decisions we find the direct statement made that a contempt proceeding is a criminal action, we find no authority which holds that a proceeding instituted by affidavit under a statute similar to the sections of the Code of Civil Procedure of our state relating to "contempts" has been held to be violative of the constitutional provision requiring all criminal prosecutions to be in the name of the People of the state and by their authority, while the cases are legion in which proceedings of that character have been sustained. In this state this court has invariably sustained such proceedings. In the *Matter of Tyler*, 64 Cal. 434, 1 P. 884; *Ex parte Karlson*, 160 Cal. 378, 117 P. 447, Ann.Cas.1912D, 1334; *In re Shuler*, 210 Cal. 377, 292 P. 481; *In re San Francisco Chronicle*, 1 Cal.2d 630, 636, 36 P.2d 369; *In re Arnold*, 204 Cal. 175, 267

P. 316; *Blodgett v. Superior Court*, 210 Cal. 1, 290 P. 293, 72 A.L.R. 482.

[3-6] In the *San Francisco Chronicle* case this court held as follows [1 Cal.2d 630, 36 P.2d 371]: "Under this section [Subdivision 7, Section 166, Penal Code], the act prohibited is both a contempt and a misdemeanor. The mere fact that the Legislature has seen fit to declare such a contempt also a misdemeanor in no way deprives the court of the power to punish such an act as a constructive contempt in a summary proceeding such as this." Our conclusion therefore is that contempt proceedings instituted under the provisions of the Code of Civil Procedure of this state are not strictly criminal actions but are special proceedings of a criminal character, and as such they are not within, or governed by, the requirements of section 20, article VI of the Constitution of this state. They are not thereby required to be brought in the name of the people of the state, nor prosecuted by their authority. Section 1211 of the Code of Civil Procedure is not at variance with said section of the Constitution. Section 1211 provides for the institution of said proceedings by affidavit, and contains no requirement that they be prosecuted by the authority of the people. In proceedings of this nature, the rule is well settled that, "It is a matter of no importance who institutes the proceedings for contempt, since the alleged contemner is not prejudiced in his defense by the particular mode in which the facts are brought to the attention of the court". 13 Cor.Jur., Contempt, sec. 82, p. 60. In the present instance, the proceedings were, as we have seen, instituted by the filing of an affidavit by the executive secretary of the bar association of the county of Los Angeles, a committee of three attorneys from said association acting as counsel in behalf of affiant. Thereafter the trial court appointed said attorneys to continue as counsel in the further prosecution of said proceeding. The procedure here followed was in all substantial respects like that approved in the case of *Freeman v. City of Huron*, 8 S.D. 435, 66 N.W. 928, 929, where the court held: "Believing the course adopted in the court below was warranted by abundant authority, and that it did not tend to prejudice the accused in respect to any substantial right, we hold there was no reversible error in the manner of entitling the affidavit and other papers, and that there was no error in allowing counsel,

other than the state's attorney, to conduct the prosecution."

[7-9] On the trial of the accused upon the charges made against him, he demanded a jury trial which was denied him by the trial court. Petitioner contends that he had the constitutional right to trial by jury. Section 1217 of the Code of Civil Procedure provides otherwise, that is, for a trial before the court in which the proceeding is pending. No authority in this state is cited by the petitioner in support of his present contention. It has been the universal practice in this state from its earliest history to try proceedings in contempt by the court without a jury. Scores of cases have been before this court in which the accused has been tried and convicted of contempt as a result of trials by the court alone, and in not a single instance to which our attention has been called was the point ever raised that the accused was entitled to a trial by jury. "A respondent in contempt proceedings is not entitled to a trial by jury except where a jury trial is expressly provided for by statute, and then only in the particular cases to which the statute applies. The fact that the act constituting contempt may also be an indictable offense does not affect the rule where the proceeding is not by indictment. The power of the court to punish summarily for contempt has existed from the earliest period of the common law and is not within the application of constitutional provisions guaranteeing a trial by jury, or providing against depriving persons of their liberty without due process of law." 35 Cor.Jur., Juries, sec. 99, p. 194. See, also, 16 R.C.L., p. 205, and cases cited in 48 Am.Dec. 192; O'Brien v. People, 216 Ill. 354, 75 N.E. 108, 108 Am.St.Rep. 219, 3 Ann.Cas. 966; O'Flynn v. State, 89 Miss. 850, 43 So. 82, 9 L.R.A.,N.S., 1119, 119 Am.St.Rep. 727, 11 Ann.Cas. 530; State v. North Shore Boom Co., 67 Wash. 317, 121 P. 467, Ann. Cas.1913D, 458. Finally, upon this point, we quote from the Debs case, supra, where the court, 158 U.S. at page 594, 15 S.Ct. at page 910, 39 L.Ed. 1092, states: "But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobe-

dience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

[10] We might also consider under the question of the proper procedure to be followed in proceedings of this character, the contention of petitioner that the affidavit accusing petitioner of contempt of court contains in some instances statements upon information and belief. While it is held in *Ex parte Roth*, 3 Cal.App.2d 226, 39 P.2d 490, that an affidavit based solely on information and belief without stating any authentic source of information is not an affidavit of facts prescribed by section 1211 of the Code of Civil Procedure and is insufficient as a basis of jurisdiction to support a warrant or order to show cause or a judgment in a proceeding in constructive contempt, the appellate court in *Re Simoniello*, 6 Cal.App.2d 425, 44 P.2d 402, pointed out that the *Roth* decision had failed to cite and was in conflict with the decision of this court in the case of *Golden Gate Consolidated Hydraulic Mining Company v. Superior Court*, 65 Cal. 187, 3 P. 628, and refused to follow the same. It is not contended that all or even the principal allegations in the accusatory affidavit against petitioner were made on information and belief, and therefore the *Roth* case, even if accepted by us, would not be controlling. However, we are satisfied with the statement of the law as expressed in the case of *Golden Gate Consolidated Hydraulic Mining Company v. Superior Court*, supra, as it appears to us that the reasoning therein is more logical and persuasive than that contained in the *Roth* case. The contention that the affidavit against petitioner gave the trial court no jurisdiction over him in the contempt proceedings by reason of the fact that it contained allegations made upon information and belief cannot therefore be sustained.

[11] We now pass to the second of the three major questions which we perceive are presented in this proceeding, and that is the question of the constitutionality of the last sentence of subdivision 13 of section 1209 of the Code of Civil Procedure reading as follows: "But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in

such a manner as to actually interfere with its proceedings."

In the case of *In re San Francisco Chronicle*, 1 Cal.2d 630, 36 P.2d 369, the constitutionality of this provision of said section was squarely before the court, and after an extended examination of the authorities, we held unequivocally that said provision of said section invaded the constitutional powers of the courts, and was, therefore, of no validity. After setting forth the contention of the respondents that, under the provisions of section 1209, subdivision 13 of the Code of Civil Procedure, the publication of any article [whatever its contents] not in the physical presence of the court should not be treated as a contempt, this court 1 Cal.2d on page 634, 36 P.2d on page 370 held as follows: "The foregoing contention requires but brief consideration. That portion of section 1209 above quoted has many times been held unconstitutional on the ground that the courts have inherent power to punish for contempts, whether of a direct or constructive nature, and that the Legislature cannot constitutionally infringe on that power. In *re Shuler*, 210 Cal. 377, 397, 292 P. 481; *McClatchy v. Superior Court*, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691; *Lamberson v. Superior Court*, 151 Cal. 458, 91 P. 100, 11 L.R.A.[N.S.] 619; In *re Lindsley*, 75 Cal.App. 122, 241 P. 934; *Lindsley v. Superior Court*, 76 Cal.App. 419, 245 P. 212; see, also, In *re Arnold*, 204 Cal. 175, 267 P. 316; *Blodgett v. Superior Court*, 210 Cal. 1, 290 P. 293, 72 A.L.R. 482; In *re Shortridge*, 99 Cal. 526, 34 P. 227, 21 L.R.A. 755, 37 Am.St. Rep. 78. What was said by this court in *Briggs v. Superior Court*, 211 Cal. 619, 297 P. 3, in no way affects the rule above enunciated. It was therein held that the Legislature may, in the case of a constructive contempt, provide for the procedure by which such contempt shall be tried and punished, but that case did not hold that the Legislature can determine what shall constitute a constructive contempt, or declare that certain acts shall not constitute a constructive contempt. There is obviously a fundamental difference between a statute merely regulating procedure, as was involved in the *Briggs* case, and one such as section 1209, supra, purporting to affect the power of the courts to punish for contempt."

Ordinarily this citation from so recent a decision in which the prior rulings of this court are set forth in great detail would

be considered a sufficient refutation of and a complete answer to the contention of petitioner that by the provisions of this section of the Code of Civil Procedure, he is shielded from prosecution for the publication of said telegram notwithstanding the contemptuous character of said publication. In attempting to sustain the constitutionality of said provision of the Code of Civil Procedure, and to overcome the array of authorities cited in our opinion in the *San Francisco Chronicle* case, petitioner cites no decision of this court, or any other appellate court of this state, supporting his theory of the law. On the other hand, he concedes that the rule of law enunciated in our former decisions, but reaffirmed so positively and definitely in the *San Francisco Chronicle* case, and other recent cases, is now and for years past has been the law in the state respecting publication of articles contemptuous in their character, even though not made in the presence of the court. He insists, however, that the courts of this state are fundamentally wrong in declaring said provision of the Code of Civil Procedure invalid as an invasion of the constitutional powers of the courts, and insists that we should rewrite the law applicable to the power of the court to summarily punish for indirect contempt, and in the revised version, hold that courts under the common law had no inherent power to punish for indirect or constructive contempt—that is, for acts committed without the immediate view and presence of the court; that this lack of power descended to the courts of this country, and, therefore, it always has been and is now within the power of the legislature, not only to provide for the procedure by which constructive contempts shall be tried and punished, but also to determine what acts shall constitute constructive contempts, and further to declare that certain acts shall not constitute a constructive contempt. In support of the proposal to have the law of constructive contempt rewritten, he has taken us back to a period in English jurisprudence antedating the time of Blackstone. He has seized upon the decision of the ancient case of *Rex v. Almon*, 97 English Reprints 94, and labeled it as the progenitor of a long line of spurious offspring that have infested the courts of both this and the mother country until recent investigation has revealed the irregularity of its birth and the falsity of its doctrine. It is even claimed that the author of the *Almon* opinion was respon-

sible for the statement in Blackstone that, "The process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal." (Jones's Blackstone, Book IV, sec. 320.) In the language of an illustrious member of the Supreme Court of the United States (Justice Holmes in *Gompers v. United States*, 233 U.S. 604, 611, 34 S.Ct. 693, 696, 58 L.Ed. 1115, Ann.Cas.1915D, 1044) this suggestion "opens vistas of antiquarian speculation", which while interesting to follow, in the end is productive of no beneficial result. From what appears to be most reliable sources, the opinion in *Rex v. Almon*, supra, was prepared by Justice Wilmot, then a justice of the King's Bench. He was afterwards Chief Justice of the Court of Common Pleas. While prepared probably about the year 1765, and during the period when Blackstone was delivering his famous course of lectures which thereafter were compiled by him in his Commentaries, this opinion was never adopted by the court or filed as the decision of the case in which it was prepared due to the fact that the case was abandoned before final judgment. It was never made public until the year 1802, some thirty-seven years after its preparation, and therefore years after Blackstone's famous Commentaries were published and in common use. It is surmised by those attacking the doctrine of this decision that because Blackstone and Wilmot were close friends, they conferred together and probably discussed the question involved in the Almon case and that Blackstone was induced by Wilmot to accept the latter's theory of the law of the inherent power of the court in matters of contempt, and so stated it in his Commentaries as quoted above. To now hold upon mere surmise that Blackstone relied upon the author of the opinion in the Almon case, and therefore his statement of the law should be discredited, would be extending the doctrine of "antiquarian speculation" beyond all reasonable limits.

But even conceding that petitioner's claims respecting the authority upon which Blackstone based his statement are true,

it cannot be disputed that the views expressed by him were then the law in England and continued to be for years thereafter. When the Wilmot opinion in the Almon case was published in 1802, it only strengthened the rule announced by Blackstone. For a long list of cases from the various English courts, extending over a period of time beginning in 1821 and including the year 1925, in which Wilmot's doctrine is applied or in which Almon case is cited with approval, see "Contempt of Court", by Sir John Fox, page 30.

Courts in this country followed the rule adopted by the English courts, and previous to any statute limiting their power, held practically without exception that they had the inherent power to summarily punish for contempt acts committed without their view or presence. However, by act of Congress enacted in the year 1831, (Rev.St. § 725; Jud.Code, sec. 268; 28 U.S.C.A. § 385) it was provided that: "The said courts [United States Courts] shall have power * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." This statute was followed by legislation in several of the states in which similar restrictions were attempted to be placed upon the courts of their respective states. This legislation was at first generally sustained by the courts. However, in 1918, the Supreme Court of the United States, notwithstanding the existence of the statute of 1831, sustained the conviction of the editor of a newspaper upon a charge of contempt of court based upon the publication of certain articles in said newspaper. *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186. The effect of this decision was to declare inoperative and ineffective for any purpose the limitation attempted by Congress to be placed on the power of the court to summarily punish for an indirect contempt, that is, to punish an act committed without the view and presence of the court. This decision has been followed generally by the United States courts. *Francis v. People of Virgin Island*, 3 Cir., 11 F.2d 860, 863-865; *In re Independent Publishing Company*, 9 Cir., 240 F. 849; *United States v. Providence Tribune Co.*, D.C., 241 F. 524; *United States v. Marke-*

wich, D.C., 261 F. 537; United States v. Sanders, D.C., 290 F. 428.

The supreme court of the state of Arkansas had, previous to the decision in the Toledo Newspaper case, held that the legislature was without power to limit the jurisdiction of the courts to punish for acts of contempt committed without the presence of the court. *State v. Morrill*, 16 Ark. 384. During and since the reassertion by federal judges of summary power as to publications, the courts of the following states, seventeen in number, have sanctioned the rule announced in the Toledo Newspaper case—Alabama, Arizona, Connecticut, Florida, Georgia, Idaho, Indiana, Maryland, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, and Virginia. The courts of eight other states have expressed views which indicate that they are in harmony with the rule announced by the Supreme Court of the United States. They are Iowa, Kansas, Minnesota, Mississippi, Nevada, Oregon, Wisconsin, and Wyoming. We have already shown the attitude of the courts of this state upon this question. In a few states the subject seems not to have been considered. Only four states out of the forty-eight states of the Union seem definitely committed to a contrary doctrine. They are Pennsylvania, New York, South Carolina and Kentucky. In each of these states, the statutes in question are over one hundred years old. (For a further discussion of this subject and the authorities cited in support of the foregoing statements see 28 Columbia Law Review, p. 542.) From the foregoing it will appear that this overwhelming weight of authority in this country supports the decision of this state rendered in the San Francisco Chronicle case, and those cited in that opinion. While we commend the diligence and industry displayed by counsel in their investigation and consideration of the subject, we find ourselves unable to agree with them in their contention that the legislature may limit the power of the court to summarily punish for contempt acts committed without the view and presence of the court. The last sentence of subdivision 13 of section 1209 of the Code of Civil Procedure above quoted is unconstitutional on the ground that the courts of the state have inherent power to punish for contempt whether of a direct or constructive nature, and the legislature cannot infringe on that power.

[12-16] In considering the third major question presented by the record in this proceeding; it is important that we keep in mind the nature of the particular proceeding before us, and not confuse it with the ordinary appeal from a judgment, nor with an original proceeding in contempt before a trial court. On petition to review the judgment of the trial court, it is definitely settled that the sole question before the reviewing court is one of jurisdiction of the trial court to render the judgment under review. If it be determined that in the rendition of said judgment the trial court acted within its jurisdiction, then the inquiry ends, and the only order the reviewing court is authorized to make is one affirming the proceedings of the trial court. On the other hand, should it appear from the record as certified to us that the court either had no jurisdiction to pronounce said judgment, or exceeded its jurisdiction in doing so, then the proceedings should be annulled. Sec. 1075, Code Civ.Proc. Other than as just indicated, the writ of certiorari will not be granted to review errors of law (*People v. Latimer*, 160 Cal. 716, 117 P. 1051), or mere questions of fact. *White v. Superior Court*, 110 Cal. 60, 42 P. 480. However, in passing upon the question of the trial court's jurisdiction, the reviewing court may consider the evidence before the trial court for the purpose of determining whether it was sufficient to give that court jurisdiction to render its judgment finding the accused guilty of contempt, and in case the court finds that the evidence is insufficient to sustain the conviction it will annul the judgment. *McClatchey v. Superior Court*, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691; *Hotaling v. Superior Court*, 191 Cal. 501, 506, 217 P. 73, 29 A.L.R. 127, and *Titcomb v. Superior Court*, 220 Cal. 34, 44, 29 P.2d 206. But in such a case, the review of the evidence is limited to determining whether there was any substantial evidence before the trial court to sustain its jurisdiction. The power to weigh the evidence rests with the trial court. *Daily v. Superior Court*, 4 Cal.App.2d 127, 134, 40 P.2d 936; *McFarland v. Superior Court*, 194 Cal. 407, 228 P. 1033; *In re Brambini*, 192 Cal. 19, 218 P. 569; *Strain v. Superior Court*, 168 Cal. 216, 223, 142 P. 62, Ann. Cas.1915D, 702; *White v. Superior Court*, 110 Cal. 60, 42 P. 480; *Imperial Water Company v. Board of Supervisors*, 162 Cal. 14, 120 P. 780. There is nothing contrary to this rule to be found in *In re*

Buckley, 69 Cal. 1, 3, 10 P. 69, nor in *Hotaling v. Superior Court*, supra, or in any other case to which our attention has been called, as all of those cases were original proceedings before this court. In proceedings of that nature, the same rule that governs the trial court in contempt proceedings is applicable to this or any appellate court at the hearing of contempt proceedings originally brought in such courts. It has repeatedly been held that an accused on trial for contempt must be proved guilty beyond a reasonable doubt. But such rule, as will be seen from the authorities cited above, has no application in a proceeding such as the one before us, to review the judgment of the trial court in finding the accused guilty of contempt.

[17] In considering the evidence before the trial court in the light of the rule just stated, it is our sole duty to determine whether such evidence is of sufficient substantiality to support the judgment of conviction, or as stated in *Daily v. Superior Court*, supra (4 Cal.App.2d page 134, 40 P.2d page 939): "In the proceeding before us the extent of our power is to inquire whether there was any evidence before the trial court sustaining its jurisdiction." The evidence in this matter is comparatively simple. The case of *Walker v. International Longshoremen's Association*, District Local 38-82, Inc., No. 420356, mentioned in the first paragraph of this opinion, was in fact a contest between the American Federation of Labor, hereinafter referred to as the A. F. of L. and the Committee for Industrial Organization, hereinafter referred to as the C. I. O., over the possession of the hiring hall maintained at San Pedro, California, for the longshoremen at said port. Petitioner was the president of the International Longshoremen's and Warehousemen's Union, a C. I. O. organization, the jurisdiction of which organization extended to all its subsidiary unions on the Pacific Coast. While not a party to said action, petitioner, as the president of the C. I. O. organization on this coast, was directly and vitally interested in the result thereof, and was particularly interested in seeing that the defendant prevailed in said action. The action was tried, and the court ruled in favor of the plaintiffs in said action, and appointed a receiver to have charge of the hiring hall, which, as we have seen, was the subject of the controversy between the parties thereto. The action was one which at-

tracted great public interest and to which the newspapers of the county of Los Angeles and other parts of the state gave wide and extensive publicity. The judgment in said action was rendered on January 21, 1938. The petitioner was then in San Francisco, and on January 24th, from his headquarters in that city he dictated to his stenographer a telegram to the secretary of labor and gave a copy thereof to James D. O'Neil, a trained newspaper man of more than twenty years' standing, who was in charge of the publicity bureau maintained by the petitioner as the executive officer of the C. I. O. in the city of San Francisco. O'Neil gave a copy of said telegram to one of the city papers of San Francisco and on that day and the following day that portion of the telegram set forth in the findings of the trial court was published in the metropolitan papers of the cities of San Francisco and Los Angeles and elsewhere in this state.

Upon this evidence the trial court found, "That at or about the time of the sending of said telegram, the defendant, Harry R. Bridges, caused a copy thereto [thereof] to be given to one James D. O'Neil for the purpose and with the intent that the contents of the said telegram should, and would be furnished to and published in the newspapers on the Pacific Coast and elsewhere." It is contended by petitioner that the evidence does not support said finding. In discussing the evidence respecting the publication of said telegram, the trial court reasoned as follows: "He [the petitioner] dictated it to his stenographer, his secretary, and told her to send it. There you have an express command. But if you do not [have] an express command respecting publicity, you are going to have publicity, because of the telegram itself. In dictating that telegram to his secretary, he did not need to tell her in words to send it, and certainly she knew when she sent the telegram what to do with a copy of it, because it was an established custom. When the copy of that telegram was put in the hands of a man, who is in the organization for the purpose of giving the telegram—which is a news story in anybody's language—publicity, it was just the same as sending it direct to the newspapers."

[18] We are in entire agreement with the conclusion reached by the trial court in holding the petitioner responsible for the publication of said telegram. Mr.

O'Neil testified that he handled the publicity of the C. I. O. for the West Coast and had an office three doors from the reception room of the C. I. O. in San Francisco, and four doors from Mr. Bridges' office; that Mr. Bridges "was news wherever he goes", that he [O'Neil] handled the publicity of telegrams released or received by Mr. Bridges, that copies of all telegrams "that had anything to do with the C. I. O., most of them came to my desk", and that he then determined whether any particular telegram was newsworthy and susceptible of being sent to the press for publication. We think that there can be no doubt from the testimony of Mr. O'Neil that petitioner not only had every reasonable ground to believe that his telegram would be given to the public press for publication but that the regulations of his organization made it the duty of O'Neil to see that the papers were apprised of the telegram in order that publicity might be given to its contents. In our opinion, there was ample evidence to sustain the finding of the trial court that petitioner gave to O'Neil the copy of the telegram sent to the secretary of labor with the intent that the contents thereof would be furnished to and published in the newspapers on the Pacific Coast and elsewhere.

[19] Finally petitioner contends that his act in publishing the telegram, even conceding that he was responsible for its publication, did not constitute a contempt of court. He claims in the first place that the final judgment in the action of Walker v. International Longshoremen's Association had been entered some days prior to the publication of said telegram and therefore the action to which he referred in his telegram was no longer pending. In assuming that the Walker action had been finally disposed of, and was therefore no longer pending, petitioner is in error. The time for moving for a new trial in said action had not yet expired, and until the action had reached that stage, it cannot be said that it had ceased to be a pending action in that court. Sec. 1049, Code Civ. Proc. The case was still before Judge Schmidt at the time of, and long after, the publication of said telegram.

[20] This brings us to the question whether the publication of that portion of the telegram set out in the findings, respecting the decision of Judge Schmidt, while the action in which said decision was rendered was pending, constituted a con-

tempt of court. It is not necessary for us to restate the contents of the published article in full. It contains the following statements: "This decision is outrageous." "Attempted enforcement of Schmidt decision will tie up port of Los Angeles and entire Pacific Coast." "International Longshoremen's & Warehousemen's Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override majority vote of members in choosing its officers and representatives." The published statement was not only a criticism of the decision of the court in an action then pending before said court, but was a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up. Furthermore, it contained a direct challenge to the court that 11,000 longshoremen on the Pacific Coast would not abide by its decision. When these statements are considered in connection with the extensive publicity that had already been given to the pending action, and the prominent position of the petitioner as the executive officer of an organization to which 11,000 longshoremen on the Pacific Coast belonged, we think that there can be no question that their publication in the metropolitan papers on the Pacific Coast, and particularly those in the county of Los Angeles in which said court was held, tended materially to affect the orderly administration of justice in the case to which reference was made and which was then pending in said court. If such would be the effect of such publication, and in our opinion, that was its effect, then the act of publishing such statements was a contempt of the court in which such action was pending. In re Shuler, 210 Cal. 377, 292 P. 481; In re San Francisco Chronicle, 1 Cal.2d 630, 36 P.2d 369; Bee Publishing Co. v. State, 107 Neb. 74, 185 N.W. 339; State of Nebraska v. Lovell, 117 Neb. 710, 222 N.W. 625; Toledo Newspaper Company v. United States, 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186; People v. Wilson, 64 Ill. 195, 16 Am.Rep. 528 (which case this court cited with approval in the San Francisco Chronicle case); Patterson v. Colorado, 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed. 879, 10 Ann. Cas. 689; Sinclair v. United States, 279 U.S. 749, 764, 49 S.Ct. 471, 73 L.Ed. 938, 63 A.L.R. 1258.

In these cases it was held that if the publication or act in question had a "reasonable tendency" to interfere with the or-

derly administration of justice in pending actions before judicial tribunals, it amounted to a contempt of court and might be punished as such. The Patterson case, *supra*, clearly states that the test to be applied in determining whether a party is guilty of contempt is whether the act complained of had a "reasonable tendency" to interfere with the orderly administration of justice. The opinion in that case was written by Mr. Justice Holmes and was cited with approval in the Shuler case (*In re Shuler*, *supra*, 210 Cal. page 403, 292 P. page 493), and this court quoted from that case, as follows (205 U.S. 454, page 462, 27 S.Ct. 556, 51 L.Ed. 879, 10 Ann.Cas. 689):

"In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

"What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury, and the publication may affect their judgment. Judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case is finished courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied." [205 U.S. 454, 27 S.Ct. 558, 51 L.Ed. 879, 10 Ann.Cas. 689.]

In the case of *Sinclair v. United States*, 279 U.S. 749, 49 S.Ct. 471, 73 L.Ed. 938, 63 A.L.R. 1258, a somewhat similar statement was made by the court, but in language as follows (279 U.S. page 764, 49 S.

Ct. page 476, 73 L.Ed. 938, 63 A.L.R. 1258): "But the situation is controlled by the reasonable tendencies of the acts done and not by the extreme and substantially impossible assumptions on the subject. Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications and, therefore, there was no proof tending to show the wrong complained of. But here again not the influence upon the mind of the particular judge is the criterion but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

Further on in the opinion, the court reiterates that, "The reasonable tendency of the acts done is the proper criterion." While this opinion was written by Justice McReynolds, it was concurred in by Justice Holmes. We mention Justice Holmes's participation in these two cases, as petitioner has cited opinions by this illustrious jurist, probably a majority of which were dissenting opinions, simply to show that while in other cases upon apparently different statements of fact, Justice Holmes has expressed certain conclusions upon which petitioner relies in support of his contention that the "reasonable tendency of the acts done" is not the proper criterion to be applied in such cases, at least in these two cases, Justice Holmes has approved the "reasonable tendency" criterion.

[21] We have called particular attention to these cases from the Supreme Court of the United States, in addition to those from our own court, for the reason that petitioner contends that the "reasonable tendency" doctrine is not the true test to be applied in determining whether the act done constituted contempt of court, and in support of his contention, he has cited opinions, both majority and dissenting, to be found principally in the Reports of the

United States Supreme Court. The tests which are mentioned in various of these opinions, any one of which petitioner insists is the only true and proper test, and should, therefore, be applied in this case, are referred to by different judges as the "inherent and dangerous tendency", the "clear and present danger", and "the actual obstruction principle". It is sufficient to say in answer to petitioner's contention that none of these tests has been applied by the courts of this state, and that neither the Patterson nor the Sinclair case, which are in accord with the decisions of the courts of this state, has been overruled by the court in which they were rendered. We are, therefore, content to rest our decision upon the "reasonable tendency" test in determining whether the publication or act done constituted a contempt of court. The application of this test to the publication by petitioner of that portion of said telegram recited in the findings of fact of the trial court, clearly renders said publication a contempt of court.

[22] Petitioner relies with much earnestness upon his constitutional right of free speech to justify his publication of the quoted portion of the telegram sent by him to the secretary of labor. A large number of pages of the briefs in behalf of petitioner are devoted to the right of an individual to freely speak his views and to the importance of this constitutional right of free speech. It may be conceded that all that has been said in these briefs as to the importance of the right of free speech and of a free press in a democracy meets with the approval of this court. In fact, we are in thorough accord with petitioner's claim that the right of free speech and of a free press are among the greatest bulwarks of the freedom which, as citizens of this country, we enjoy. But as was said in a recent decision of the Supreme Court of the United States, "The right [of free speech] is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom." *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484.

[23] This contention of petitioner that he is protected in the publication of said telegram by the constitutional right of freedom of speech is in our opinion completely answered by what we said in *Re Shuler*, supra, 210 Cal. at page 402, 292 P.

at page 492: "The constitutional guaranties of freedom of speech and of the press do not, in our opinion, and in the light of the authorities which we are about to cite, go so far as to protect the citizen in making such comment by either spoken or printed utterance with respect to causes pending before courts of justice, as have for their purpose and manifest tendency an attempted interference with the orderly administration of justice before such tribunals and in respect to causes pending and in course of conduct therein." In that case, as in the case now before us, the petitioner attempted to justify his animadversions of the court by the claim that his utterances were protected by the right of free speech. In an opinion concurred in by all the members of this court we held that his claim was without merit. The same conclusion must be followed in this action respecting petitioner's claim of immunity.

In addition to the three questions hereinbefore discussed, petitioner has raised other questions which may be regarded as of minor importance but which are of sufficient consequence to require answers.

[24] He contends that as he did not personally cause said telegram to be published he is not liable for criminal contempt for the act of his agent in publishing the same without his direction. If the evidence supported the facts recited in this statement, we would have no hesitancy in sustaining said contention. But as we have seen, the trial court found that petitioner caused his agent to make said publication, and we have held that this finding is supported by substantial evidence in the record. Petitioner having directed the publication of said telegram by his agent, is personally liable for any infraction of the law due to said publication equally with his agent.

Petitioner further contends that the sending and publication of said telegram by him as a labor official to the secretary of labor respecting labor matters is protected by the constitutional guarantee to engage in a lawful occupation. We thoroughly agree with petitioner that the sending of a telegram to the secretary of labor was within his constitutional rights, and one might go further and hold that it was within his duties as the executive head of the union affected by the decision of Judge Schmidt to inform the secretary of labor of said decision, but he was not charged

nor punished for the sending of the telegram. It was the publication of the telegram in the manner hereinbefore set forth, and not the sending of it, that constituted the offense of which he was found guilty.

[25] Finally petitioner contends that the trial court exceeded its jurisdiction in adjudging petitioner guilty of contempt of court because it had no jurisdiction to make the order in the original action out of which action the alleged contempt arose. This contention is based upon what petitioner conceives to be the legal effect of federal legislation establishing the national labor relations board and conferring upon that board certain powers respecting labor disputes. We do not understand that that legislation has taken from the state court jurisdiction of disputes of the nature of that involved in the case of *Walker v. International Longshoremen's Association* which was pending before Judge Schmidt's court. Petitioner has cited in support of this last contention the case of *Fur Workers Union No. 72 v. Fur Workers Union*, 70 App.D.C. 122, 105 F.2d page 1, decided by the United States Court of Appeals, District of Columbia, on March 27, 1939. We find nothing in the decision of that case which tends to support the contention of petitioner that the Superior Court of the County of Los Angeles was without jurisdiction to hear or decide the issues involved in the *Walker v. International Longshoremen's Association* case.

In considering the questions herein discussed we had access, not only to the able briefs and arguments of counsel in this case, but also those in the two cases, entitled, *The Times-Mirror Company, a Corporation, et al. v. Superior Court*, and numbered respectively L. A. 16928, and L. A. 16929, now before us on petitions to review judgments of contempt. All three of these cases were argued with the understanding that both the arguments and briefs filed in any one of said cases either by the respective parties or by amici curiae might be used by the court in the decision of any one or more of the other cases. It was in pursuance of this understanding that we have had the benefit of the argument and briefs of the *Times-Mirror* cases in this decision of the present one.

For the reasons herein stated we are of the opinion that the proceeding adjudging petitioner guilty of contempt of court must be affirmed.

It is therefore ordered that the judgment of the trial court be and the same is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; HOUSER, J.; NOURSE, Justice pro tem.

EDMONDS, Justice (dissenting).

The petitioner published a statement concerning Judge Schmidt and the merits of a case which had not been finally decided. Such an act, the legislature has declared, shall not constitute a contempt of court. In my opinion, judicial officers have no inherent power to punish for a constructive contempt, and the statute which provides that "no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings" sec. 1209, Code Civ.Proc. is constitutional. This law, passed in 1891, expresses the constitutional guarantees of free speech and a free press and should be upheld.

The California statute is in substantially the same form as those of many other states upon this subject. Unquestionably the legislative purpose has been to prevent abuses of uncontrolled power. However, such enactments, with few exceptions, have been swept aside as unconstitutional efforts to trench upon judicial authority. These decisions are posited upon the assumption that the right to hold one guilty of either a direct or a constructive contempt, summarily and without a jury trial, is "inherently necessary" to judicial administration and is founded upon "immemorial usage" at common law. Yet neither the declarations of the courts in support of their dignity and independence, nor the enactments of legislative bodies upholding freedom of speech and the press, have settled the seemingly irreconcilable conflict. Whenever vital issues affecting the public interest are presented for adjudication and editors or citizens of positive views comment upon either the facts of a case or the principles which are claimed to govern the result, the question whether a judge may punish for contempt usually arises, phoenix-like, from the ashes of earlier controversies.

Modern legal scholars have made an extended study of the principles upon which the law of contempt by publication rests and conclude that much of what has been judicially relied upon as authority to punish for such an act is fiction. The writers of an exceptionally well-considered article in the *Columbia Law Review*, after a most thorough investigation, assert that the rules of the common law do not support the claims which have been made for them. (Nelles and King, *Contempt by Publication in the United States*, 28 *Col.L.Rev.* 401, 525.) In short, it now appears that in this branch of the law, the courts have built a structure of judicial reasoning upon the sands of precedents which do not exist.

The first enactment upon the subject of contempts was that of the statute of Westminster (13 Ed. 1, c. 39) which was adopted seventy years after the date of Magna Charta. This statute concerns contempts in resisting the process of the Kings courts, a class defined by Blackstone as consequential contempts, and it seems most unlikely that this legislation would have been enacted if the power to punish such offenses constituted a part of the law of the land which existed so long before Magna Charta as to be considered a maxim of jurisprudence. In any event, the first newspapers were established 350 years after the date of Magna Charta, and the offense of contempt by publication must, therefore, be of much later origin.

Early in our own national history the question was presented by a case in Pennsylvania which arose out of the campaign for ratification of the federal Constitution. A newspaper editor named Oswald, who was the leader of the opposition to ratification, was arrested for a libel. He countered in the columns of his newspaper with the charge that the prosecution was prompted by political motives, and for this publication he was ordered to show cause why he should not be attached for contempt. In support of the attachment counsel relied upon Blackstone and a dictum in *Roach v. Garvan*, 2 *Atkyns* 469 (1742), which was a decision by the English Court of Chancery not based upon any common law precedent. (See *Fox, Contempt of Courts*, p. 22.) Chief Justice McKean of Pennsylvania, in deciding the case, stated that "proceeding by attachment is as old as the law itself, and no act of the legislature, or section of the constitution, has interposed to alter or suspend it" and he concluded that since the Constitution guaran-

teed trial by jury only "as heretofore", the summary procedure was proper. *Respublica v. Oswald*, 1 *Dall., Pa.*, 319, 1 *L.Ed.* 155, 1 *Am.Dec.* 246.

According to Blackstone's Commentaries, either "speaking or writing contemptuously of the Court of Judges, acting in their judicial capacity" or "printing false accounts of causes then pending in judgment" was punishable by immediate attachment. In such a proceeding, Blackstone said, the court's power "results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal". (4 *Blacks. Com.* 284 et seq.) Largely upon the authority of Blackstone's views, the Pennsylvania court concluded that summary process and trial was proper in all contempt proceedings. Oswald was fined and imprisoned, but upon his release he memorialized the legislature for the impeachment of the justices of the Supreme Court. After consideration of the charges a resolution was adopted denying articles of impeachment. Later a proposal to define the nature and extent of contempts was introduced in the legislature, but the measure was defeated by a Federalist majority. See note to *Respublica v. Oswald*, supra, page 329 et seq.

The concept of freedom of the press, stated by Blackstone, is completely foreign both in time and place to the fundamental principles of American institutions. The doctrine that "the liberty of the press * * * consists in laying *previous* restraints upon publications and not in freedom from censure for criminal matter when published" (5 *Blacks.Com.* 151) is a statement of the British law at a time when seditious libel was punishable as a crime; it is not the interpretation of a constitution. Moreover, that law has been very differently declared in the last one hundred and twenty-five years. See Chafee, *Freedom of Speech*, (1920) 8 et seq.

It now appears probable that Blackstone's notions of "immemorial usage" concerning the authority of a court to summarily punish for contempt by publication were based upon the draft of an "opinion" in *King v. Almon* written by Wilmot, J., about 1765, three or four years before the publication of the Commentaries. See *Fox, Contempt of Courts*, p. 21. A rule nisi had been obtained to attach John Almon, a bookseller, for publishing a libel on the Chief Justice, Lord Mansfield, and after argument Wilmot

prepared an opinion. In answer to the contemnor's claim that summary procedure by attachment was inappropriate, he stated: "The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it, 1 Ventris I, and the issuing attachments by the supreme courts of justice in Westminster Hall for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terrae* and within the exception of Magna Charta as the issuing any other legal process whatsoever. * * * And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation and basis as trial by juries do—immemorial usage and practice. (Wilmot's Notes, p. 254.)" Fox, *supra*, pp. 7, 8.

The proceeding against Almon was aborted by a procedural defect and was subsequently abandoned with a change of ministry; consequently, Wilmot's decision was never delivered. However, almost 40 years later it was published with his other papers, and has been cited and relied upon as a correct statement of the law ever since. Sir John Fox comments upon it as follows: "Never pronounced in court, this extrajudicial opinion did not possess the binding effect of a decision, but it acquired the singular distinction of becoming a leading authority by citation and approval in subsequent cases, the earliest of which was decided fifty-six years after the opinion was written. No higher testimony to Mr. Justice Wilmot's reputation for learning and ability could be given than this, that his opinion was adopted by succeeding judges without question and without examination of earlier authorities." Fox, *supra*, p. 8.

Here is one of the strangest stories in the history of the law. The most remarkable part of it is that the earlier authorities, with the exception of the decisions of the Star Chamber, required prosecution by indictment, presentment and arraignment for contempts committed by "strangers" to the court, and the contemnor was entitled to a trial by jury. See Solly-Flood: "Prince Henry and Chief

Justice Gascoigne," Transactions of the Royal Historical Society, vol. 3, N.S., p. 47; Fox, *supra*, p. 227 et seq. But Blackstone followed the posthumous views of his friend Wilmot, and the supreme court of Pennsylvania in the Oswald case based its decision upon a doctrine which was historically incorrect. Thus the opinion of an English judge in an undecided case was given the authority of a precedent in the new country.

A decade later the same question was reviewed in the case of Bayard v. Passmore, 3 Yeates, Pa., 438. Passmore, by posting a notice in the exchange room of the city tavern, denounced his adversary in a pending appeal as "a liar, a rascal and a coward". For this he was attached for contempt and was found guilty and sentenced to fine and imprisonment. The controversy then passed from the court to the legislature, but by this time the Federalists were in a minority, and articles of impeachment were preferred against the three Federalist judges who had found Passmore guilty. In the state senate the vote was 13 to 11—two votes short of the necessary two-thirds for impeachment. (See Nelles and King, *supra*, p. 414.) But shortly afterward a statute was passed restricting the judicial power over contempts to its true historic limits: (1) official misconduct of court officers; (2) disobedience of process; and (3) misbehavior, in the actual presence of the court which actually obstructs the administration of justice. 1808-09 Pa. Acts, c. 78, p. 146. Although the statute has been amended, it has stood as the law of Pennsylvania from the date of its enactment to the present time. 17 P.S. §§ 2041-2045.

The history of legislation in New York concerning punishment for contempt has a similarly interesting background. In 1803, Chancellor Kent asserted the same broad summary power which had been maintained by Chief Justice McKean in Pennsylvania. *People v. Freer*, 1 Caines, N.J., 518. However, the power was moderately used in New York, and only once did public clamor arise over its exercise. That occasion grew out of an attachment of one Yates, who was charged with illegally practicing as a solicitor—a contempt which is within the historic scope of the power to punish summarily. Yates sought habeas corpus in the supreme court and the writ was dismissed, after which he appealed to the "Court for the Trial of Impeachments and the Correction of Er-

rors", which consisted of the justices of the supreme court and the members of the state senate. That body reversed the supreme court and held that Yates should have been discharged. Case of J. V. N. Yates, Yates v. People, 6 Johns, N.Y., 337.

Yet it was not until 1829 that New York limited the judicial power in contempt proceedings. By legislation then adopted, with the exception of permitting punishment of "a false, or grossly inaccurate report of its proceedings", the summary powers of the New York courts were confined to direct contempts tending to interrupt their proceedings and any resistance to or disobedience of their orders or process. N.Y.Rev.Stat. of 1829, part 3, chap. 3, title 2, art. 1, sec. 10. Historically, it is said that this statute reflects the views of Edward Livingston, who considered the power of summary punishment to be repugnant "to all the fundamental principles which secure private rights in the administration of justice", and argued that there is no true necessity for a court to undertake the punishment of its own offenders. See Nelles and King, *supra*, p. 419.

The early development of the contempt power in the federal courts presents a true parallel to the Pennsylvania experience. Section 17 of the Judiciary Act of 1789, 1 Stat. 83, empowered the courts of the United States "to punish by fine or imprisonment * * * all contempts of authority in any cause or hearing before the same". There were several cases under this provision containing intimations of "inherent" power (United States v. Hudson, 7 Cranch 32, 3 L.Ed. 259; Anderson v. Dunn, 6 Wheat. 204, 227, 5 L.Ed. 242), but the first decision directly passing upon a conviction for contempt by publication, summarily imposed, did not arise until the notorious Peck-Lawless controversy in 1826.

With the acquisition of the Louisiana territory earlier in the century, there was a wild speculative scramble for land claims. Although public lands in the territory had not yet been opened up for pre-emption, previous grants by Spanish and French authorities were recognized. Fraud and forgery in efforts to prove such grants were rife, and there was great public interest in litigation over land claims. Lawless, who was an attorney representing a large group of claimants, appeared as counsel in a case brought to test the validity of such a grant. Judge Peck, the

federal judge for Missouri, decided one case against him, and Lawless countered with a newspaper article criticizing the decision. Judge Peck promptly attached Lawless for contempt and, after a hearing, found him guilty, imposing a sentence of one day's imprisonment and suspension from practice for 18 months.

Lawless, who had influential friends in Washington, then memorialized Congress for Peck's impeachment. After a trial which consumed a large part of the session of 1830-31, Judge Peck was acquitted by a narrow margin. See Stansbury, Trial of James H. Peck (1833). However, the episode immediately precipitated legislation on the question of summary judicial power in contempt proceedings. A federal statute enacted in 1831, 4 Stat. 487, provided that "the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts * * * and the disobedience or resistance by any officer * * * party, juror, witness, or any other person * * * to any lawful writ, process, order, rule, decree, or command of the said courts".

The words "misbehaviour * * * so near thereto as to obstruct the administration of justice" were inserted to include, within the definition of contempts, breaches of the peace near the courthouse which might interrupt judicial proceedings. See Nelles and King, *supra*, p. 530. By other provisions of the statute, acts formerly designated as contempts, such as attempts to influence jurors, witnesses or officers or attempts to obstruct or impede the administration of justice by threats or force were made punishable by the regular process of indictment and trial. Act of March 2, 1831, c. 99, 4 Stat. 487; now U.S.Code, 28, § 385 and 18, § 241, 28 U.S.C.A. § 385 and 18 U.S.C.A. § 241. Again, by legislation, summary judicial power was expressly restricted to its true historic limits.

General public agreement with the policy exemplified by the federal statute and those of Pennsylvania and New York is indicated by the fact that numerous other states soon adopted similar laws. By 1860, 23 of the 33 states of the Union had adopted acts

limiting the summary power to punish for contempt. See *Nelles and King*, supra, p. 533. And with the exception of New Hampshire and Arkansas, these limitations were respected in every jurisdiction where they were questioned. *Ex parte Poulson*, 1835, Fed.Cas.No.11350, pages 1205-1209; *United States v. Holmes*, 1842, Fed.Cas.No. 15383; *Stuart v. People*, 1842, 3 Scam., Ill., 395; *Ex parte Hickey*, 1844, 4 Smedes & M., Miss., 751; *Dunham v. State*, 1858, 6 Iowa 245; *Brown & Calkins Case* (1854), see in *State ex rel. Ashbaugh v. Circuit Court for Eau Claire*, 97 Wis. 1, 11, 72 N.W. 193, 38 L.R.A. 554, 65 Am.St.Rep. 90; *Foster v. Com.*, 1844, 8 Watts & S., Pa., 77.

The New Hampshire court held that the writer of an article constituting a contempt might be punished summarily, notwithstanding the statute of that state, but in reaching that conclusion it relied upon *Respublica v. Oswald*, supra, which, as has been pointed out, followed the fallacious doctrine of Blackstone based upon the writing of Judge Wilmot. *Tenney's case*, 23 N.H. 162, 185. This decision has not attracted general attention and is referred to infrequently. However, the case of *State v. Morrill*, 16 Ark. 384, like *King v. Almon*, supra, has had an unusual influence in shaping the law concerning contempts. It has been cited and relied upon as an authority in many states, including California, and as it is the first decision in the United States which set aside a statute limiting a court's jurisdiction over alleged contempts, it merits particular attention.

In an editorial in his newspaper, Morrill intimated that the justices of the state supreme court had been guilty of bribery in a criminal case. They summoned him to show cause why he should not be adjudged in contempt. In a lengthy opinion, which added little that was new to the subject, the court sustained its power to punish summarily notwithstanding legislative limitation to specified acts "and no others". By constant repetition, factitious weight was given to the assumption that such power is inherent, necessary, and traditional. The court quoted at length from Blackstone, *Roach v. Garvan*, supra; *Respublica v. Oswald*, supra; *King v. Almon*, supra, and from earlier Arkansas cases of direct contempt. Cases which had sustained the limitations placed by congress upon the federal courts were held inapplicable upon the ground that the lower federal courts

were the creatures of congress and not of the Constitution. The *Peck-Lawless* case was distinguished upon the ground that Lawless had "published a criticism upon the opinion, not impugning the motives or charging corruption upon the judge, but discussing the correctness of the opinion" and "the distinction between constitutional freedom, and licentious abuse of the press, is now so well understood in this country, that no American judge could consider himself authorized to punish as for contempt, authors of publications of the character of that made by Mr. Lawless".

Morrill was finally discharged upon filing a response under oath denying any intention to commit a contempt. *State v. Morrill*, 16 Ark. 384, 412. But this decision led the way for a series of cases which cast off the legislative fetters in almost every jurisdiction where they had been imposed. See *Nelles and King*, supra, pp. 554, 562. The basis for the asserted authority of a court to ignore statutory regulation of the power to summarily punish for contempt was, most frequently, said to be that it is unconstitutional as trenching upon an inherently necessary and immemorially exercised power. See for example, *State ex inf. Crow v. Shepherd*, 177 Mo. 205, 76 S.W. 79, 99 Am.St.Rep. 624; *State v. Frew*, 24 W.Va. 416, 49 Am.Rep. 257. Other cases hold that legislation on the subject of inherent judicial power is merely declaratory and is not binding on the courts. See *Dale v. State*, 198 Ind. 110, 150 N.E. 781, 49 A.L.R. 647.

In a third class of cases the same result was achieved by construing the phrase "in the presence of the court or so near thereto", adopted from the federal statute, as applying to contempts by publication upon the theory that a widely circulated newspaper is constructively present in or near to the court. See *People v. Wilson*, 64 Ill. 195, 16 Am.Rep. 528; *Myers v. State*, 46 Ohio St. 473, 22 N.E. 43, 15 Am.St.Rep. 638. Only in Pennsylvania, New York, Kentucky and (probably) South Carolina have the legislative limitations been respected (*Ex parte Steinman*, 95 Pa. 220, 40 Am.Rep. 637; *Rutherford v. Holmes*, 5 Hun, N.Y., 317, 319, affirmed 66 N.Y. 368; *Adams v. Gardner*, 176 Ky. 252, 195 S.W. 412), but it is worthy of note that the courts of these states have become neither contemptible nor inefficient.

For some 75 years, the federal courts construed the congressional statute as a

limitation upon their power to summarily punish for a constructive contempt. *Ex parte Poulson*, 1835, *supra*; *Ex parte Robinson*, 1873, 19 Wall. 505, 510, 22 L.Ed. 205. After 1900, moreover, there were indications that the requirement of physical proximity might be interpreted so as to include newspaper comment (*Ex parte McLeod*, D.C., 1903, 120 F. 130, 140; *United States v. Huff*, D.C., 1913, 206 F. 700, 704), but it was not until 1915 that the constructive presence doctrine was extended to contempts by publication. In that year the Toledo News-Bee published articles and cartoons which intimated that a United States district judge was biased in litigation pending between the city of Toledo and a traction company. The newspaper and its editor were adjudged guilty of contempt in a summary proceeding (*United States v. Toledo Newspaper Co.*, D.C., 220 F. 458); and the judgment was sustained by the United States Supreme Court in *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 38 S.Ct. 560, 563, 62 L.Ed. 1186, Justices Holmes and Brandeis dissenting. Chief Justice White, who wrote the majority opinion, held that it was "essential to recall the situation existing at the time of the adoption of the Act of 1831 in order to elucidate its provisions", but his research apparently stopped with his own opinion written a year and a half earlier in *Marshall v. Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881, L.R.A. 1917F, 279, Ann.Cas.1918B, 371, dealing with the power of congress to punish summarily for contempt. An analogy was drawn between the powers of congress and the courts, and he asserted that each was based upon the "right of self-preservation". This is the doctrine of "inherent necessity" in a new garb.

Regardless of the fact that judicial power had been limited by the Statute of 1831, the court had "no doubt that the provision conferred no power not already granted and imposed no limitations not already existing". This conclusion is palpably and demonstrably incorrect when considered in the light of the historical background in which the federal statute was conceived. The federal courts, although by statute stripped of their power to punish contumacious editors, had transacted judicial business for almost a century without loss of either prestige or independence, yet Justice White said that freedom of the press "cannot be held to include the right

virtually to destroy". The omission in the federal act of the tautological provision of the Pennsylvania act expressly abolishing contempts by publication, was considered by him to be "the strongest possible evidence of the purpose not to enact such provision". (For a searching criticism of the majority opinion, see Frankfurter and Landis: *Power of Congress over Procedure in Criminal Contempts*, 37 Harv.L. R. 1010)

In California the first legislature expressly provided that the courts might punish for contempts. Stats. 1850, chap. 33, sec. 13. Under this statute the "power to punish in a summary manner, by fine or imprisonment, or either, for contempts offered to them while in session, or to any process, writ, rule, or order of said courts issued and made, or for disobeying any writ, process, or order thereof, or for obstructing or preventing the execution of the same, and the judgments, decrees, and determinations of said Courts in such cases shall be final and conclusive. * * *

This statute was soon put to a test. Early in 851 William Walker, the editor of the San Francisco "Herald", published an article referring to Judge Parsons with biting scorn. Also attacking the courts generally, the writer said: "They cover crime with the folds of the ermine; they lift their impotent arms to scourge an unfettered press with the rods of justice, as they style it. They drop the tears of a bastard mercy upon the robbers and the assassins who threaten our lives and our property; they turn with a scowl of wrath and an arm of vengeance upon the press which dares to complain of the tenderness with which offenders are treated."

Cited for contempt of court in summary proceedings, Walker was adjudged guilty, his punishment was fixed at a fine of five hundred dollars and he was ordered to stand committed until the same should be paid. In a written opinion Judge Parsons pointed out that the legislature had not defined "what shall or shall not be a contempt", and relying upon some statements of Chancellor Kent in *People v. Freer*, *supra*, he held that the power to punish summarily had existed in English and American courts "time out of mind" and "is exercised * * * in all the States of the Union, unless a statute exists expressly taking away from the Courts that power". *Matter of Impeachment*, 1 Cal. 542.

Immediately upon his commitment, Walker memorialized the assembly of the legislature for the impeachment of Judge Parsons. A special committee submitted a report taking as precedents the Peck-Lawless and *Respublica v. Oswald* cases and recommending impeachment. But the assembly refused to adopt the report, and appointed another special committee. The second committee found in early expressions of Chief Justice McKean of Pennsylvania and Chancellor Kent of New York, common law sanction for the use of summary power and declared that section 13 of the District Court Act did not explicitly limit that power; hence "If there be fault anywhere, it is attributable to the obscurity of this section of the act, rather than to the interpretation put upon it by the court." The committee, therefore, concluded that Walker's charges "show no cause for impeachment" of Judge Parsons but was "induced to recommend the passage of a law, more explicitly defining contempts of court and the power of courts to punish them".

At the second session of the legislature, section 480 of the Practice Act was enacted. Stats. 1851, chap. 5, tit. 13, p. 126. In general, this section defined contempt of court as any misbehavior or breach of the peace in the presence of the court or its immediate vicinity which tends to interrupt the due course of trial or any disobedience of process. Section 1209 of the Code of Civil Procedure, enacted in 1872, adopted the Practice Act definition of contempt together with several additions to it. Official misconduct of judicial officers, abuse of process, acting as an officer of the court or attorney without authority or license, interference with jurors or witnesses, and disobedience of the order of a superior court by an inferior tribunal were brought within the summary power as was also "any other unlawful interference with the process or proceedings of a court". Subd. 9.

Not until 1890 did anyone challenge the application of this section to contempts by publication. At that time one Barry, who was editor of the San Francisco Weekly Star, published a particularly violent denunciation of Francis W. Lawler, a superior court judge, for sustaining a demurrer to a suit to oust a city supervisor from office. Barry was found guilty of contempt in a summary proceeding before three other judges of the superior court. The Supreme Court denied his application for habeas cor-

pus upon the ground that the editorial was an "unlawful interference with the * * * proceedings of a court" within the meaning of subdivision 9 of section 1209 of the Code of Civil Procedure. *Ex parte Barry*, 85 Cal. 603, 25 P. 256, 20 Am.St.Rep. 248.

Criticism of the decision soon appeared in several San Francisco newspapers. The Morning Call characterized the court as "accuser and judge" and argued that the accused should have been allowed a jury trial, as was then the practice of the federal courts in such cases. The San Francisco Evening Bulletin of September 13, 1890, stated in part, "The decision of the Supreme Court in the case of Editor Barry is exciting a great deal of unfavorable comment. Whether he libelled or not one of the Superior Judges cuts no figure in the case. The main fact is that he is to be punished without a hearing. * * *" In the San Francisco Chronicle of September 22, 1890, appeared an editorial which concluded: "All that can be done, if the Supreme Court adheres to its ruling in the Barry case, is to amend the statute by a negative clause, declaring that an attack upon the integrity of a judge made in the columns of a newspaper or other publication is not a contempt of court. If it comes within the definition of a libel, the proprietor of the newspaper must stand the consequences. That is the responsibility which the Constitution and the law impose upon the newspaper, and which it cannot escape if it would; but to have its mouth closed thereafter, and to be precluded from making its defense before a jury, is not in harmony with either the spirit or the letter of the law, organic as well as statutory."

It is interesting to note that within a few months after this decision the legislature of 1891, St.1891, p. 6, amended section 1209 of the Code of Civil Procedure by providing that "no speech or publication reflecting upon, or concerning any Court, or any officer thereof, shall be treated or punished as a contempt of such Court, unless made in the immediate presence of such Court while in session, and in such a manner as to actually interfere with its proceedings". But this restriction upon the judicial power was soon declared unconstitutional. In *re Shortridge*, 99 Cal. 526, 532, 34 P. 227, 229, 21 L.R.A. 755, 37 Am.St.Rep. 78. The inherent necessity doctrine, said Justice Paterson, is "founded upon the principle—which is coeval with the existence of

the courts, and as necessary as the right of self-protection—that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence”. Admitting that the legislature had the right to “regulate the procedure and enlarge the power”, the court also held that it could not “without trenching upon the constitutional powers of the court, and destroying the autonomy of that system of checks and balances which is one of the chief features of our triple-department form of government, fetter the power itself”.

To support the court's conclusions it cited only the Arkansas case of *State v. Morrill*, supra, which was said to be “in line with all the authorities”. But aside from the lack of precedent for the decision, it is entitled to no consideration in defining the law of contempt because the judgment against the offending editor was set aside upon the ground that, considering all of the facts, “the publication could not, under any circumstances, constitute a contempt”. Yet in *People v. Durrant*, 116 Cal. 179, 209, 48 P. 75 it was cited for the obiter statement that a publication calculated to influence a decision is punishable as a contempt. Also, the same dictum was quoted in *Lamberson v. Super.Ct.*, 151 Cal. 458, 461, 91 P. 100, 11 L.R.A., N.S., 619; *Paddon v. Super.Ct.*, 65 Cal.App. 34, 223 P. 91; and *In re Mason*, 69 Cal.App. 598, 232 P. 157, but in each of these cases the petitioner was charged with a direct contempt and no question concerning the constitutionality of that portion of section 1209 of the Code of Civil Procedure relating to contempts by publication was properly before the court. In the *Lamberson* case the petitioner had filed a contumacious affidavit charging a judge with bias and lack of integrity. This, the court held, was a contempt committed in the presence of the court. The acts complained of in the *Paddon* and *Mason* cases were contempts of the same character and were spoken of as having been done “in the face of the court”. In the former, the petitioner refused to obey a subpoena and filed an affidavit in court stating his refusal; the contemnor in the *Mason* case violated a court order.

In *McClatchy v. Superior Court*, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691, it appears that the court was of the opinion that a false report of pending litigation was punishable as a contempt, but the order committing the alleged contemnor was annulled upon

the ground that he had not been given a fair hearing. However, in *re Lindsley*, 75 Cal. App. 122, 241 P. 934, 935, and *Lindsley v. Superior Court*, 76 Cal.App. 419, 245 P. 212, each hold that the publication of newspaper comment on pending litigation is a contempt of court punishable in a summary proceeding, although the question of the validity or applicability of subdivision 13 of section 1209 of the Code of Civil Procedure does not appear to have been raised and it was not discussed in either opinion. The first case cites 13 C.J. 34 to the effect that “it is contempt to issue publications which are calculated to prejudice or prevent fair and impartial action in a cause of judicial investigation then pending”. The second case, which arose out of the same proceeding in the superior court, holds that a contempt under subdivision 9 of section 1209 was sufficiently proved.

The dictum of *In re Shortridge*, supra, was again quoted in *Blodgett v. Superior Court*, 210 Cal. 1, 290 P. 293, 72 A.L.R. 482, which is another case where the facts show that there was a direct contempt. In *re Hallinan*, 126 Cal.App. 121, 14 P.2d 797, is in the same category. The *Shortridge* case was there relied upon to sustain the trial court's power to punish an attorney who was guilty of disorderly conduct during the course of a trial.

In *Ex parte Shuler*, 210 Cal. 377, 397, 292 P. 481, and *In re San Francisco Chronicle*, 1 Cal.2d 630, 36 P.2d 369, this court for the first time directly held that the limitation upon the power of the courts to punish contemnors by publication is unconstitutional. Little consideration was given to the subject in either opinion, the court relying entirely upon the dictum in the *Shortridge* case and the intervening cases which cited that case or quoted from it. However, mere reiterations of the doctrines of “inherent necessity” and “immemorial usage” are not authority for their validity.

The notion that contumacious publications have been subject to the summary power from time immemorial has been shown to be historically incorrect. Also, the experience of Pennsylvania and other jurisdictions where immunity of the press has long been maintained conclusively proves that no such power is necessary to maintain either the existence of or the respect for courts. It is not necessary to the wholesome administration of justice in this state that judicial officers have uncontrolled dis-

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cretion in passing upon alleged constructive contempts of court. The opportunity for arbitrary punishment often provides the occasion for it. Noise, interruptions, violence of any kind in the course of judicial proceedings must be repressed, obedience to all lawful orders must be enforced. To uphold its authority when challenged by such affronts to the judicial procedure, a court may and should summarily punish the offender. But indirect contempts, particularly publications in a newspaper, are entirely different in their nature and consequences.

The rights of freedom of speech and of the press have their roots deep in the soil of this nation's organic law. Five days before the Declaration of Independence was proclaimed, the patriots of Virginia declared in their Constitution "that the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments". Const. Va. 1776, § 12. For more than a century and a half our nation has consistently upheld this right of expression by a free people as a vital principle which the founders of our national and state governments stated in the respective constitutions as necessary to a democracy.

"Congress shall make no law * * * abridging the freedom * * * of the press." (Art. I, Amendments to U. S. Const., U.S. C.A.) The positive scope of this guarantee was stated by Mr. Justice Harlan in the celebrated case of *Patterson v. Colorado*, 205 U.S. 454, 27 S.Ct. 556, 559, 51 L.Ed. 879, 10 Ann.Cas. 689, as follows: "I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty * * *. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the nation or by the states, which does not embrace the right to enjoy free speech and the right to have a free press." Similarly our state Constitution ordains that "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Art. I, sec. 9, Calif. Const.

These provisions are binding upon the courts and no claims of judicial necessity can outweigh them. When free speech is fettered, liberty is a meaningless word.

The judgment should be annulled.

1. Judges ⇨51(4)

In contempt proceedings, peremptory challenge to judge under provisions of statute providing that when it is made to appear probable that, by reason of bias or prejudice of a judge, a fair and impartial trial cannot be had before him, he will not be permitted to sit, was properly denied. Code Civ.Proc. § 170.5.

2. Judges ⇨51(4)

If act charged against alleged contemnor was a constructive contempt, then judge had no authority to hear or pass on question of judge's disqualification, raised by the alleged contemnor. Code Civ.Proc. § 170.

3. Contempt ⇨30

The power of a court to punish for a direct contempt is based on the judge's knowledge of the commission of the act by the contemnor.

4. Judges ⇨51(4)

The alleged sending of a telegram to judge, if a contempt, was an "indirect contempt," and hence judge had no authority under statute to hear or pass on the question of his disqualification, since judge could not be certain that telegram was either written or sent by alleged sender. Code Civ. Proc. § 170.

[Ed. Note.—For other definitions of "Indirect Contempt," see Words & Phrases.]

In Bank.

Certiorari proceeding by German Bulcke against the Superior Court of the State of California, in and for the County of Los Angeles, and the Honorable Ruben S. Schmidt, Judge thereof, and Judge presiding in Department 22 thereof, respondents, to review a judgment whereby the petitioner was found guilty of contempt of court.

Judgment annulled.

Gladstein, Grossman & Margolis and Ben Margolis, all of San Francisco, and

Gallagher, Wirin & Johnson and A. L. Wirin, all of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, Newlin & Ashburn, A. W. Ashburn, Michael G. Luddy, and Arnold Praeger, all of Los Angeles, for respondents.

EDMONDS, Justice.

The petitioner in this proceeding sent a telegram to Judge Ruben S. Schmidt protesting against the decision which occasioned the controversy in the case of *Bridges v. Superior Court*, Cal.Sup., 94 P. 2d 983, and was adjudged guilty of contempt. Upon his petition a writ of review was issued by this court.

It appears that on the day before that set for hearing a motion for a new trial and a motion to vacate the judgment which had been rendered in the litigation concerning the affiliation of union longshoremen at Los Angeles harbor, petitioner, as vice-president of the International Longshoremen's and Warehousemen's Association, sent Judge Schmidt, before whom the motion was pending, the following telegram:

"Five thousand members and permit men International Longshoremens and Warehousemens Union Local 1-10 have accepted National Labor Relations Act Guaranteeing right of American workers to select own union and sole collective bargaining agency as boon to labor. We believe such rights in best American tradition. Appointment of administrator for handling union affairs International Longshoremens and Warehousemens Union Local 1-13 nullifies intent Labor Relations Act and is severe injustice to members that local. We urge such appointment shall not be made."

This telegram was received by the judge in his chambers and later shown by him to a committee of the Los Angeles Bar Association.

Thereafter, affidavits made on behalf of the association were filed in the superior court. According to one of them, the telegram sent by the petitioner was calculated and intended by him to interfere with and influence the actions and decisions of Judge Schmidt in the matters then pending before him; interfere with the due and orderly administration of justice; and bring about the vacation of the order theretofore made by causing him to grant a new trial. Upon

these affidavits Judge Schmidt issued an order requiring the petitioner to show cause why he should not be adjudged guilty of contempt and punished therefor.

[1] When the petitioner appeared before the court in response to the order to show cause, his counsel offered a peremptory challenge to the judge under the provisions of section 170.5 of the Code of Civil Procedure. This challenge was properly denied. *Austin v. Lambert*, 11 Cal. 2d 73, 77 P.2d 849, 115 A.L.R. 849. There was also presented a written "motion" to disqualify Judge Schmidt for cause. This was accompanied by an affidavit stating facts allegedly showing bias and prejudice.

Declining to consider the "motion" or the supporting affidavit, the court sustained an objection to their being filed upon the ground that the contempt charged against the petitioner was a direct and not a constructive one. The prosecution then withdrew the objection to the filing of the documents and asked that the court allow them to be filed and then deny the motion, but Judge Schmidt ruled: "The Court on its own motion will deny the request to have the motion filed."

Counsel for petitioner then requested a jury trial, which request was likewise denied. A trial of the issues followed, and upon its conclusion judgment was rendered that the action of the petitioner in sending the quoted telegram was a contempt of the court and that he should be punished accordingly.

[2] In contending that this judgment should be annulled, the petitioner, in addition to other objections made by him, insists that it is void because Judge Schmidt refused to follow the requirements of section 170 of the Code of Civil Procedure which provide for the hearing and determination of challenges for cause. The point relied upon in this regard is that when the petitioner filed his written statement under oath, objecting to the hearing of the contempt matter by Judge Schmidt and setting forth the grounds for the disqualification in the form required by the statute, Judge Schmidt lost jurisdiction to proceed further. The answer to this question depends upon whether the sending of a telegram to a judge under the circumstances here shown is a direct contempt of court. For if the act charged against the petition-

er was a constructive contempt, then Judge Schmidt had no authority to hear or pass upon the question of disqualification raised by the petitioner. *Briggs v. Superior Court*, 211 Cal. 619, 297 P. 3.

Apparently the appellate courts of this state have not heretofore been called upon to decide whether one who sends to a judge a communication concerning a pending case commits a direct or a constructive contempt of court although by each of three decisions the writer of a letter was found guilty. However, in each of these cases the writer, after having sent his letter, offered it as evidence in the pending proceedings.

In the case of *Ex parte Ewell*, 71 Cal. App. 744, 236 P. 205, 206, the petitioner sent a contumacious letter to the judge and was later found guilty "upon the ground that said letter was an attack upon the honor and integrity of the court; that petitioner's part in dictating said letter, having it written by said witness, presenting it * * * through the mail, and afterwards injecting it into proceedings on the hearing of said motion, coupled with the language used by petitioner during the hearing of said motion, was contemptuous". So, also, in *Blodgett v. Superior Court*, 210 Cal. 1, 290 P. 293, 296, 72 A.L.R. 482, the contemnor, who wrote a grossly contemptuous letter to the judge, later filed an "Answer to Contempt Proceedings" in which he asserted that the judge was disqualified because of bias, and in support of this claim attached a copy of the letter. At the contempt proceeding the judge denied his disqualification and found *Blodgett* guilty of contempt in respect to the matter contained in the "Points and Authorities" and also guilty of a further contempt consisting in the sending of the letter and its presentation in open court at the hearing. This court in affirming the judgment held that the filing of the "Points and Authorities" was a contempt "committed in the presence of the court within the meaning and intent of section 1209 of the Code of Civil Procedure" and was "a direct, as distinguished from a constructive, contempt". As to the second charge, based upon the contemnor's production in open court of the scandalous letter which he had sent to the judge, the court held that the production and offer of this letter in open court "could not but constitute another and more flagrant contempt".

A case where the facts are more directly in point is *In re Arnold*, 204 Cal. 175, 267 P. 316, 317, which was an original proceeding in this court. The contemnor, who was not an attorney in nor a party to a pending election matter before the court, addressed a letter to the justices which, it was held, constituted "an unlawful interference with the proceedings of the court and an attempt to obstruct the course of justice, and, therefore, a contempt of court." Although cited in the *Blodgett* case, *supra*, as one of direct contempt, the opinion does not classify it as such and the procedure which was followed does not determine how the court defined the offense. So far as the record and opinion shows, the respondent may have been prosecuted for either a direct or indirect contempt because the proceeding was initiated by citation and without affidavit, which is prescribed as necessary for indirect contempts, but the court heard evidence, which is inconsistent with the practice where one is charged with a direct contempt.

However, the question was directly decided by the Supreme Court of the United States in *Cooke v. United States*, 267 U.S. 517, 45 S.Ct. 390, 395, 69 L.Ed. 767. The petitioners, who were attorney and client in litigation pending before a federal district judge, addressed a letter, marked personal, to the judge and caused it to be delivered to him at his chambers. The letter charged that the judge evinced bias toward the client in a case just completed and requested the judge to withdraw voluntarily from remaining cases in which the client was interested. The judge caused petitioners to be attached and without giving them an opportunity to obtain counsel or to present matter in defense or extenuation summarily committed them to prison for thirty days.

On certiorari, the order of commitment was annulled upon the ground that the procedure followed by the district judge deprived petitioners of their liberty without due process of law. It was said that for obstructions occurring in open court a judge may proceed upon his own knowledge of the facts and punish the offender without further proof and without issue or trial in any form. "When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by wit-

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Judges 51(4)

In contempt prosecution for allegedly sending a telegram protesting against a decision to a judge, alleged contemner was entitled to a hearing on the challenge for cause of judge's qualifications to hear and determine the contempt proceedings.

In Bank.

Original certiorari proceeding by V. Wahlenmaier against the Superior Court of the State of California, in and for the County of Los Angeles, and the Honorable Ruben S. Schmidt, Judge thereof, and Judge presiding in Department 22 thereof, respondents, to review a judgment of conviction for a contempt.

Judgment annulled.

Gladstein, Grossman & Margolis, of San Francisco, Gallagher, Wirin & Johnson, of Los Angeles, and Ben Margolis, of San Francisco, for petitioner.

Newlin & Ashburn, A. W. Ashburn, Michael G. Luddy, and Arnold Praeger, all of Los Angeles, for respondents.

EDMONDS, Justice.

This original proceeding to review a judgment of conviction for a contempt of the superior court is based upon facts almost exactly the same as those shown in the case of *Bulcke v. Superior Court*, Cal. Sup., 94 P.2d 1006.

The petitioner, as a county organizer of the Workers' Alliance, sent a telegram to Judge Ruben S. Schmidt protesting against the same decision which was criticized with more force by Mr. Bulcke. Mr. Wahlenmaier's message was as follows: "Workers' Alliance County Council C 517 San Diego vigorously protests your decision in handing over 3000 Longshoremen to fifteen renegade I L A men."

After its receipt by Judge Schmidt the Los Angeles Bar Association filed affidavits charging that the petitioner had committed a contempt of court and he was order-

nesses and argument. * * * Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." Although the court did not expressly define the petitioner's act as a direct or constructive one, the reasoning of the opinion makes certain that the decision was predicated upon the ground that the sending of a contumacious letter to a judge is not a direct contempt.

A New York case is to the same effect. It arose because an attorney wrote to a judge criticizing him and characterizing an expected decision as unjust. It was held that, while his conduct was most reprehensible, it was not punishable as a contempt of court under the New York statute, which limited the court's power to punish for misbehavior in the presence of the court; that is, for direct contempts. In *re Griffin*, City Ct.N.Y., 1 N.Y.S. 7. The case of *Ex parte Earman*, 85 Fla. 297, 95 So. 755, 31 A.L.R. 1226, also holds that one who sends such a letter is not guilty of a direct contempt. In an annotation to the report of this case in 31 A.L.R. 1239, it is said "that letters or other written communications sent through the mail to a judge necessarily seem to fall within the class of contempts known as indirect or constructive contempts". Also, a recent case indicating that such conduct constitutes a constructive contempt is *Freedman v. State*, Md., 6 A.2d 249.

[3,4] This rule would seem to be supported by both reason and authority. The power of a court to punish for a direct contempt is based upon the judge's knowledge of the commission of the act by the contemnor. A judge usually cannot say with any certainty that a letter or telegram received by him purporting to be signed by a certain person was either written or sent by that person; hence such an act, if contumacious, should be classified as an indirect contempt. So far as the decision of *In re Arnold*, supra, may be said to hold to the contrary, it is overruled.

This determination makes it unnecessary to consider any of the other points presented by the petitioner.

The judgment is annulled.

We concur: WASTE, C. J.; HOUSER, J.; CURTIS, J.; SHENK, J.

ed to show cause why he should not be punished therefor. Upon his appearance the matter was submitted to the court upon the same questions of law and fact presented in the Bulcke case and the petitioner was found guilty.

For the reasons stated by this court concluding that German Bulcke was entitled to a hearing upon the challenge for cause of Judge Schmidt's qualifications to hear and determine the pending charge of contempt the judgment against the petitioner is annulled.

It is so ordered.

We concur: WASTE, C. J.; HOUSER, J.; CURTIS, J.; SHENK, J.



35 Cal.App.2d 168

GALLO et al. v. BOYLE MFG. CO., Inc.

Civ. 6107.

District Court of Appeal, Third District,
California.

Oct. 16, 1939.

1. Appeal and error ⇨931(1), 1010(1)

Where contract was to be performed is fact question, determination of which by trial court will not be disturbed on appeal, if supported by any substantial evidence in record, and all conflicts must be resolved in prevailing party's favor. Const. art. 12, § 16.

2. Appeal and error ⇨1024(3)

An order denying corporate defendant's motion for change of venue of action must be affirmed if facts on which motion was heard and determined reasonably support inference that contract was to be performed in county wherein action was brought. Const. art. 12, § 16.

3. Corporations ⇨503(3)

As delivery of article sold is essential part of sale contract, verified complaint, alleging that corporate defendant sold and delivered metal drums to plaintiff f. o. b. named city in county of venue, and purchase order directing delivery thereof to plaintiff f. o. b. such city, warranted trial court's

finding that contract was to be performed in such county and denial of defendant's motion for change of venue. Civ.Code, § 1761; Const. art. 12, § 16.

4. Appeal and error ⇨1024(3)

In action for breach of warranty respecting metal drums sold to plaintiffs by defendant corporation, which filed motion for change of venue, evidence of facts supporting defendant's theory that drums were to be delivered in another county than that in which action was brought are not conclusive on appeal from order denying motion, but at most created conflict in evidence, where purchase order stated plainly that drums were to be delivered in county of venue. Const. art. 12, § 16.

5. Appeal and error ⇨1024(3)

Whether there was mistake in stating terms of contract for sale of metal drums that they should be delivered in county wherein action for breach of warranty respecting them was brought was matter entirely for trial court to determine on corporate defendant's motion for change of venue. Const. art. 12, § 16.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by E. Gallo and another, copartners, doing business under the firm name and style of E. & J. Gallo Winery, against the Boyle Manufacturing Company, Inc., to recover damages for breach of a warranty respecting metal drums sold to plaintiffs by defendant. From an order denying defendant's motion for a change of venue, defendant appeals.

Affirmed.

Hawkins & Hawkins & Cardozo, of Modesto, Gibson, Dunn & Crutcher, of Los Angeles, J. W. Hawkins, of Modesto, and Ira C. Powers, of Los Angeles (John Henry Peckham, Jr., of Los Angeles, of counsel), for appellant.

Edward T. Taylor, of Modesto, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an appeal from an order denying defendant's motion for change of venue.

The complaint states a cause of action for damages based upon a warranty in re-

spect to certain metal drums sold by defendant to plaintiffs. It is alleged that the principal place of business of defendant corporation is the city of Los Angeles, and that drums were sold and delivered, f.o.b. Modesto, Stanislaus county, California.

Article 12, section 16 of the Constitution of California provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated subject to the power of the court to change the place of trial as in other cases."

It is the contention of appellant that the contract involved does not come under any of the foregoing provisions. Respondent contends that there was sufficient evidence to justify the trial court in finding that the contract was to be performed in Stanislaus county; hence, the trial court properly refused to change the venue.

[1, 2] It is the rule that the question of where the contract was to be performed is one of fact, and the determination by the trial court of that question will not be disturbed if there is any substantial evidence in the record to support it, and all conflicts must be resolved in favor of the prevailing party. If, therefore, the facts upon which the present motion was heard and determined reasonably support the inference that the contract was to be performed in Stanislaus county, the order must be affirmed. *Parker Co., Inc., v. Exeter Refining Co.*, 26 Cal.App.2d 610, 79 P.2d 1114.

[3] The motion was heard upon the verified complaint and affidavits introduced by both parties. The complaint alleges that defendant sold and delivered the drums to plaintiffs f.o.b. Modesto, California. The purchase order in evidence contains the following language: "Please deliver to us via Santa Fe, f.o.b. Modesto, the following items * * *." As delivery of an article sold is an essential part of the contract, and as the contract called for delivery in Stanislaus county, it would seem that the foregoing is ample evidence upon which the trial court could make a finding that the contract was to be performed in that county. "It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale." Civ.Code, sec. 1761.

CAL.REP.93-94 P.2d-47

[4, 5] Appellant points out other facts which it contends support the theory that delivery was to be made in Alameda county. We have examined the record and have come to the conclusion that such facts, at the most, create a conflict in the evidence. To entitle defendant to prevail, we would have to hold that the facts adduced by appellant are conclusive in character. This we are unable to do. The purchased order states plainly and without ambiguity that the drums were to be delivered in Stanislaus county. Whether or not there was a mistake in stating such terms was a matter entirely committed to the trial court.

The order is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



35 Cal.App.2d 159

PEOPLE v. JOLLEY.

Cr. 3258.

District Court of Appeal, Second District,
Division 2, California.

Oct. 16, 1939.

1. Receiving stolen goods ◯8(3)

Proof of possession of stolen property, together with a showing of suspicious circumstances, is sufficient to justify conviction of receiving stolen property.

2. Receiving stolen goods ◯8(3)

Proof of possession of stolen property alone is not sufficient to justify conviction of receiving stolen property, since it must be established that defendant received the property from another with guilty knowledge that property had been stolen.

3. Receiving stolen goods ◯8(3)

In prosecution for receiving stolen property, although defendant need not be shown to have had physical possession of the property, he must be shown to have had either actual or constructive possession of it.

4. Receiving stolen goods ◯8(4)

In prosecution for receiving stolen automobile tires, evidence that defendant was

engaged in used-tire business, that tires in question had been found in defendant's garage after being removed from stolen automobiles, but failing to show that defendant had knowledge of activities of others whereby tires were placed in garage or that defendant knew tires were in his garage, was insufficient to establish that defendant had "possession" of stolen property.

[Ed. Note.—For other definitions of "Possession," see Words & Phrases.]

5. Receiving stolen goods ⇨8(4)

Proof that stolen property was brought upon one's property by a thief does not establish possession thereof, as respects liability for receiving stolen property.

6. Criminal law ⇨407(1)

In prosecution for receiving stolen automobile tires, a statement by defendant's cousin, while being examined by police in defendant's presence, as to alleged conversations between defendant and a third party respecting stolen automobile tires, was "hearsay" and not admissible when unaccompanied by proof of conduct of defendant, when statement of cousin was made, indicating guilt of one or more of the offenses for which defendant was on trial.

[Ed. Note.—For other definitions of "Hearsay Evidence," see Words & Phrases.]

7. Receiving stolen goods ⇨8(3)

Evidence held insufficient to sustain conviction for receiving stolen property, where property consisted of automobile tires found in defendant's garage after being removed by former employees of defendant from stolen automobiles, and there was no showing that defendant had knowledge of activities of former employees or that tires were in garage.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

W. A. Jolley was convicted of receiving stolen property, and he appeals.

Reversed and new trial ordered.

Paul W. Davis, of Pasadena, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendant was accused of the crime of receiving stolen property in each of three counts of an information. In count I it is charged that on March 20, 1939, defendant received certain automobile tires, the property of William Wilson, Jr.; in count II it is charged that on March 22, 1939, he received certain automobile tires, the property of Wegge-Pelton Motor Company; and in count III it is charged that on the 22nd day of March, 1939, he received certain automobile tires, the property of E. L. Payne. At a trial before the court without a jury defendant was convicted on counts I and II and acquitted on count III. He appeals from the judgments and from the order denying his motion for a new trial.

Defendant now contends that the evidence is insufficient to justify the conviction. It was shown in evidence that defendant lived at 3900 Elma road in the city of Pasadena, where he had resided with his wife and two children for approximately two years. The home consisted of a dwelling house and a twocar garage on the rear of a lot of average size. Defendant was on the dates charged in the information and had been for several years in the used tire business, principally regrooving smooth tires, which he conducted at a downtown location, but he had since occupying the home premises kept a stock of old tires in the garage, which he used for storage purposes. He also used the garage for storing tools and household goods but did not use it for housing his automobile. On the day of his arrest there were on the premises, besides a number of hub-caps and automobile tools, 94 used tires of which 20 appeared to have been used less than 5,000 miles. The tires referred to in the information were found on the premises.

A brother of defendant, Vance Jolley, was also in the used tire business and he made use of defendant's place of business to receive telephone calls, although he was working for himself. Vance Jolley was accustomed to buy tires from various used car lots and service stations and at times stored them at defendant's place of business.

On March 20, 1939, Vance Jolley and one Jack Hurley, both of whom had been formerly employed by defendant, took a stolen car to the residence of defendant and on the driveway near the garage they removed the tires from the stolen car and re-

placed them with old tires taken from the stock in the garage. Thereafter they drove the stolen car away and abandoned it. On the following day similar operations were repeated by the same parties, the tires being taken from another stolen car. The tires taken from these two stolen cars form the basis of the charges contained in counts I and II. On March 22, 1939, Vance Jolley, Jack Hurley and one Jay Rhodes drove another stolen car into the driveway of the residence of defendant and removed the tires from it but before they had stored the tires they were apprehended by police officers. No evidence appears in the record that on any other occasions stolen cars or tires were brought to defendant's residence. Defendant was not at home at the time the cars were brought to his residence by Vance Jolley and his two companions. When defendant returned home for dinner on March 22d at his customary hour he was arrested and taken to the police station. He denied any knowledge of the criminal activities of Vance Jolley and denied knowledge of the presence of stolen tires on his property. Vance Jolley and Hurley both testified that defendant did not have any complicity in their criminal actions and did not know that the cars were stolen.

[1-3] Respondent relies upon the rule that the proof of possession of stolen property together with a showing of suspicious circumstances is sufficient to justify a conviction of the crime of receiving stolen property. *People v. Jacobs*, 73 Cal.App. 334, 238 P. 770. Proof of possession of stolen property alone is not sufficient since it must be established that defendant received the property from another with guilty knowledge that the property had been stolen. Although it need not be shown that defendant had physical possession of the property it is essential to show that he had possession either actual or constructive. The prosecution doubtless showed suspicious circumstances but it did not establish that defendant had possession of the stolen property, that he exercised dominion or control over it or that he had knowledge of its stolen character. In *Caringella v. U. S.*, 7 Cir., 78 F.2d 563, the Circuit Court of Appeals reversed a conviction on the charge of receiving stolen property where it appeared that the defendant had been the proprietor of a butcher shop for several years, occupying the ground floor of a three-story building, on the third floor of which he lived with his family. In the

rear was a garage. Early in the morning bandits seized a truck loaded with 320 cases of eggs and left the truck crew in the country. In about two hours the truck was discovered being unloaded in the garage of the defendant. Officers found the defendant sweeping sawdust in the store in front of the garage. The defendant denied that he knew that the eggs were in his garage and that he knew that they were stolen. In reversing the conviction the court said: "The burden was on the Government to establish appellant's guilty participation in the crime. This burden might have been overcome by facts from which inferences pointing to guilt arose. But proof, by facts or inferences, was necessary. In the instant case the Government rested its case upon the asserted inferences arising from the fact that thieves were caught unloading the stolen eggs in appellant's garage. The inference is illogical because the fact—possession—from which the presumption arose, was disproved."

[4,5] The record before us discloses that former employees of defendant took three stolen cars to defendant's driveway where they removed the tires and replaced them with old tires taken from the stock in defendant's garage, but it was not shown that defendant had any knowledge of these operations. It appears from his uncontradicted statement that defendant had not been in his storage garage for ten days. The circumstances undoubtedly appear to be suspicious but it cannot be held that they are sufficient to establish possession of stolen property by defendant or knowledge of its stolen character. Proof that stolen property is brought upon one's property by a thief does not establish possession thereof by the owner of the property.

In order to complete its case the prosecution relied upon a statement made by George Jolley, a cousin of defendant, and the conduct of defendant in relation thereto. An examination of the circumstances under which this statement was made convinces that the statement, even if it be deemed admissible in evidence, bears so little incriminatory evidence against defendant that it fails to supply the proof necessary to his conviction. George Jolley was before the police on March 23d and subjected to an examination in which he made several statements involving defendant. The following day George Jolley was again before the police in the presence of defendant and the questions and his an-

swers previously made were reread to him and he was asked if his answers previously given were correct. George Jolley did not implicate defendant in the offenses for which he was brought to trial but at one stage in the examination he stated:

"Q. What were they discussing that you overheard? A. I heard Vance Jolley and W. A. discussing about Vance stealing tires from hot cars. Vance had stolen a car and W. A. talked like he didn't like to have the hot stuff there. * * *

"Q. Has W. A. Jolley ever told you that he was handling hot tires? A. W. A. has told me he was handling hot tires but he has never asked me to handle them * *."

George Jolley and defendant both testified that defendant had interrupted this examination and had called George Jolley a "liar". The police stenographer who took notes of the examination testified that defendant questioned the truthfulness of George Jolley's statement. She testified: "Q. By Mr. Davis: Do you recall, in connection with your last statement, that there was some question as to the truthfulness of George's statement raised by this Mr. Jolley? A. Yes, I believe there was." The court admitted in evidence the written statement of George Jolley as an exhibit but ruled that only certain parts marked with a blue pencil should be considered in evidence. Neither the statement in its entirety nor the part admitted in evidence purports to contain all of the conversation that took place at the time of the examination.

[6] The statement of George Jolley was clearly hearsay and could not be deemed admissible in evidence unless accompanied by proof of the conduct of defendant indicating guilt of one or more of the offenses for which he was on trial. In such circumstances it is the conduct of the accused that is admissible in evidence and not the statements of the accuser. *People v. Teshara*, 134 Cal. 542, 66 P. 798; *People v. Goltra*, 115 Cal.App. 539, 2 P.2d 35. In introducing the instrument containing the statements of George Jolley the prosecution offered no evidence whatever concerning the conduct of defendant at the time George Jolley made the statements. Without evidence of defendant's conduct indicating guilt the statement was inadmissible. The defense presented evidence that defendant did in fact object to the statements of George Jolley and called him a liar. Although police officers testified that defend-

ant did not call George Jolley a liar, the fact remains that the record is barren of any evidence showing that defendant either remained silent or indulged in any conduct indicating his acquiescence in the truth of the statement made by George Jolley. In this connection it is very important to note that the police officers testified that defendant had consistently from the time of his arrest denied knowledge that stolen property was at his residence.

[7] The evidence is insufficient to sustain the conviction. The judgments and order denying a new trial are reversed and a new trial is ordered.

MOORE, Presiding Justice (concurring).
I concur.

In a case of the conviction of a party for receiving stolen property, it is necessary only that it be proved by competent evidence that the accused had possession, actual or constructive, of the stolen chattels, together with circumstances from which it might be reasonably inferred that the accused knew of his possession. *People v. Juehling*, 10 Cal.App.2d 527, 52 P.2d 520. But in this case, the only approach to proof of possession was the presence of the stolen tires in defendant's garage of which he had made no use except to store a stock of old tires, tools, and household goods. The brother, Vance, had made use of defendant's place of business as well as of his said garage, but otherwise there is no evidence that defendant in any manner or by any agency knowingly received or sheltered the stolen tires. The only evidence of defendant's possession is the fact of his ownership of the garage; but this was overcome by the large stock of stored tires there and want of proof that he had been inside the garage while the stolen tires were there or that he knew the tires were stolen.

The only accusatory items of evidence are two, viz: (1) The testimony of defendant's wife who heard him, at a time not indicated, tell Vance not to bring his friends around the home; saw Vance and another drive a car to defendant's home in the latter's absence when on her inquiry, Vance said he was servicing the car for a customer; told defendant of said visit of which he disapproved. This tends only to arouse suspicion but shows no knowledge of defendant that the stolen property was on his premises. (2) The accusatory exhibit which was incompetent. It was merely an ex parte statement of a witness,

not stenographically taken. When read in defendant's presence, he denied the truth of it. Extrajudicial statements of a witness are in themselves incompetent. Only the contemporary response by the accused to them is material. *People v. McCoy*, 127 Cal.App. 195, 15 P.2d 543.

The evidence failed directly or by inference to show guilty knowledge of defendant.

McCOMB, Justice (dissenting).

I dissent. In my opinion there was substantial evidence to sustain the conviction.



**MORAN v. SUPERIOR COURT IN AND
FOR SACRAMENTO COUNTY. ***
Civ. 6351.

District Court of Appeal, Third District,
California.

Oct. 19, 1939.

Rehearing Granted Nov. 18, 1939.

Subsequent Opinion 96 P.2d 193.

1. Judgment ⇨386(1)

Unless the invalidity of a judgment is apparent from an inspection of the judgment roll, the court rendering it has no power in the absence of application made within time specified by statute to make any order vacating or setting aside such judgment. Code Civ.Proc. § 473.

2. Divorce ⇨165(1)

Where findings of fact and conclusions of law were waived when order vacating interlocutory decree of divorce was entered and motion to vacate order vacating interlocutory decree was not filed within ten days from notice of entry of judgment, statute relating to vacation of judgment based on findings of fact or incorrect conclusions of law did not apply to motion to vacate judgment. Code Civ.Proc. § 663.

3. Divorce ⇨165(5½)

A motion to set aside an order vacating interlocutory decree of divorce on ground that filing of the cross-complaint and taking of evidence thereon were necessary to complete determination of rights of parties, but not showing pursuant to statute that order

was result of mistake, inadvertence, surprise, or excusable neglect, was not sufficient to authorize vacation of order and order setting aside order was in excess of trial court's jurisdiction and void. Code Civ. Proc. § 473.

4. Courts ⇨37(1)

Jurisdictional matters cannot be waived by litigant.

5. Courts ⇨21

If court cannot try question except under particular conditions or when approached in a particular way, court is without jurisdiction unless such conditions exist or unless the court is approached in the manner provided.

6. Divorce ⇨165(5)

Party seeking to set aside an order vacating an interlocutory decree of divorce could not waive proper notice which is necessary to court's jurisdiction and order entered without such notice was void. Code Civ.Proc. §§ 473, 663.

Certiorari proceedings by Arthur R. Moran against the Superior Court of the State of California in and for the County of Sacramento to annul an order setting aside and vacating an order vacating and setting aside an interlocutory decree of divorce.

Order affirmed.

Johnson & Curtright, of Sacramento, for petitioner.

McAllister & Johnson and O. F. Meldon, all of Sacramento, and A. C. McClellan, of Hanford, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

Petition for writ of certiorari to annul an order setting aside and vacating an order vacating and setting aside an interlocutory decree of divorce.

As alleged in the petition, the action in which the order here assailed was entered is one for divorce, commenced against petitioner by his alleged wife, upon the grounds of extreme cruelty. The issues upon the divorce complaint having been settled, the respondent court proceeded to a trial of the action, as a result of which an interlocutory decree of divorce was given, made, and caused to be entered on March 3, 1939. Petitioner thereafter, and on July 6, 1939, caused to be served and filed a notice oi

*For subsequent opinion see 96 P.2d 193.

motion to vacate the interlocutory decree, to reopen the cause, for leave to file an amendment to this petitioner's answer in the form of a cross-complaint for an annulment of marriage, and for leave to offer evidence in support of said cross-complaint. The cross-complaint alleged, as a ground for annulment of the marriage between the parties, that at the time of said marriage plaintiff was the wife of one Paul R. Henricks, then living. This motion came on regularly for hearing, which plaintiff in the divorce case, and her counsel, and petitioner and his counsel all attended. The motion to vacate the interlocutory decree was thereupon made, and witnesses were sworn and examined, and two depositions were read in support of the motion. The matter was then argued to the court, the authorities then quoted and cited, and the motion was submitted for consideration and decision. The respondent court, upon such submission, then granted the motion, vacated the judgment, and granted leave to petitioner to file the proposed cross-complaint. Thereafter, pursuant to the leave granted, petitioner served and filed his cross-complaint, to which plaintiff answered, and upon memorandum and motion for the purpose, the cause was regularly set down for trial on the cross-complaint and answer thereto.

The cause came on regularly for trial, on the issues as thus fixed, on August 30, 1939, and the cause was tried on the issue of the validity of the marriage, and was submitted to the court on that sole issue. This trial took place without any objection whatever being made to the regularity thereof, nor to the validity of the order vacating the interlocutory decree. At no stage of the second hearing, nor at any time, was any motion or application of any kind made to vacate the order vacating said interlocutory decree, nor was any notice of any kind given to, or by either of the parties, or by the respondent court, or to anyone, that the vacation and setting aside of the order vacating said interlocutory decree was contemplated, considered, or intended. Neither was any hearing of any kind ever had at which was presented or considered the proposition of the vacation of such order.

After the submission of the cause, on September 8, 1939, and, as above pointed out, the court, without motion, notice or application, and without deciding any of the issues presented at the hearing of the cause, made its minute order vacating and

setting aside the order of the 17th day of July, 1939, which last-mentioned order vacated and set aside the interlocutory decree. And it is this order nullifying the order vacating the interlocutory decree that is the subject of this application.

It is contended by petitioner that the order of the trial court setting aside and vacating its order vacating the interlocutory decree was without jurisdiction, and, should therefore be annulled by this court. This contention is based, according to the points and authorities filed, upon the ground that the original order was valid upon its face. In his points and authorities filed, petitioner made no attempt whatever to justify the action of the trial court upon statutory authority, but relies entirely upon the ground that "when the order is valid upon its face, as disclosed by an inspection of the judgment roll, its attempted nullification without notice, hearing or motion, is without jurisdiction and wholly void". As the record and judgment roll show that the order was made only after *application, motion and hearing*, he contends that lack of jurisdiction does not appear. He appears to take the view that if the elements mentioned and italicized above are present, the contents and form of the application have little or no bearing upon the question. We take the view, as will hereafter appear, that lack or presence of jurisdiction must be determined by facts alleged in the application, which is part of the judgment roll. The order which the trial court set aside reads as follows:

"Upon notice heretofore duly given, made, served and filed herein, and after a hearing in open court whereat McAllister and Johnson represented plaintiff, and Johnson and Curtright represented defendant and good cause appearing therefor: It is hereby ordered, adjudged and decreed, that the interlocutory decree heretofore made and entered herein on the 3rd day of March, 1939, in Book 84, at page 574, Records of the County Clerk's Office of the County of Sacramento, State of California, be, and the same is hereby vacated and set aside, and the defendant, Arthur R. Moran, is hereby granted leave to file a cross-complaint in the above entitled action."

The view of petitioner in respect to the right of the court to set aside a void order is thus expressed by him: "It is to be conceded that an order wholly void upon its face and requiring only an inspection of the judgment roll to demonstrate its want of

vitality, may be vacated and set aside by the court without notice. (People v. Greene, 74 Cal. 400, 16 P. 197 [5 Am.St.Rep. 448]). Thus, if the order vacating the interlocutory decree itself disclosed the lack of jurisdiction in the court to make it, or, if its invalidity appears from an inspection of the judgment roll, the court, in its exercise of its inherent power over its own judgment, could properly have set the order aside of its own motion."

We will therefore proceed upon the premise that this question of law is uncontroverted.

[1] At the outset, it appears that several references are made by petitioner to the "judgment roll". An examination of the records and papers certified to this court does not disclose any judgment roll as that term is defined by law. The parties seem to proceed, however, upon the assumption that the notice of motion and the order vacating the judgment constitute the judgment roll, and we will adopt that view, without so deciding. "The effect of these well settled rules is that, unless the invalidity of a judgment is apparent from an inspection of the judgment roll, the court rendering it has no power, in the absence of application made within the time specified in section 473, Code Civil Procedure, to make any order vacating or setting aside such judgment." People v. Davis, 143 Cal. 673, 77 P. 651.

[2] As pointed out by respondent there are two statutory methods of setting aside and vacating a judgment. One is under the provisions of section 663 of the Code of Civil Procedure, and is based upon erroneous conclusions of law. As findings of fact and conclusions of law were waived in the instant case, the section does not apply. Furthermore, under said section the motion must be made within ten days from notice of entry of judgment. Here, the motion was made many months thereafter. The other method is under section 473 of the Code of Civil Procedure, which provides in part as follows: "The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no

case exceeding six months, after such judgment, order or proceeding was taken."

The notice of motion reads as follows:

"To the plaintiff above named and to McAllister & Johnson, attorneys for plaintiff:

"You and each of you will please take notice that on Monday, the 17th day of July, 1939, at the hour of 10:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the defendant will move the above entitled court, before Hon. Peter J. Shields, judge of department 2 thereof, at the courtroom of department 2 of said court in the Sacramento County Courthouse, in the City of Sacramento, County of Sacramento, State of California, for an order of said court vacating and setting aside the interlocutory decree of divorce heretofore made and entered herein, and reopening said cause, and granting to defendant leave to file herein a cross-complaint, and granting to defendant leave to offer evidence in support of said proposed cross-complaint.

"Said motion will be made upon the ground that said filing herein of said cross-complaint and the taking of said evidence thereon are necessary to a complete determination of the rights of the parties to this cause, and are necessary to prevent a miscarriage thereof and miscarriage of justice therein.

"Said motion will be based upon this notice, upon the proposed cross-complaint, a copy of which is served herewith, and upon all of the files, records, pleadings and proceedings heretofore had and filed in this action, upon the minutes of the court, and upon the oral and documentary evidence heretofore offered in said action and to be adduced at the hearing of said motion. Dated, July 6, 1939."

[3] It will be noted that there is no attempt whatever to show "mistake, inadvertence, surprise or excusable neglect". The motion cannot be held to come under the last-named section.

In the case of United Railroads of San Francisco v. Superior Court, 170 Cal. 755-760, 151 P. 129, 132, Ann.Cas.1916E, 199, the following rule is laid down: "As was said by the late Chief Justice Beatty in *Holtum v. Greif*, [144 Cal. 521, 524, 78 P. 11], supra: 'The question, then, is as to the power of the trial court to vacate an order granting or denying a new trial after it has once been regularly made and entered. The decisions of this court are numerous and

uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute. If they have been entered prematurely, or by inadvertence, they may be set aside on a proper showing; and, if the order as entered is not the order as made, the minutes may be corrected so as to make them speak the truth; but, subject to these exceptions, the order is reviewable only on appeal, and, the decision of the trial court having been once made after regular submission of the motion its power is exhausted, it is *functus officio*." (Italics ours.)

In the case of *Eli Rodman v. Superior Court*, etc., Cal.Sup., 89 P.2d 109, 112, the holding that failure to follow statutory procedure results in a lack of jurisdiction appears in the following language: "An examination of the numerous cases which deal with this problem impels the conclusion that some confusion exists with reference to what constitutes an excess, and what constitutes an error, in the exercise of jurisdiction. However, it seems well settled (and there appears to be no case holding to the contrary) that *when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess.*" (Italics ours.)

Applying the foregoing rule to the case here, it appears that there was no statutory authority for the vacation of the judgment, and under the opinion in the Rodman case the act of the trial court was in excess of its jurisdiction, and therefore void.

[4-6] Upon the argument of the cause, and in a supplemental list of points and authorities filed thereafter, the further contention is made by petitioner that by appearing and contesting the motion in the trial court, respondent has waived the requirement of notice, and any defect in the notice with respect to the statement there-

in of the grounds of the notice; jurisdiction of respondent to vacate the prior order of vacation without notice, and with respect to the jurisdiction of the court to vacate its own orders, valid on their face. In the first place we have held that the order was not valid on its face. It is the general rule that jurisdictional matters of this character cannot be waived by a litigant. "It is not within the power of litigants to invest a court with any jurisdiction or power not conferred on it by law, and accordingly it is well established as a general rule that, where the court has not jurisdiction of the cause of action or subject-matter involved in a particular case, such jurisdiction cannot be conferred by consent, agreement, or waiver. *So also if the court cannot try the question except under particular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or unless the court is approached in the manner provided, and consent will not avail to change the provisions of the law in this regard.*" 15 C.J. 802-806, § 101. In a note to the foregoing paragraph, numerous instances are cited which show that the case here comes within the rule. The case of *Hammond Lumber Co. v. Bloodgood*, 101 Cal.App. 561, 281 P. 1101, does not cover waiver of jurisdiction, but merely holds that procedural matters such as want of written notice of a motion may be waived, or failure to specify all the relief asked or going beyond the terms of the notice may be waived. It was not contended that any of the omissions were jurisdictional in character. Furthermore, the only respondent here is the trial judge, and it is doubtful if he can be bound by the conduct of counsel for the litigant in the exercise of his lawful right to annul a void order upon his own motion.

The order is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

35 Cal.App.2d 115

PETERS v. FULLEN.

Civ. 2370.

District Court of Appeal, Fourth District,
California.

Oct. 11, 1939.

Appeal and error ⇐607(1)

Where transcript was not filed within prescribed statutory time, notice of appeal contained no request that transcript be made up and prepared, no request was made to clerk of court in which the action was brought to make up and prepare transcript, and no proceeding for bill of exceptions or for transcript, under statute, was pending in trial court, and time to institute such proceeding had expired, motion to dismiss appeal was granted. Code Civ.Proc. § 953a.

Action by Lena Ayer Peters, also known as Leona Peters, also known as Leona Lovelee, against Alice M. Fullen, wherein defendant filed a cross-complaint. From an adverse judgment the plaintiff appeals. On motion to dismiss appeal.

Motion granted, appeal dismissed, and remittitur ordered to issue in accordance with written stipulation of the parties.

M. M. Sattinger, of Calexico, for appellant.

Wolford & Heald, of Brawley, for respondent.

GRIFFIN, Justice.

This is a motion on behalf of respondent and cross-complainant Alice M. Fullen, based on an amended notice of motion duly served upon appellant, to dismiss the appeal. The motion is predicated upon the grounds that the transcript has not been filed within the prescribed statutory time, and that the notice of appeal did not contain any request that a transcript be made up and prepared, and that no request was ever made to the clerk of the court in which the action was brought to make up and prepare the transcript, and that no proceeding for a bill of exceptions or for a transcript under section 953a of the Code of Civil Procedure is pending in the trial court, and that the time to institute the same has expired. A certificate of the clerk of the superior court of Imperial

county to this effect has been duly filed herein.

The motion to dismiss the appeal is granted and the appeal is dismissed. Wood v. Peterson Farms Co., 131 Cal.App. 312, 21 P.2d 468. In accordance with the written stipulation of the parties duly filed, it is ordered that a remittitur issue forthwith.

We concur: BARNARD, P. J.; MARKS, J.



35 Cal.App.2d 92

SOCONY-VACUUM OIL CO., Inc., v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10442.

District Court of Appeal, First District,
Division 1, California.

Oct. 11, 1939.

Rehearing Denied Nov. 10, 1939.

Hearing Denied Dec. 8, 1939.

1. Corporations ⇐642(4½)

Where foreign corporation's steamship touched at harbors in California to unload and reload cargo, and, in connection with such activities, corporation's agent, appointed to represent corporation in its engagements with public in California ports, entered notices, in United States Customs House, of ship's arrival and departure from ports, the corporation was actively "doing business in this state" within contemplation of statutes concerning service of process directed to foreign corporations doing business in California. Code Civ.Proc. § 411, subd. 2; Civ.Code, § 406a.

[Ed. Note.—For other definitions of "Doing Business," see Words & Phrases.]

2. Corporations ⇐668(5)

An agent of a foreign corporation managing and controlling generally whatever services were required by corporation's ships in loading and reloading cargoes in California harbors was a "general manager," within contemplation of statute providing that process directed to foreign corporations may be served on a general manager in the state.

Code Civ.Proc. § 411, subd. 2; Civ.Code, § 406a.

[Ed. Note.—For other definitions of "General Manager," see Words & Phrases.]

3. Corporations ⚡668(5)

The position of a foreign corporation's agent managing and controlling generally the services required by corporation's ships in loading and reloading cargoes in California harbors was of sufficient rank and character to make it reasonably certain that, when summons in action brought in a California court against corporation was served on such agent, the corporation would be apprised of the action. Code Civ.Proc. § 411, subd. 2; Civ.Code § 406a.

Proceeding by the Socony-Vacuum Oil Company, Incorporated, against the Superior Court of the State of California, in and for the City and County of San Francisco, for a writ of prohibition to restrain the Superior Court from entering a default against petitioner.

Peremptory writ denied.

Harris F. Shaw, of San Francisco, for petitioner.

George K. Ford, of San Francisco, for respondent.

WARD, Justice.

This is a petition praying for a writ of prohibition restraining the superior court from entering a default based upon service of summons and complaint under the provisions of subdivision 2 of section 411 of the Code of Civil Procedure providing that summons in a suit against a foreign corporation doing business in this state must be served in the manner provided by section 406a of the Civil Code which, so far as material to this proceeding, provides that such process may be served upon the corporation by delivering a copy to its designated agent "or to the president or other head of the corporation, a vice-president, a secretary, an assistant secretary, the general manager in this State * * *."

Petitioner herein, a New York corporation having its principal place of business in New York city, has been named as one of the defendants in an action entitled *Lollo v. Socony-Vacuum Oil Company, Inc.*, et al., instituted in the superior court of this state in and for the city and county of San Francisco. The action arose out of in-

juries received by the plaintiff while in the employ of petitioner as seaman aboard its steamship "Socony Vacuum". No agent having been designated by petitioner upon whom process may be served in this state, summons was served upon one L. J. Moore who held a power of attorney from petitioner corporation to represent it in matters before customs districts of the United States customs service at Los Angeles and San Francisco authorizing him "to make, indorse, sign, declare, or swear to any entry, withdrawal, declaration certificate, bill of lading, or other document required by law or regulation in connection with the importation, transportation or exportation of any merchandise shipped by or to, or consigned to said grantor; to perform any condition or act that may be required by law or regulation in connection with said merchandise; to receive any goods deliverable to said grantor".

The steamship Socony Vacuum was a carrier of petroleum products to and from various Pacific coast ports. Its purpose in touching at San Francisco and San Pedro harbors in California was to unload and reload the whole or portions of its cargo. In this connection, notices of its arrival and departure were entered in the United States custom house of these ports by the corporation's agent L. J. Moore, who also represented and acted for petitioner in its various activities and engagements with the public in California ports and in connection with the entry and departure of its ships from such ports.

[1] From the statement of facts presented it appears that petitioner was transacting more than one isolated act of business in the state of California. Its business here was similar to the ordinary business transacted in its home port, New York, and was of sufficient substantial character to bring it within the purview of actively "doing business in this state". Code Civ. Proc. sec. 411; *Jameson v. Simonds Saw Co.*, 2 Cal.App. 582, 84 P. 289; *Davenport v. Superior Court*, 183 Cal. 506, 191 P. 911; *Milbank v. Standard Motor Construction Co.*, 132 Cal.App. 67, 22 P.2d 271; *Winfield v. United Fruit Co.*, 135 Cal.App.Supp. 791, 24 P.2d 247.

[2, 3] Moore was an agent of the petitioner corporation, managing and controlling generally whatever services any of the ships of the petitioner corporation might require in loading or reloading. He was a general manager in California as dis-

tinguished from one in charge of a branch or department in a particular district (Pacific Coast Railway Co. v. Superior Court of San Luis Obispo County, 79 Cal. 103, 21 P. 609; Gordon v. I. A. C., 199 Cal. 420, 249 P. 849, 58 A.L.R. 1374; People v. Arthur, 1 Cal.App.2d Supp. 768, 32 P.2d 1002; Whipple v. Prudential Ins. Co., 222 N.Y. 39, 118 N.E. 211), and his position with petitioner corporation was of sufficient character and rank to make it reasonably certain that the corporation would be apprised of the service of summons in the action of Lollo v. Socony-Vacuum Oil Company, Inc., et al. (Winfield v. United Fruit Co., supra; Tropico Land, etc., Co. v. Lambourn, 170 Cal. 33, 148 P. 206; Frontier S. S. Co. v. Franklin S. S. Co., D.C., 233 F. 127; In re Hohorst, Petitioner, 150 U.S. 653, 14 S.Ct. 221, 37 L.Ed. 1211; Nichizui Trading Co. v. U. S. A., D.C., 6 F.2d 335.)

The peremptory writ is denied.

We concur: PETERS, P. J.; KNIGHT, J.



35 Cal.App.2d 206

PEOPLE v. THOMAS.

Cr. 3241.

District Court of Appeal, Second District,
Division 1, California.

Oct. 19, 1939.

Hearing Denied Nov. 16, 1939.

1. Witnesses ⇨286(3), 287(1), 388(8), 389

In robbery trial, question on redirect examination of state's witness as to whether his testimony at preliminary hearing that he could not see whether men whom he saw in complaining witness' store were white or colored did not refer to time when they were running out of store was not objectionable as leading and suggestive, nor as without proper foundation for use as impeachment and not explanatory of any matter brought out on cross-examination, where-in witness testified that such men were colored and that he was not sure whether he made such statement at preliminary hearing.

2. Criminal law ⇨683(2)

Whether district attorney's showing in robbery trial that state's witness testified

on numerous occasions at preliminary hearing that men whom witness saw at complaining witness' store were colored should have been permitted on redirect examination of witness or on rebuttal of his testimony concerning his statement at preliminary hearing that he could not see whether they were white or colored was question addressed to trial court's discretion.

3. Criminal law ⇨723(1)

The district attorney's remark during examination of state's witness that "I am surprised counsel will try to confuse the issue here" was not prejudicial to defendant.

4. Criminal law ⇨1163(2)

On appeal from robbery conviction, court cannot assume that appellant was prejudiced by district attorney's conduct in questioning appellant's witness as to date of her birthday at his office and obtaining her signature to statement that her birthday was on different date than that of crime after she testified that appellant attended her birthday party on night of robbery, where record revealed that jury had benefit of all facts connected with incident and full opportunity to consider witness' testimony in light thereof.

5. Robbery ⇨24(1)

Evidence held to support conviction of second degree robbery.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Clarence Thomas was convicted of second degree robbery, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant, Clarence Thomas, was charged by information with the crime of robbery committed on January 20, 1939. A jury returned a verdict of robbery of the second degree. The appeal is from the judgment of conviction and from the order denying the motion for a new trial.

The facts as revealed by the record are as follows: On January 20, 1939, at about 11 o'clock in the evening, three negroes appeared at the liquor store of the com-

plaining witness, Vito Balenzano, in Los Angeles, and requested a pint of wine. There was some discussion among the men as to the kind of wine desired. The store was well lighted and Balenzano saw the three men plainly. He testified that the defendant, Clarence Thomas, was standing on the side, watching where the money was being placed. The men left the store, returning about 10 or 15 minutes later, at which time they requested another pint of wine. Balenzano recognized the men as the ones who had been there previously. While filling the pint bottle, he turned his head and again saw the defendant Thomas facing toward the money box. One of the other men (who was not present at the trial) at this time "caught" Balenzano from the back, pulled him to the rear of the store and told him to lie down. All three of the men were by then in the back of the store; the complaining witness was "banged down" and his pockets were searched, at which time a watch of the value of \$65 and a knife were taken from him. The money box containing about \$35 was also stolen. Balenzano was then struck in the face, and the three men ran out of the store.

Balenzano further testified that some eight or ten days later while he was on his way to the bank he saw defendant Thomas on the street and recognized him as one of the three men who had been in the store on the night of the robbery; that he called the police but by the time they were able to arrive the defendant Thomas was gone; that some ten days thereafter he again saw the defendant Thomas, who was walking on a downtown street in Los Angeles, and at this time he had the defendant arrested for robbery.

One Bert Thomas, a witness for the People, testified that he had arrived at the liquor store at around 11 o'clock on the evening of January 20, 1939; that the defendant and his codefendant, Tommie Williams, were standing in front of the wine barrels; that Williams dealt him a blow in the stomach and shoved him out into the street, and that he saw three men run out of the store.

In support of an alibi sought to be established, a witness for the defense, Belle Anderson, testified that she was born in Chicago, Illinois, and that her birthday was January 20th; that a Miss Seth Williams, whom she had known for some six months, gave a party in her honor at the

cocktail lounge of the Dunbar Hotel on January 20, 1939, at which party defendant Thomas and his wife were present; that she had known the defendant Thomas for about a year but that she had not met previously the other two men comprising the rest of the party; that she saw the defendant Thomas at 9:30 o'clock that evening and that he remained with the party until the bar closed, which was at 2 o'clock the following morning. Two other members of the birthday party testified to having seen Thomas at the cocktail bar from 9:30 o'clock on the evening of January 20, 1939, until 2 o'clock the following morning.

[1] On appeal it is urged that the court erred in the admission of certain evidence: namely, "a reading of the testimony given by the witness" (Bert Thomas) "at the preliminary hearing".

Upon cross-examination, the witness Bert Thomas was asked whether the three men whom he saw in the store were colored or white. The witness answered that they were colored. The defendant's counsel then asked the witness the following question:

"Q. Calling your attention to page 19 * * * of the preliminary examination testimony, I want you to start reading line 13 and read to line 16. (Handing transcript to witness.) I will ask you if you were asked the following question and made the following answer: 'Q. Could you see whether or not they were white or colored men? A. No.' Did you so state at the preliminary examination? A. I am not sure."

On redirect examination the district attorney asked the witness the following:

"Q. (By Mr. Stahlman): Now, the question is,—do you have the question in mind: 'Q. Could you see whether or not they were white or colored men? A. No,' and I will ask you if that did not refer to the time they were going around the corner, when they were running, wasn't that it? A. Yes, sir."

Defendant's counsel objected to the question as leading and suggestive, which objection was overruled. Appellant complains that "There was no proper foundation laid for the questions to be used as impeachment, and they were not explanatory of any matter brought out on cross-examination."

There was no merit to the objection at the trial, nor is there any merit to the con-

tention on appeal as a result of the court's ruling.

[2] In connection with defendant's effort to impeach the witness Bert Thomas the district attorney sought to show, and did in fact show, by reference to the transcript, that the witness Bert Thomas had upon numerous occasions during his testimony at the preliminary hearing testified that the men were "colored". Whether such a showing should have been permitted upon redirect examination of the witness or upon rebuttal, was a question addressed to the discretion of the trial court.

[3] During the examination of the witness Bert Thomas the district attorney remarked, "I wish to—I am surprised counsel will try to confuse the issue here." The remark was assigned as misconduct, and a request for an instruction to disregard it was denied. Appellant complains bitterly of the ruling and of the alleged prejudicial character of the remark. The complaint is trivial.

[4] At the noon recess, after the testimony of Belle Anderson was given, she was taken to the office of the district attorney and questioned as to the date of her birthday. Later, Miss Anderson was recalled to the stand by defense counsel, at which time she was questioned, outside of the presence and hearing of the jurors, relative to that which transpired during her visit to the office. She testified, in effect, that the prosecuting attorney had stated that he wished to ask her the correct date of her birthday; that he told her he did not think that her birthday was January 20th; that it would be necessary for him to check the records as to her birthday and that if she was not telling him the truth she would get into "trouble"; that she thought the matter over and then told him that her birthday was January 12th; that she wrote down the date of her birthday as January 12th on a slip of paper and signed her name to it; and that she did this because she was frightened. Upon cross-examination by the district attorney following this testimony, Miss Anderson stated that her true birthday was January 20th. In reply to the question by the district attorney: "Now, you say now the reason you told me is that you were scared, but it is on the 20th, is that your statement at this time?" the witness answered: "Yes, my birthday is on the 20th, but other people questioned me—I did not know who to tell the truth to, because so many people

ask you everything." Miss Anderson's signed statement was thereafter offered and admitted in evidence and read to the jury.

It is urged that the above described conduct of the district attorney amounted to an unwarranted tampering with the defendant's witness which, together with the district attorney's argument regarding an alibi defense, was highly prejudicial. The record reveals that the jury had the benefit of all of the facts connected with the incident and a full opportunity to consider the testimony of the witness in the light thereof. It cannot be assumed, under the circumstances, that any prejudice resulted in the absence of a more substantial showing than the record discloses.

[5] The jury was properly and adequately instructed on all issues, and the evidence supports the verdict.

There being no prejudicial errors in the record, the judgment and the order appealed from are affirmed.

We concur: YORK, P. J.; WHITE, J.



35 Cal.App.2d 166

VANDERPOOL v. DUNHAM.
Civ. 12303.

District Court of Appeal, Second District,
Division 2, California.
Oct. 16, 1939.

1. Automobiles ☞244(50)

Evidence that pedestrian was proceeding in marked pedestrian zone and that motorist, before striking pedestrian, had driven into space between center line of street and automobiles which had stopped to let pedestrian pass, warranted finding that pedestrian was free from contributory negligence.

2. Appeal and error ☞996

In automobile accident case, issue presented by defendant's claim of contributory negligence by plaintiff was for determination of trial court, and its finding could not be set aside on appeal unless no inference could reasonably be drawn from evidence other than that plaintiff was negligent.

3. Automobiles ⇨ 160(4)

A pedestrian, while crossing an intersection in pedestrian zone, had the right of way over an approaching motorist, especially where traffic was congested and pedestrian was near center of street when motorist approached.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Leonard G. Vanderpool against Walter Perry Dunham for personal injuries received when plaintiff was struck by an automobile driven by defendant. From a judgment for plaintiff for \$2,188.50, defendant appeals.

Affirmed.

A. H. McConnell, of Long Beach, for appellant.

William N. Deatherage, of Long Beach, for respondent.

WOOD, Justice.

Plaintiff obtained a judgment against defendant in the sum of \$2,188.50 for damages which were suffered when he was struck by an automobile driven by defendant. From this judgment defendant appeals. The only contention made by defendant is that plaintiff was guilty of contributory negligence as a matter of law.

The accident occurred at the intersection of Long Beach boulevard and Plymouth street in the city of Long Beach at 8:30 p. m. on May 11, 1936. Long Beach boulevard runs in a northerly and southerly direction and Plymouth street runs in an easterly and westerly direction. According to the testimony of plaintiff, he was at the southeast corner of the intersection and before stepping from the curb to cross Long Beach boulevard he looked to the left and to the right to see if there were any cars coming. He saw cars to the south 75 or 100 feet away. He then started to walk across Long Beach boulevard in a marked pedestrian zone. As plaintiff proceeded to cross the boulevard two automobiles came up from the south and stopped to let him pass. He continued in the pedestrian zone until he reached the center line of Long Beach boulevard at which point he hesitated to observe whether a car traveling south was going to stop. Plaintiff further testified that he was on the west side of the center line, possibly 2 or 3 feet past the center line, when he

was struck by an automobile driven by defendant.

The two cars which had stopped to allow plaintiff to pass along the pedestrian zone left a space of 8 or 9 feet between the center line of Long Beach boulevard and the nearest stopped car. Defendant, according to his own testimony, drove into this space with his left front fender 12 or 18 inches from the center line. Two witnesses who were traveling in a car in a southerly direction on Long Beach boulevard testified that plaintiff was struck when he was on the center line. Defendant testified that plaintiff took a step back when he was struck.

[1-3] Defendant's contention is devoid of merit. The finding of the trial court that plaintiff was free from contributory negligence is manifestly supported by ample evidence. The issue presented by defendant's claim of contributory negligence on the part of plaintiff was for the determination of the trial court and its finding may not be set aside on appeal unless no inference may reasonably be drawn from the evidence other than that plaintiff was negligent. These principles are so well established that no authorities need be cited. While crossing in the pedestrian zone plaintiff had the right of way. He was at an intersection where traffic was congested. According to his own testimony, as well as that of the two witnesses traveling south, the most that can be said of his conduct is that he hesitated at the center line to observe southbound traffic. Such conduct might reasonably be held to indicate prudence rather than negligence. According to plaintiff and his witnesses he was struck by defendant's car either at the center line or a short distance west of the center line. It is readily apparent that the facts shown in evidence furnish no basis whatever for defendant's contention.

The judgment is affirmed.

I concur: McCOMB, J.

MOORE, Presiding Justice (concurring).

Whether a pedestrian be negligent in crossing a street is to be determined by the jury, in the absence of regulatory statutes. *Burgesser v. Bullock's*, 190 Cal. 673, 214 P. 649. Where a pedestrian is using the cross-walk, it is the duty of the motorist to yield the right of way (Vehicle Code, § 560, St. 1935, p. 188), and the extent of care to be exercised by the pedestrian is

correlative with the amount of the traffic then and the particular surroundings there. *Nicholas v. Leslie*, 7 Cal.App.2d 590, 46 P.2d 761. The question of the pedestrian's negligence in such circumstances is primarily one for the trial court. *Coursault v. Schwebel*, 118 Cal.App. 259, 5 P.2d 77. It is the duty of an appellate court so to construe the evidence as to support the judgment if it is fairly susceptible of such construction. *Miller v. Schimming*, 129 Cal.App. 171, 18 P.2d 357.



35 Cal.App.2d 154

HILL et al. v. CITY OF EUREKA.
Civ. 6213.

District Court of Appeal, Third District,
California.

Oct. 13, 1939.

Hearing Denied Dec. 12, 1939.

1. Municipal corporations ⇨57

A municipal corporation has only such powers as are expressly granted by its charter.

2. Municipal corporations ⇨956(1)

A municipal charter authorizing the imposition of a tax is to be strictly construed against the taxing power and in favor of the taxpayer.

3. Licenses ⇨6(1)

Where merely a power to license is given by municipal charter, presumption is that it is regulatory rather than for the production of revenue.

4. Statutes ⇨245

Taxation ⇨2

A tax must be based upon an express statutory authority and doubt will be resolved against the taxing power.

5. Licenses ⇨6(2)

Under charter of city of Eureka empowering council to license any business not prohibited by law and to establish and regulate the issuance of municipal licenses and the collection of license taxes, municipality was not empowered to license for revenue. St.1895, p. 369, § 43, subd. 50, as amended by St.1917, p. 1749; Const. art. 11, § 8.

94 P.2d—65

6. Licenses ⇨6(2)

In determining whether provision of charter of city of Eureka empowering council to license any business not prohibited by law and to regulate the issuance of licenses authorized city to exact license for revenue, charter of the city as a whole would be examined. St.1895, p. 369, § 43, subd. 50, as amended by St.1917, p. 1749; Const. art. 11, § 8.

7. Licenses ⇨6(1)

Provisions of charter of city of Eureka expressly designating the source from which sufficient revenue should be raised for the operating of the city implied exclusion of right to license for revenue. St.1895, p. 369, § 43, subd. 50, as amended by St.1917, p. 1749; Const. art. 11, § 8.

8. Constitutional law ⇨70(1)

Court is without power to supply an omission in construing statutes.

9. Statutes ⇨245

Courts will not extend by construction a tax law to include things not described in the statute.

10. Licenses ⇨1

General policy of the state is against the raising of revenue by the collection of direct taxes as a condition precedent to the conduct of business. Pol.Code, § 3366, as added by St.1901, p. 635.

11. Licenses ⇨6(3)

Under the freeholders' charter of the city of Eureka authorizing council to license any business and regulate the issuance of licenses, municipality was without authority to enact ordinance providing for the collection of a license tax for revenue purposes on the business of practicing law. St.1895, p. 369, § 43, subd. 50, as amended by St.1917, p. 1749; Const. art. 11, § 8.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action for declaratory judgment by Arthur W. Hill and another, doing business under the name of Hill & Hill, attorneys at law, against the City of Eureka, a municipal corporation. From an adverse judgment, plaintiffs appeal.

Reversed.

Hill & Hill, of Eureka, for appellants.

E. S. Mitchell, of Eureka, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiffs, attorneys at law, duly licensed to practice as such, and engaged in the practice of their profession in the City of Eureka, brought this action for declaratory relief to determine the respective rights and duties of the parties hereto, in so far as such rights and duties are affected by ordinance No. 859 of the City of Eureka.

From a judgment of the trial court holding that the City of Eureka had the power and authority under its charter to pass the ordinance in question providing for the collection of a license tax for revenue purposes on the business of practicing law, plaintiffs prosecute this appeal.

The City of Eureka is a municipal corporation governed by a freeholders' charter pursuant to section 8 of article XI of the Constitution of California. The charter was adopted in 1895, Stats. 1895, p. 355, and amended in 1917, Stats. 1917, p. 1742.

Among the provisions of its charter, and the one upon which the city largely bases its right to enact the particular ordinance in question, is section 43, subdivision 50 thereof:

"The Council shall have power to pass ordinances. * * *

"(50) To provide for licensing any or all business not prohibited by law; to establish and regulate the issuing and granting of municipal licenses, and the collection of license taxes."

It is admitted that a municipality has no regulatory power over the practice of the law by plaintiffs, that power vesting in the state bar, so the single question here is as to the authority of the council to levy a tax for revenue purposes, as distinguished from a regulatory tax.

[1-3] It is fundamental that a municipal corporation has only such powers as are expressly granted by its charter, and that a charter authorizing the imposition of a tax is to be strictly construed against the taxing power and in favor of the taxpayer. To this rule may be added the further qualification that where merely a power to license is given, the presumption is that it is regulatory, rather than for the production of revenue. As to this, Cooley in *The Law of Taxation*, 4th edition, volume 4, page 3531, says: "The terms in which a municipality is empowered to grant licenses will be expected to indicate with sufficient precision whether the grant is

conferred for the purpose of revenue, or whether, on the other hand, it is given for regulation merely. It is perhaps impossible to lay down any rule for the construction of such grants that shall be general and at the same time safe; but as all delegated powers to tax are to be closely scanned and strictly construed, it would seem that when a power to license is given, the intendment must be that a regulation is the object, unless there is something in the language of the grant, or in the circumstances under which it is made, indicating with sufficient certainty that the raising of revenue by means thereof was contemplated."

This rule is followed in *Merced County v. Helm*, 102 Cal. 159, 36 P. 399, 400:

"This power to impose a license tax upon a 'business' cannot be extended to any subject not enumerated in the statute by which the power is conferred. The right to demand a license tax as the condition of engaging in any business within the county must be expressly conferred * * *.

"Any attempt on the part of the state, or of the county as one of the political subdivisions of the state, to take the property of an individual for public purposes by way of taxation, must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the state * * * the proceeding is in invitum, and no presumption is to be indulged in favor of the right to take the property, or of any intention that is not distinctly expressed in the statute under which it is sought to be taken. * * *"

To the same effect are *San Francisco & F. Land Co. v. Banbury*, 106 Cal. 129, 39 P. 439; *Hellman v. City of Los Angeles*, 147 Cal. 653, 82 P. 313; *Connelly v. City and County of San Francisco*, 164 Cal. 101, 127 P. 834, and *Whitmore v. Brown*, 207 Cal. 473, 279 P. 447.

[4] And "the imposition of a tax by inference or implication, no matter how logical or reasonable it may seem, is universally condemned by the authorities, which lay down the rule that the tax must be based upon an express statutory authority, and that doubts will be resolved against the taxing power". *American Co. v. City of Lakeport*, 220 Cal. 548, 32 P.2d 622, 629.

[5] Examining further section 43 of the charter it is seen the council has power

to license any business not prohibited by law and to establish and regulate the issuing of municipal licenses and the collection of license taxes. There is no express grant of power to license for revenue. In *Ex parte Pfirrmann*, 134 Cal. 143, 66 P. 205, in considering the sufficiency of the title of the act adding section 3366 of the Political Code (Stats. 1901, p. 635) the court, under the particular rules of construction there applicable, felt justified in upholding the constitutionality of that statute and construed "license tax" as synonymous with "license fee or charge" but said that "license tax" did not always or necessarily mean the same as a license tax assessed and collected for revenue purposes.

[6] To determine whether "to license and regulate" will be construed as empowering the corporation to exact a license for revenue, the charter of the city as a whole must be examined. *Ex parte Frank*, 52 Cal. 606, 28 Am.Rep. 642. In so examining the charter of the City of Eureka, we find article VI, Revenue and Taxation, embracing, apparently, all matters relating to taxation and revenue, and no reference to a right of the municipality to license for revenue is therein found. Section 77 of that article provides: "The Council shall annually fix the rate of taxation to be levied, and levy the taxes upon all property, both real and personal, in the city, necessary to raise sufficient revenue to carry on the various departments of the municipal government for the current fiscal year."

[7-9] The charter expressly designating the source from which sufficient revenue shall be raised for the operating of the city, it would seem unnecessary to raise additional money from another source. "It is an elementary rule of construction that the expression of one excludes the other. And it is equally well settled that the court is without power to supply an omission." *Towner v. Stimson*, 22 Cal. App.2d 178, 70 P.2d 678, 679. Since tax proceedings are in invitum, tax laws are strictly construed and a statute will not be held to have imposed a tax unless clear and explicit. Courts will not extend by construction a tax law to include those not described in the statute. 24 Cal.Jur., p. 26, et seq. It will also be noted that the revenue and taxation section of the charter specifically refers to the classes of prop-

erty to be taxed and prescribes, by adopting the methods of the state and county, for the assessment, equalization, collection, sale and redemption of taxable property.

[10] It would seem also that the general policy of the state is against the raising of revenue by the collection of direct taxes as a condition precedent to the conduct of business as being a burden upon legitimate business. Sec. 3366, Pol. Code, Stats. 1901, p. 635.

Respondent cites *In re Johnson*, 47 Cal. App. 465, 190 P. 852; *City of Redding v. Dozier*, 56 Cal.App. 590, 206 P. 465; *In re Galusha*, 184 Cal. 697, 195 P. 406, and *Ex parte Braun*, 141 Cal. 204, 74 P. 780, as supporting its contention. The first two of these cases, however, arose in cities of the sixth class which were not governed by a freeholders' charter, as in the case of Eureka. The act creating municipalities of the sixth class, act 5233, Gen. Laws, provides specifically in section 862.12 that such municipalities shall have power to license for the purpose of revenue and regulation every and all kinds of business.

In *re Galusha*, supra, the court stated the question there involved as follows: "The only feature of the ordinance attacked is its application to the profession of attorney at law, * * *" and concludes, "There is no reason for making a particular exception of the legal profession * * *", which is not the question with which we are here concerned. Furthermore, the several provisions of the two charters are not so alike in their provisions as to compel an interpretation of one to be conclusive on the other. So, also, in *Ex parte Braun*, supra.

[11] Again examining ordinance No. 859 of the City of Eureka, we find it is quite obviously a police rather than a revenue measure. Section 1 requires persons to comply "with any and all regulations of such trade". Section 7 provides for inspection and empowers the police to enter and examine all places, without a warrant, to file criminal charges against non-taxpayers, and for a failure to diligently enforce the law, subjects such officers to suspension or dismissal from their office. Section 8 provides for a criminal prosecution for a violation of the provisions of the ordinance, including the failure to pay the tax, which is not the method of enforcement of payment of a license for revenue.

From what is found in the charter and the ordinance enacted thereunder it would therefore appear that the ordinance in question is one of regulation primarily and not a license for revenue. The judgment therefore must be reversed and it is so ordered.

We concur: TUTTLE, J.; THOMPSON, J.



35 Cal.App.2d 130

WOODWARD v. SOUTHERN PAC. CO.
Civ. 6106.

District Court of Appeal, Third District,
California.
Oct. 13, 1939.

Hearing Denied Dec. 12, 1939.

1. Master and servant ⇨250¼

The Federal Employers' Liability Act prevails over state laws in particular field to which it applies, but in absence of controlling provisions in such statute, state laws are controlling in all matters of principle and procedure, including direction of verdict and entry of judgment notwithstanding jury's verdict. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

2. Master and servant ⇨289(33)

In action against railway company for death of switching crew foreman, crushed between two cars during switching operations, whether deceased gave locomotive engineer back-up signal just before accident was for jury on conflicting evidence. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

3. Master and servant ⇨278(18)

In action against railway company for death of switching crew foreman, crushed between two cars during switching operations, evidence *held* sufficient to support judgment on jury's verdict for plaintiff. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

4. Death ⇨58(1)

In death action, where plaintiff's evidence discloses deceased's act and conduct immediately before and at time of fatal in-

jury, presumption of his due care has no place in case.

5. Death ⇨104(2)

In action against railway company for death of switching crew foreman, crushed between two cars during switching operations, instruction that deceased is presumed to have taken ordinary care for his own concerns and that jury must determine from all evidence, including such presumption, whether defendant's employees were negligent, was not erroneous as authorizing jury to find defendant's negligence from such presumption. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

6. Death ⇨58(1)

In action against railway company for death of switching crew foreman, crushed between two cars being switched, presumption of deceased's due care applied during interim from time when he gave locomotive engineer back-up signal until his outcry was heard and he was seen between couplers of cars. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

7. Negligence ⇨121(1)

Negligence is not presumed, and burden of proving it devolves on party alleging it.

8. Evidence ⇨89

A presumption is in the case and before court and jury until evidence establishes its inapplicability or it disappears because of testimony introduced.

9. Death ⇨104(2)

An instruction that presumption is evidence and may outweigh positive testimony adduced against it, that where it is undertaken to prove fact against presumption, it remains with jury to say whether fact has been proved, and that jury, if not satisfied with proof, may accept evidence of presumption, *held* proper under facts shown in action against railway company for death of switching crew foreman crushed between two cars being switched. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

10. Master and servant ⇨288(3), 289(33)

In action against railway company for death of switching crew foreman, crushed between two cars being switched, weight of conflicting evidence and witnesses' credibility were for jury to determine in passing on defenses of contributory negligence and assumption of risk. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

11. Appeal and error ⇨928(2)

The appellate court cannot assume that jury did not follow trial court's instructions as to rules of law applicable in determining witnesses' credibility, weight of their testimony, their motives and their interest in and relation to case, together with all circumstances appearing before them.

12. Appeal and error ⇨1002

The appellate court cannot interfere with jury's determination of questions of contributory negligence and assumption of risk on conflicting evidence in action against employer for employee's death.

13. Trial ⇨252(11)

In action against railway company for death of switching crew foreman, crushed between two cars being switched, instruction to find for defendant, if jury found that accident would have been avoided had deceased obeyed defendant's rule that cars must be stopped when necessary to change alignment of couplers and separated not less than one car length if necessary to change or repair couplers, was properly refused as assuming facts not shown by evidence, where couplers were shown to be open and in good condition at time of accident. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Ida P. Woodward, administratrix of the estate of Charles F. Woodward, deceased, against the Southern Pacific Company to recover damages for intestate's death. From an order, denying a motion for judgment for defendant notwithstanding a jury's verdict, and a judgment for plaintiff on the verdict, defendant appeals.

Affirmed.

Hearing denied; CARTER, J., not participating.

Devlin, Devlin & Diepenbrock and Horace B. Wulff, all of Sacramento, for appellant.

John J. McMahon, of San Francisco, and Henry & Bedeau, of Sacramento, for respondent.

MONCUR, Justice pro tem., delivered the opinion of the court.

This is an appeal from an order denying a motion for judgment for defendant notwithstanding the verdict of the jury and from the judgment entered upon the verdict of the jury in favor of the plaintiff for

damages for the death of plaintiff's husband, alleged to have been caused as a result of negligence on the part of an employee of defendant. Charles F. Woodward was the husband of respondent herein and at the time of the accident was in the employ of appellant, Southern Pacific Company, and was employed in interstate commerce. Therefore, the action is brought under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., and under which act the courts of this state have concurrent jurisdiction.

Decedent Charles F. Woodward was crushed between two cars and fatally injured during switching operations in the yards of appellant railroad company in Sacramento. He was the foreman of the switching crew, and the other members were Charles Hand, engineer of the locomotive used in the switching operations; Carl G. Shea, fireman; A. M. Cunningham, switchman, and B. C. Downs, switchman. The two switchmen, Cunningham and Downs, were called as witnesses by the plaintiff and the defendant called the engineer and fireman as witnesses.

Foreman Woodward had been engaged in railroad work since about 1902 and had been employed continuously for appellant in the Sacramento yards from 1923 until the date of his death. He was an habitually careful, competent, capable and experienced switchman and was so regarded in the Sacramento yards. Also, the evidence shows that Woodward always gave clear, distinct signals. Engineer Hand became an engineer in 1919, but only worked as an engineer in the summer time; he had not worked in the Sacramento yards in ten years and had not worked as an engineer prior to the afternoon in question in any yard for the past five or six years. On the afternoon of the accident he was working as an extra engineer operating a superheater engine he was not shown ever to have operated before. He testified a superheater is quicker and more powerful than an ordinary saturated locomotive and that at the time of the accident he had been back at the throttle less than two hours with a crew with which he had not theretofore worked; that he was merely an extra man taking the regular engineer's place.

There is no substantial conflict in the evidence and the facts are as follows: Woodward, the deceased, was the foreman of the 3 o'clock p. m. shift of the 6th street yard switching crew in the Sacramento yards of

the appellant, and as such foreman was in charge of the entire crew, including the engine crew. The foreman is the sole member of the crew who receives any instructions as to the switching operations to be conducted by the shift. His instructions are received by way of the switch list and oral instructions from the yardmaster. It is his duty to supervise the switching operations of freight trains in the Sacramento yards. The manner in which cars are picked up and switched in the make-up of trains lies entirely in the discretion of the foreman. The engineer and fireman have no knowledge of any switching movements and do not know what the next move will be. The engineer operates his engine solely upon signals from the foreman, when he is in a position to give signals, and, if not, upon the signals of the helpers. The engineer of a switching crew has no discretion whatsoever as to the movement of the engine and cars thereto attached, but his sole authority is to move said engine or cars pursuant to signals from the foreman.

Just prior to the accident the engine was pulling four cars easterly upon track No. 3, with switchman Downs riding the west end of car No. 1 (the car attached to the engine), switchman Cunningham was riding the west end of car No. 2 and foreman Woodward, the east end of car No. 3. All of said parties were riding on the right side, or engineer's side of said cars. As the engine and cars pulled out on track No. 3, Downs dropped off the train as his car passed switch No. 2, as he had been directed by the deceased shortly before the accident to align the lead to tracks 2 and 3 with track No. 2, so that cars on the lead might be switched therefrom back to track No. 2.

As the engine came in the vicinity of the 6th street shanty, situate adjacent to said lead track, Woodward gave a stop signal to the engineer, and then jumped off the car onto the ground, and, while the cars were still moving, uncoupled cars No. 2 and No. 3 by use of the lever. Both Cunningham and Woodward got off the cars onto the ground at about the same time, and the pulling of said lever caused cars No. 3 and No. 4 to be separated from cars No. 1 and No. 2 by the space of about 4 or 5 feet. As soon as Cunningham and Woodward got off the cars, Woodward said to Cunningham "Westbound", which, according to Cunningham's testimony, the latter understood to mean that the engine and two cars were to be moved in a forward direction to the westbound main track.

When Woodward said "Westbound", Cunningham turned his back to Woodward, got on the second car and then moved over on said car (which was an empty flat car) to leave the stirrup free to Woodward to get on. By such movement, Cunningham's back was turned to Woodward and Woodward was not seen by him until the cars started in the backward movement and Woodward was being crushed between the couplers. At the time Woodward was last seen by Cunningham, he was standing 2 to 4 feet south of the cut, in the clear and in a safe position.

Switchman Downs watched the engine and cars from No. 2 switch until they stopped and then turned his attention to aligning switch No. 2, so the cars would operate on a back-up movement from the lead on to track No. 2 in lieu of track No. 3, with the result that neither of the helpers was in a position to see what occurred or what signals were given by Woodward after the cars stopped in the vicinity of the shanty. As to what transpired from the time Woodward was in the safe position 2 to 4 feet south of the cars until he was crushed between the couplers, the only witness was the engineer, Hand. The latter testified that after he received the signal from Woodward to back up, given slowly and methodically by Woodward, while Woodward was 2 to 4 feet south of the cars, he, Hand, then turned his head into the engine cab to release the air, reverse the engine and to slowly open the throttle, and just as the cars and engine started backing he looked around, saw Cunningham on the car, heard a scream and immediately saw Cunningham give a violent stop signal. According to Hand's testimony, the train moved backward only 5 feet and, according to Cunningham's testimony, 6 or 6½ feet. Cunningham testified that when the train started to move backward, he turned around and saw Woodward with his face directly toward the engine, with the coupler on the east car opposite his stomach and the coupler on the west car directly opposite his back. As a result of this movement, the two cars, No. 3 and No. 4, weighing approximately 100 tons, which were not braked in any manner, rolled back about 40 feet. In that vicinity the track was on a down grade, not uniform, of between two-tenths of one per cent and four-tenths of one per cent.

The testimony of the witnesses was to the effect that the rolling of the two unbraked

cars for 40 feet from the described back-up operation was usual and normal.

Engineer Hand testified that at the time the two cars between which foreman Woodward was crushed came together that there was a very slight contact, if any; that he could not notice it; that there was not much of a contact; that he could feel a slight jolt; that he hadn't started to stop before he felt the jolt, and that the throttle was open and he was working the steam. E. D. Moody, trainmaster in the employ of appellant in the Sacramento yards, testified as follows:

"Q. Like the testimony in this case shows, these two cars were hit and knocked—in other words, the throttle of the engine according to the testimony, was still open when the cars came together,—is that the usual way of coupling on two cars? A. Not when the throttle is still open; if they moved five feet, they couldn't hit very hard.

"Q. It isn't the usual way to come up against standing cars with an engine and two cars, with the throttle open, is it? A. They have got to come up there with a closed throttle and drift into it.

"Q. Absolutely,—so when they come up and hit with the throttle open, that is unusual, isn't it? A. Yes."

The evidence is without conflict that when the second and third cars were uncoupled prior to the accident by the releasing of a lever, the knuckle on the east end of the third car was open and the knuckle on the west end of the second car was closed. There is absolutely no evidence in the record showing any reason why foreman Woodward should have gone in between these two cars at the time the accident occurred. The engineer demonstrated and repeated the back-up signal which he testified he had received from foreman Woodward. The demonstration was made in the presence of the other members of the crew in court, and they all testified that the signal which he demonstrated was the standard back-up signal and the one customarily used by foreman Woodward. Switchman Cunningham testified that the fourth car, in due course of switching movements, was to be kicked into track No. 2, and that it would have been a logical switching movement to have cut off No. 4 car and switched or kicked it into track No. 2, and after that car was kicked into track No. 2, then to proceed with cars No. 1 and No. 2 to the westbound main; and that the foreman had the right

and power to, and does on occasions, change his mind as to the order of switching movements.

From the facts as shown, it is apparent that there was no probable chance for any mistake as to the kind of signal which foreman Woodward gave.

At the conclusion of the evidence at the trial appellant moved for a directed verdict, which was denied. After verdict by the jury in favor of respondent, appellant moved in the alternative for a judgment for defendant notwithstanding the verdict of the jury and, in the event of a denial of said motion, for a new trial. These motions also were denied.

It is most earnestly contended by appellant that the court was in error in denying the said motions and, as a basis for support of such contention, asserts that there was insufficient evidence to submit to the jury the question of whether the engineer negligently backed the engine and cars without a signal, and in order to so hold it was necessary to disbelieve the testimony of the engineer in regard to the giving of the back-up signal; to draw an inference in conflict with the presumption that the ordinary course of business was followed; permit the jury to guess as to the real cause of the accident; hold that the jury could draw an inference upon an inference or presumption; that decedent's conduct in giving the signal and then going into the cut was the sole proximate cause of his death; and errors of the court in instructing the jury.

[1] The federal statute prevails over state laws in the particular field to which the act applies, but in the absence of any controlling provisions in the federal statute, the state laws are controlling in all matters of principle and procedure. A late pronouncement upon this matter is found in the case of *King v. Schumacher et al., Trustees, etc.*, 32 Cal.App.2d 172, at page 181, 89 P.2d 466, at page 471, and therein it is stated:

"Defendants make the further point that even though the law of this state is as stated in the decision in the *Walton* case [*Walton v. Southern Pac. Co.*, 8 Cal.App.2d 290, 48 P.2d 108], it is contrary to the doctrine of reversal followed in like cases in the federal jurisdiction, and that this being an action based on a federal statute, the rule of the federal courts is controlling. In opposition to this view, plaintiff cites certain cases which he contends demonstrate that no substantial conflict exists between

the doctrines of the two jurisdictions. But whether or not such conflict does exist is not important, for the reason that it is well settled in both the federal and state jurisdictions, and the parties herein agree, that where as here an action founded on a federal statute is properly brought in the state courts, the law of the state, in the absence of any contrary provisions in the federal statute (and here there are none), is controlling in all matters of practice and procedure; and manifestly the process of determining on appeal whether error was committed by the trial court during the trial of the cause and if so whether such error is prejudicial and therefore constitutes ground for reversal, is a matter of practice and procedure. Referring to the judicial construction given those terms as they are used in the law, it has been said that together and in a larger sense they include the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or declares the right (*Duggan v. Ogden*, 278 Mass. 432, 180 N.E. 301, 82 A.L.R. 765; *Anderson's Law Dictionary*); whereas, singly, the word 'procedure' has been defined as the machinery for carrying on the suit, including pleading, process, evidence and practice, whether in the trial court or the appellate court, or in the processes by which causes are carried to the appellate court for review, or laying the foundation for such review (*Jones v. Erie R. Co.*, 106 Ohio [St.] 408, 140 N.E. 366), and the word 'practice' is said to be the form, manner or order of instituting or conducting a suit or other judicial proceeding through its successive stages to the end in accordance with the rules and principles laid down by law or by the regulations and precedents of the courts. (*Black's Law Dictionary*, citing among other cases *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 P. 303, and *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506.) Here, admittedly the enforcement of the legal rights given and declared by said federal act is committed concurrently to the state courts, and the act does not attempt to attach any conditions to the practice and procedure through which the jurisdiction of the state courts shall be exercised in the enforcement of such rights. *Taylor v. Southern Ry. Co.*, 350 Ill. 139, 182 N.E. 805. It follows, therefore, that the hearing and determination of the cause, not only in the trial court, but also on appeal, must be had in accordance with the rules, principles and precedents governing the practice in the state court.

Moreover, a number of adjudicated cases might be cited in support of the conclusion reached herein. For example, the law of the forum has been held controlling with respect to non-unanimous verdicts (*Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961; *Winters v. Minneapolis & St. L. R. Co.*, 126 Minn. 260, 148 N.W. 106; see, also, cases cited in 12 A.L.R., note XI, page 713); and as to the submission of a cause on special verdicts (*Chesapeake & O. Ry. Co. v. Meadows*, 119 Va. 33, 89 S.E. 244; *Kansas City So. R. Co. v. Leslie*, 238 U.S. 599, 35 S.Ct. 844, 59 L.Ed. 1478; *Union Pac. R. Co. v. Hadley*, 246 U.S. 330, 38 S.Ct. 318, 62 L.Ed. 751); also as to the matter of directing a verdict (*Brenizer v. Nashville, C. & St. L. Ry.*, 156 Tenn. 479, 3 S.W.2d 1053, 8 S.W.2d 1099; *Dutton v. Atlantic Coast Line R. Co.*, 104 S.C. 16, 88 S.E. 263); and the entry of judgment non obstante veredicto. (*Marshall v. Chicago, R. I. & P. R. Co.*, 133 Minn. 460, 157 N.W. 638; *Robertson v. Chicago, R. I. & P. Ry. Co.*, 180 Minn. 578, 230 N.W. 585).

"It is true, of course, that a substantive right or defense granted by the federal act cannot be lessened or destroyed by a state rule of procedure or practice; but as already shown, unless the act itself modifies or changes those rules of procedure and practice, the cause must be heard and determined in the same manner as would like causes arising under the law prevailing in the state. See 45 U.S.C.A., p. 262, note 443."

Thus it is seen that the law of the forum is controlling with respect to the matter of directing a verdict and the entry of judgment notwithstanding the verdict.

The questions involving the order of the court denying the motions for a directed verdict and for judgment notwithstanding the verdict have been before the state and federal courts under a great many different phases. The case of *Line v. Erie R. Co.*, 6 Cir., 62 F.2d 657, 658, appears to be very similar in its facts to the case herein. In that case one C. H. Line was killed in a railroad accident. He was the conductor of the train involved and, briefly, the facts were that the train, while proceeding eastwardly, came to a stop and conductor Line proceeded along the train to investigate. The trouble was found and conductor Line then sent the head brakeman forward to have the engineer call the flagman. Conductor Line then turned as if to go to the caboose of the train and was not thereafter

seen alive. Shortly after the train started conductor Line was struck and killed by some portion of the train, his body being found lying between the rails of the east-bound track. In that case there was a directed verdict and on the appeal the Circuit Court, in reversing the order of the court below, said:

"By rule 591 the engineer was forbidden to start the train without receiving the customary signal from the conductor.

"The gravamen of the action is that the engineer started without such signal, when the deceased was under the thirty-sixth car either repairing or removing the defective brake rigging.

"As the train stood at Ashland hole the thirty-sixth car would have been approximately fourteen hundred and twelve feet east of Jerome Fork Bridge. There was naturally some divergence of opinion as to the exact spot where the body was found because those searching for it in the night (about 3 a. m.) were more interested in finding it than in determining its location. But there was substantial evidence that it was found about a quarter of a mile east of the bridge. There was also evidence that it was found a little nearer to Jerome Fork Bridge than to Stanch's crossing, the next highway crossing to the east. The distance from Jerome Fork Bridge to Stanch's crossing was three thousand and seven hundred eighty-six feet. Either of these points would have been quite near the thirty-sixth car as the train stood at Ashland hole.

"There was evidence that a short distance, possibly ten feet, west of the body a wrench and an air hose were found lying between the east and west bound main tracks and that deceased's cap was also nearby. Deceased did not have a wrench when he separated from Carder at the tenth car but he had had sufficient time to go to the caboose for one and return before the train started. The evidence tends to show that it was unnecessary to use a wrench to raise a fallen brake rigging but it was probably necessary to use one in removing the rigging altogether. A short distance west of the air hose the deceased's lantern, unlit, was found sitting on the ballast between the rails of the east-bound track. It was upright though slightly inclined from the perpendicular. Its bottom ring was bent but there was evidence that this was an old bend; otherwise the lantern was in good condition for it was used by deceased's suc-

cessor on the same night, after the accident.

"We think that this evidence, though circumstantial, is sufficient, if believed by the jury, to sustain a verdict in appellant's favor. *Western & Atl. R. R. Co. v. Hughes*, Adm'x, 278 U.S. 496, 498, 49 S.Ct. 231, 73 L.Ed. 473. The evidence was more than a scintilla. *Hardy-Burlingham Min. Co. v. Baker*, 10 F.2d 277 (C.C.A. 6); *Begert v. Payne*, 274 F. 784, 788 (C.C.A. 6). It carried a justifiable rather than a mere possible inference (*American Oil Co. v. Frederick*, 47 F.2d 54, 57, C.C.A. 6) that when the engineer started the train the deceased was under it and could not therefore have given the signal to proceed. Under the rules it was the duty of the conductor to inspect the train on his return from the tenth car to the caboose and if he found a brake rigging down on the thirty-sixth car under rule 520 it was his duty to see that it was removed and the jury might reasonably have concluded that at the time he was killed deceased was under this car performing that duty.

"Appellee introduced evidence tending to show that deceased gave the usual starting signal by lantern from the top of the train somewhere near the thirty-fifth or fortieth car from the engine, and contends that after the train started deceased fell between two of the cars to the track below.

"It will be noted that this is not a serious contradiction of appellant's evidence as to the whereabouts of deceased relative to car 36 at the time he was struck, but it does contradict the inference that he was under the car when the train started. As such it is of no consequence in determining the correctness of a directed verdict. *Gunning v. Cooley*, 281 U.S. 90, 94, 50 S.Ct. 231, 74 L.Ed. 720; *Richmond & Danville R. Co. v. Powers*, 149 U.S. 43, 47, 13 S.Ct. 748, 37 L.Ed. 642; *Rochford v. Pennsylvania Co.*, 174 F. 81, 83 (C.C.A. 6); *Minneapolis, St. Paul, etc., Ry. Co. v. Galvin*, 54 F.2d 202 (C.C.A. 6); *Begert v. Payne*, supra; *Howard v. Louisiana & A. R. Co.*, 49 F.2d 571 (C. C. A. 5)."

A petition for a writ of certiorari was denied by the Supreme Court. 289 U.S. 729, 53 S.Ct. 526, 77 L.Ed. 1478.

[2] Appellant contends that the presumption to the effect that a person is presumed to use ordinary care for his own safety, by reason of engineer Hand's testimony that a back-up signal was given by

foreman Woodward, became no longer applicable and disappeared from the case. However, under the facts of this case as compared with the facts in the case of *Line v. Erie R. Co.*, supra, and under the legal effect of that decision, we think the presence of said presumption in the case becomes immaterial so far as said motions are concerned. It is, of course, not questioned that circumstantial as well as direct evidence may be considered in reaching a determination, and, therefore, omitting all consideration of the presumption, engineer Hand's testimony did no more than create a conflict with the evidence introduced on behalf of the respondent and, this being so, it became a matter for the jury to determine and it did not lie with the court to resolve this conflict on motions either for a directed verdict or for a judgment for appellant notwithstanding the verdict.

We are unable to see how any other conclusion can be reached unless we hold that by the mere fact that engineer Hand did so testify the court was thereby warranted in taking the case from the jury. To so hold would, we think, be a clear invasion of the province of the jury, the duty of determining the weight and effect of the evidence, its sufficiency in proving any fact for which it is offered, and also the duty of the jury in determining the credibility of the witnesses.

Foreman Woodward was deceased and consequently it was not possible to refute the testimony of engineer Hand in regard to the giving of the back-up signal. Under somewhat similar circumstances regarding the weight to be given to a witness' testimony, in the case of *Lippert v. Pac. Sugar Corp.*, 33 Cal.App. 198, 212, 164 P. 810, 816, where a workman was killed in the explosion of a boiler and the testimony of the master mechanic was involved, the court said: "We do not think the jury were compelled to accept at its face value the testimony of Connolly as to verbal instructions or conversations with Lippert, who being dead could not explain or refute them. Connolly may not intentionally have misstated any fact, but his memory may have been at fault. Evidence of alleged declarations of deceased persons is always more or less unsatisfactory and the unsupported testimony of a single person as to a conversation between himself and a deceased person is regarded as the weakest of all kinds of evidence. *Mattingly v. Pennie*, 105 Cal.

514, 39 P. 200, 45 Am.St.Rep. 87; *Austin v. Wilcoxson*, 149 Cal. 24, 84 P. 417."

In the case of *Crain v. Illinois Cent. R. Co.*, 335 Mo. 658, 73 S.W.2d 786, 789, in which a petition for a writ of certiorari was denied by the United States Supreme Court (293 U.S. 607, 55 S.Ct. 123, 79 L.Ed. 698), and which was an action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., the court, after citing with approval and following numerous cases of the United States Supreme Court, said: "'If there is a conflict of the evidence or inferences a verdict should not be directed.'" *Atchison T. & S. F. Ry. Co. v. Condos (C.C.A.)*, 30 F.2d 669, 670."

And also: "The credibility of the witnesses, the interpretation of testimony, and 'the weight of evidence and the extent and effect of contradiction' present questions for the jury."

Under all of the facts and circumstances shown by the evidence in this case, if the court is vested with the authority to say, in the first instance, that the testimony of engineer Hand is clear, positive, uncontradicted and not open to doubt, it would, in effect, be a denial of the constitutional right to a trial by jury.

We are satisfied that the court was correct in its denial of the motion for a directed verdict and of the motion for judgment for defendant notwithstanding the verdict of the jury.

[3,4] The other grounds for reversal will be considered under the appeal from the judgment. We are satisfied the evidence is sufficient to support the judgment and unless there were erroneous instructions given at the request of the respondent and error in refusing the instructions requested by appellant resulting in prejudice to its rights, the judgment should be affirmed. Appellant contends that the trial court erred in instructing the jury upon the question of presumption of due care. In connection with the giving of similar instructions in cases of this kind, many cases, both federal and state, have been cited. The law is established in California that where the evidence introduced by plaintiff discloses the act and conduct of the injured party immediately prior to and at the time in question, this presumption has no place in the case. *Campbell v. City of Los Angeles*, 28 Cal.App.2d 490, 82 P.2d 720; *Mundy v. Marshall*, 8 Cal. 2d 294, 296, 65 P.2d 65; *Lindley v. Southern Pacific Co.*, 18 Cal.App.2d 550, 556, 64

P.2d 490; Varner v. Skov, 20 Cal.App.2d 232, 240, 67 P.2d 123; Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709.

[5] The following instruction regarding presumptions was given by the court at the request of respondent: "Under the law there is a presumption that at the time and place in question, the deceased Woodward took ordinary care for his own concerns, and that he didn't heedlessly go between the cars, and that he did not see or know of the danger, if any, closing in upon him. It is for the jury to determine from all the evidence, including this presumption, whether defendant's employees were negligent, and if so, whether this negligence, if any, was the proximate cause or a contributing cause of Woodward's death, or whether he assumed the risk as incident to his employment."

Appellant contends by this instruction the jury were authorized to make a finding of negligence on the part of appellant from the presumption that the decedent took ordinary care for his own concern, and directs that said presumption has sufficient force and foundation to impute negligence to appellant and that respondent is thereby released from her normal and usual burden of proof that appellant was negligent and that said negligence was the proximate cause of the injuries. We are unable to give this instruction the effect contended for by appellant.

In other instructions the jury were told that there was no burden upon the appellant herein to disprove the allegations of the plaintiff's complaint but that the burden of proof of negligence rested upon the respondent; that proof must be made by a preponderance of evidence; that if the weight of the evidence bearing upon the whole case is in favor of the defendant, or that if it were evenly balanced that the plaintiff could not recover; that the jury was not to determine the case arbitrarily or through prejudice but to weigh it over carefully and consider it carefully and to take in consideration all the circumstances, all of the evidence in the case and then to determine what the truth was and how much weight, or how little, they should give to the testimony of any witness; that appellant was not liable for loss simply because a loss may have occurred without fault on its part, that on the contrary, liability could be imputed to de-

fendant only if it had been negligent and if its negligence had proximately caused the damage; that if they found that the accident which resulted in the death of foreman Woodward may have resulted from any one of several causes, for some of which appellant was responsible and for some of which it was not, then it was not within the province of the jury to guess between these various causes but under such circumstances their verdict must be in favor of appellant and against respondent.

[6] Assuming that the back-up signal was given, still from that time until the outcry was heard and foreman Woodward was next seen between the couplers of the cars, there is no testimony showing his actions. Surely then, the presumption of due care applied during that interim. In the case of Pitt v. Southern Pacific Co., 121 Cal.App. 228, 232, 9 P.2d 273, 275, a case under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., and in which a new trial was granted, the court said:

"Respondent's argument on this branch of the case is that, inasmuch as appellant proved the conduct of the deceased immediately before the accident which resulted in his death, he was not entitled to the presumption that a person takes ordinary care for his own safety. Code Civ.Proc., § 1963, subd. 4. There was no eyewitness to the actual crushing of deceased, and appellant did not prove or establish directly why deceased went between the cars, or what was his purpose at the very time of the accident. He was entitled to the presumption as evidence that he did not heedlessly go between the cars, and that he did not see or know of the danger closing in upon him. It was then a matter for the jury to determine from all the evidence, including the presumption, whether the respondent's employees were negligent, and whether this negligence, if any, was the proximate cause of Shaw's death, or whether he had assumed the risk as incident to his employment, that is, whether the accident was caused by an ordinary risk, or if extraordinary, whether he assumed it."

Again in the case of Thornton v. Seaboard Air Line Ry., 98 S.C. 348, 82 S.E. 433, 435, which also was a case under the federal act, 45 U.S.C.A. § 51 et seq. the court said: "As has been said, there are no eyewitnesses to the killing. There is

nothing proven by eyewitnesses as to whether the negligence of defendant, or negligence of deceased, or his contributory negligence, caused the accident. The evidence shows deceased was in a normal condition of mind when he left to inspect the cars, and there is no suggestion that he committed suicide. In the absence of proof to the contrary, the presumption is that he was attempting to carry out the duties of his employment, for which he had contracted, with due care and precaution."

[7-9] The trial court also instructed the jury, at the request of respondent, regarding presumptions, as follows: "A presumption is evidence, and may, in certain cases, outweigh positive testimony adduced against it. Against a proved fact or a fact admitted, a disputable presumption has no weight, but where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven, and if the jury is not satisfied with the proof offered in its support, then the jury is at liberty to accept the evidence of the presumption."

This statement of the law regarding presumptions is found in the case of *People v. Milner*, 122 Cal. 171, 179, 54 P. 833, and is cited with approval in the case of *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529, 532. In the latter case the court said: "That a presumption is evidence and may in certain cases outweigh positive evidence adduced against it has long been the settled law of this state."

Under the decisions of this state, therefore, the instruction was proper, but it is contended by appellant that these instructions are not warranted under the decisions of the federal courts, and many federal cases in support of this contention are cited. We quote from one of the cited cases, *Ariasi v. Orient Ins. Co.*, 50 F.2d 548, the Ninth Circuit Court of Appeal, per Wilbur J., presiding, at page 552, as follows: "The question as to the effect of positive evidence controverting a disputable presumption has been recently before the Supreme Court of California in the case of *Smellie v. Southern Pacific Co. et al.*, 269 P. 657, thrice reheard, 276 P. 338, 287 P. 343; [212 Cal. 540], 299 P. 529. It was there held that the presumption that a person exercises due care for his own safety was substantive evidence to be weighed against the testimony introduced concerning his conduct, tending to contradict the presumption. See,

also, *Mar Shee v. Maryland Assurance Corp.*, 190 Cal. 1, 210 P. 269, and cases there cited. This conclusion, so far as it is predicated upon the statutory law of California, is not controlling in the federal courts, where the rule has been established to the contrary in *Western & A. R. R. v. Henderson*, 279 U.S. 639, 643, 49 S.Ct. 445, 447, 73 L.Ed. 884."

In *Western & A. R. R. v. Henderson*, 279 U.S. 639, 49 S.Ct. 445, 447, 73 L.Ed. 884, there was involved a statute of Georgia to the effect that: "Upon the mere fact of collision and resulting death, the statute is held to raise a presumption that defendant and its employees were negligent in each of the particulars alleged, and that every act or omission in plaintiff's specifications of negligence was the proximate cause of the death, and it makes defendant liable unless it showed due care in respect of every matter alleged against it. And, by authorizing the jury, in the absence of evidence, to find negligence in the operation of the engine and train, the court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect."

In the *Ariasi* case above cited it was further said:

"The trial court entered judgment that plaintiff take nothing by his action. It appears from the memorandum opinion of the trial court in the record that the trial court was of opinion that the prima facie case established by the revocation of appellant's permit was not overcome by appellant's evidence. While we have referred to the opinion as indicating that the trial court discredited the testimony of the appellant, this result is to be inferred also from the judgment. The appellant concedes, as he must do in view of our previous decision, that the order revoking the permit establishes prima facie that the liquor destroyed by the fire in question was illegally possessed, and hence not property within the meaning of the law and the insurance policy. But he contends that this presumption merely required him to go forward with his proof, and that, having done so, the presumption is at an end, citing *Western & A. R. R. v. Henderson*, 279 U.S. 639, 642, 49 S.Ct. 445, 73 L.Ed. 884; *Mobile [J. & K. C.] R. Co. v. Turnipseed*, 219 U.S. 35, 43, 31 S.Ct. 136, 55 L.Ed. 78, 32 L.R.A. (N.S.) 226, Ann.Cas.

1912A, 463. The revocation of the permit upon the ground stated, in the absence of other testimony, established the fact that the liquor was illegally possessed by appellant. The question is whether or not this evidence is overcome by the affirmative evidence introduced by the opposing party. In this connection, appellees seem to admit that the prima facie case is met and overcome by adverse testimony, but point out that they do not rely wholly upon the prima facie case arising from the order of revocation itself, but that this proof has been supplemented by the findings of the assistant prohibition director, approved and adopted by the prohibition director, which disclose the facts upon which the order was based and show that an illegal sale of intoxicating liquor had been made by the appellee upon the premises involved herein. * * *

"The question for our consideration then is, Did the testimony of the appellant, directly controverting this prima facie evidence of illegal possession, require the trial court, as a matter of law, to find the facts to be as he testified them to be? Although it is a fundamental rule of law that a trial court is not required to accept the testimony of any witness as true, but must weigh the testimony of such witness in connection with all the other evidence in the case and determine the truth, in the absence of all contradictory evidence and any inherent improbability in the testimony, the court cannot arbitrarily reject the testimony of a witness whose testimony appears credible. It is unquestionably true that, if the witnesses who appeared before the assistant prohibition director and testified as above indicated had appeared before the court on the trial of this action and had again so testified, their testimony, being in direct conflict with that of the appellant, would sustain the judgment. They did not testify. The record admitted is not primary evidence of the truth of the testimony therein set forth, nor of the facts stated in the record."

Under the facts in the instant case, however, it is seen that respondent did not depend upon the presumption of due care or of its effect, but presented evidence of circumstances sufficient to establish a prima facie case, and there was no dependence in the first instance upon a presumption itself to establish her right to recover. Therefore, the Ariasi case, the Henderson case, and the many other cases involving the application of the rule regarding the

presumption of due care cited therein as held under the federal decisions can hardly be said to be determinative as applied to the facts in the instant case.

Under the laws of this state, as under the laws of federal procedure, negligence is not presumed and the burden of proving negligence devolves upon the party alleging it. Therefore, what is said in the Henderson case and the other cases involving similar statutory provisions must be considered in connection with those particular provisions attempting to place the burden upon the party against whom the negligence is alleged. Whether we call this presumption evidence, as under the state law, or it be given some other designation, as claimed under the federal laws, nevertheless, in proper cases a presumption is in the case and before the court and jury until the state of the evidence establishes its inapplicability or that by reason of the testimony introduced it has disappeared, and cannot be considered. In this view of the state statutes and decisions and of the federal statutes and decisions thereunder, there is substantially no difference in the effect to be given to these disputable presumptions when applied to the evidence herein. We are of the opinion that under the facts of the instant case the instructions concerning presumptions were proper to be given.

Furthermore, it may be questioned in connection with the giving of the instructions concerning presumptions whether appellant is in a position to complain. At its request the court gave the following instruction: "The law presumes that the ordinary course of business was followed by the defendant Southern Pacific Company and its employees in making the switching movements prior to and at the time of this accident, and such must be presumed by you, unless controverted by other evidence."

[10] The defenses of contributory negligence and assumption of risk, under the evidence herein, may be considered together. If the accident occurred in the manner described by engineer Hand, unquestionably appellant and engineer Hand were not guilty of any negligence proximately causing the fatal injuries to foreman Woodward and there would be no liability in any event. On the other hand, if no back-up signal were given and the engineer made the backward movement without any signal being given, unless there

was a violation of rules or some other intervening act on the part of foreman Woodward proximately causing or contributing to the accident, the evidence being conflicting, the jury was justified in finding, by its verdict, that appellant was negligent; that foreman Woodward was not negligent; that he did not assume the risk and that appellant's negligence was the sole proximate cause of the accident. The backing of the train without a signal of any kind being given under the circumstances shown in evidence, would have been a movement which foreman Woodward could not reasonably have anticipated and in consequence, it would not have been an ordinary risk incident to his employment nor could it have been an extraordinary risk which he could be held to have assumed. And again referring to the presumption that the ordinary course of business was followed, as such presumption may be applied to the defense of contributory negligence, this being a defense necessary to be established by appellant unless such defense is shown by the evidence of respondent, the application of these presumptions where the defense of contributory negligence is involved, is discussed in the case of *Larrabee v. Western Pacific Ry. Co.*, 173 Cal. 743, at page 746, 161 P. 750, at page 751. Therein the court said:

"What then is to be said of the conduct of the deceased? Respondent contends that the question whether that conduct did or did not constitute contributory negligence is peculiarly and exclusively a question of fact for the jury. And herein it is said, first, that the jury was at liberty to infer that the deceased exercised ordinary care and diligence. Code Civ. Proc. 1963, subd. 4; *Gay v. Winter*, 34 Cal. 153; *Baltimore & P. R. Co. v. Landrigan*, 191 U.S. 462, 24 S.Ct. 137, 48 L.Ed. 262. In the latter case the court had instructed the jury that 'in the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross the south track, the presumption would be that he did.' Respondent invokes this evidentiary presumption to rebut contributory negligence and to establish that the deceased did all things which should be done by a prudent man situated as he was. It is true that in by far the greater number of cases the question of contributory negligence is, as it has been frequently declared to be by this court, a question of fact for the deter-

mination of the jury, and it becomes a question of law only 'when the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from these facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury.' *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513. But, touching the presumption that the deceased exercised ordinary care, it is to be noted that that presumption is given weight only in the absence of evidence on the subject of the deceased's conduct. It has been declared to be 'an artificial presumption of so weak a character that it is not to be allowed to have the effect of evidence before the jury where the uncontradicted evidence of the circumstances attending the accident overthrows it.' *Thompson, Negligence*, § 401."

Appellant relies upon the testimony of engineer Hand as to what occurred from the time he testified the back-up signal was given until deceased was seen between the couplers. Therefore, it would appear that there was no place in the case for the presumption that the usual course of business was followed. But if this presumption that the usual course of business was followed may be held to apply to that interim following the giving of the back-up signal to the instant when foreman Woodward was seen between the couplers, the presumption would be that foreman Woodward followed the usual course of business, whatever it may have been. Then the presumption that he used due care for his own safety during that interim also applied. The testimony of engineer Hand solely as to the giving of the back-up signal, like presumptions, considered in connection with the fact that foreman Woodward was dead, is classed as weak testimony. Therefore, from the whole case it appears clear that the duty of determining the weight of the evidence, the credibility of the witnesses, and of resolving the conflicts in the evidence was one solely for the jury.

[11] Concededly, the jury could not arbitrarily disregard engineer Hand's testimony nor could they disregard it because he was an employee of appellant and a participant in the switching movements which occasioned the accident but the trial court and the jury saw him on the witness stand and heard him testify. We cannot assume that the jury did not follow the

instructions of the court in reference to the rules of law to be used by them in determining the credibility of the witnesses and the weight to be given to their testimony, their motives, and the interest, if any, and their relation to the case, together with all of the circumstances appearing before them.

In connection with the instructions concerning presumptions, it would perhaps have been more advisable to so word them as to conform to the federal rules in regard to such instructions, but, under the evidence and the circumstances herein appearing, there was no error committed in so instructing the jury in the form in which the instructions were given of which the appellant is in a position to complain.

[12] The jury having resolved the conflicts in favor of respondent and against appellant, this court is precluded from interfering with the determination of the jury in respect to these two defenses. We are not persuaded that there is any merit to the contention of appellant that the jury were instructed to or that they did, in arriving at a verdict herein, draw inferences from inferences or inferences from presumptions, and we therefore deem a discussion of this point unnecessary to a decision herein.

[13] It is further contended by appellant that there was such a violation of the rules of the appellant Railroad Company as to preclude a recovery and that the court committed error in refusing to give an instruction covering this alleged violation of the rule. The instruction proposed was as follows:

"I hereby instruct you that the proof in this case shows that the defendant Southern Pacific Company promulgated for the safety of its yard employees the following rule:

"'Employees * * * must not * * * go between moving cars, or between engines and cars in motion. * * * When necessary to change the alignment of couplers, cars must be stopped, and under no circumstances, must attempt be made to adjust couplers with foot or hand, or raise lock pin by hand, while cars are moving.

"'If necessary to make change or repairs to couplers, the action must be understood by all employees who may, through misunderstanding, move or cause cars to be moved; the cars should be separated not less than one car-length to reduce liability of injury, should they be moved by mistake.

Employees should, when possible, avoid standing directly in line with couplers while making repairs.'

"And if you find that if Charles F. Woodward had obeyed and performed said rule the said accident would have been avoided and if you further find that his disobedience thereto was the sole efficient cause of his death, then I instruct you that your verdict must be in favor of defendant and against plaintiff."

Evidence was introduced at the trial court for the purpose of showing the construction placed upon this rule by the employees at the time of the accident. The rule itself seems to be quite plain and it may be questioned as to whether there is any necessity for such evidence, but, however that may be, it does not appear to be material when considered in connection with the evidence in this case. As has been said, the couplers were open and in good condition. A change in the alignment of the couplers apparently was not necessary, neither was it necessary to make change or repairs to the couplers, and, therefore, there was no necessity of separating the cars at least one car length or for standing directly in line with the couplers while making repairs. To change couplers could mean nothing less than to put others in their places, and repairs would only be necessary when the couplers were out of order. Under these circumstances, the instruction assumes a state of facts not shown by the evidence. This instruction told the jury that if the deceased had obeyed and performed said rule the said accident would have been avoided, and then told the jury that if they so found their verdict must be in favor of the defendant and against the plaintiff. We are satisfied, therefore, that the court was correct in refusing to give this instruction.

A second cause of action was set forth in the complaint, but, as there was no evidence to substantiate it, it was withdrawn from the jury and any issues in connection with it are not before this court for consideration.

We have, we believe, considered all of the questions raised by this appeal and necessary to a determination. The case was carefully and fairly tried, the judgment is supported by the evidence, and we find no error in the record prejudicial to any of the rights of appellant. Therefore, the order denying the motion of defendant for judgment notwithstanding the

verdict of the jury and the judgment are hereby affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



35 Cal.App.2d 192

KING v. UNGER et al. (two cases).

Civ. 12196, 12231.

District Court of Appeal, Second District,
Division 2, California.

Oct. 18, 1939.

Hearing Denied Dec. 14, 1939.

1. Automobiles 245(72)

Whether pedestrian who was struck by automobile while crossing intersection was guilty of contributory negligence was for jury.

2. Automobiles 19

Owner of automobile could not escape liability as owner for injuries caused by negligent operation of vehicle, by reason of owner's failure to file with department of motor vehicles the certificate of ownership and registration card in accordance with statute. Vehicle Code, §§ 179, 402, St.1935, pp. 115, 153.

3. Automobiles 249

A judgment for personal injuries to one caused by negligent operation of automobile against owner who has permitted another to drive it should be in the same amount as the judgment against the driver, with limitation that judgment against owner cannot be for sum in excess of \$5,000. Vehicle Code, § 402, St.1935, p. 153.

4. Automobiles 249

Where jury first returned verdict in favor of plaintiff who was struck by automobile, against both owner and driver of automobile, in the amount of \$6,677.16, and then, upon being instructed that verdict was erroneous in that amount of judgment against owner, under statute, could not exceed \$5,000, returned verdict against driver for \$5,341.71 and against owner for \$1,335.45, latter verdict was erroneous, since plaintiff was entitled to judgment in same amount against

owner and driver, with limitation that judgment against owner could not exceed \$5,000. Vehicle Code, § 402, St.1935, p. 153.

5. Appeal and error 1176(1)

Where District Court of Appeal determined that plaintiff who was struck by automobile properly had verdict against driver for sum in excess of \$5,000, court would vacate verdict against owner of automobile for sum less than \$5,000 and direct superior court to enter verdict against owner in the sum of \$5,000. Vehicle Code, § 402, St.1935, p. 153.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by George R. King against Milton R. Unger, Herbert E. Woodward, Incorporated, and another, for injuries sustained when struck by an automobile driven by defendant Unger. From judgments for plaintiff, defendants Unger and Herbert E. Woodward, Incorporated, appeal, and from order denying plaintiff's motion to enter judgment against Unger in the sum of \$6,677.16 and against the Woodward company in the sum of \$5,000, plaintiff appeals.

Judgment in accordance with opinion.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for George R. King.

Charles H. Goebel, of Los Angeles, for Milton R. Unger.

Parker & Stanbury, of Los Angeles, for Herbert E. Woodward, Inc.

WOOD, Justice.

Plaintiff commenced this action to recover damages for personal injuries suffered by him when he was struck by an automobile while walking across the intersection at Ninth street and Broadway in the city of Los Angeles on February 27, 1937. At a trial with a jury he obtained judgments against appellant Unger as driver and against appellant Herbert E. Woodward, Inc., as owner of the automobile. Both defendants have appealed from the judgments and plaintiff has appealed from the judgment and from the order denying his motion to enter judgment against Unger in the sum of \$6,677.16 and against the Woodward company in the sum of \$5,000. All of the appeals have been consolidated.

[1] Taking up the appeals of the two defendants we find that their main contention is that plaintiff was guilty of contributory negligence as a matter of law. In presenting this point they review the evidence at considerable length in their opening brief but they fail entirely to mention the fact that this is the second appeal in the case and that this court has heretofore passed upon the issue presented. In the reply brief of plaintiff it is shown that on the former appeal (*King v. Unger*, 25 Cal.App.2d 632, 78 P.2d 255, 256) the issue of alleged contributory negligence of plaintiff was before the court and was passed upon adversely to the contention of defendants. We then held that the issue whether plaintiff "acted as a reasonably prudent person was a question of fact for the jury". A petition for hearing after the decision of this court was denied by the Supreme Court on June 2, 1938. The evidence in the second trial was substantially the same as the evidence in the first trial. There is no merit in defendants' contention.

[2] Appellant Herbert E. Woodward, Inc., contends that the evidence was insufficient to show its liability as owner of the car driven by defendant Unger. It is conceded that the Woodward company purchased the car from one Alison before the accident and was in fact the owner of the car at the time of the accident. Plaintiff introduced in evidence as an exhibit a photostatic copy of the records of the department of motor vehicles showing Alison as the first registered and legal owner, that Alison had endorsed the registration card to Herbert E. Woodward, Inc., as first transferee and that thereafter the Woodward company had transferred ownership to one Mounce. The certificate showed that it was filed with the department of motor vehicles on September 1, 1937, more than six months after the date of the accident. The Woodward company made a dealer's report under date of August 30, 1937, showing that it had sold the automobile to Mounce on that date. No showing was made that the Woodward company was operating the automobile at the time of the accident under special plates for the purpose of testing or demonstrating it. On the other hand it was conceded that the Woodward company had loaned the car to defendant Unger.

The Woodward company did not file with the department of motor vehicles the certificate of ownership and registration

card in accordance with the provisions of section 179 of the Vehicle Code, St.1935, p. 115, but retained the car as actual owner, permitted its use by defendant Unger and delayed filing of the certificate and card until the sale of the vehicle six months later. The issue involved was directly passed upon adversely to the contention of defendants in the cases of *Schmidt v. C. I. T. Corp.*, 14 Cal.App.2d 92, 57 P.2d 1016, and *Collard v. Love*, 17 Cal.App.2d 72, 61 P.2d 458, wherein it was held that owners of automobiles, by failure to comply with the requirements of the law as to registration cannot take advantage of their own wrong and thereby escape liability under section 402 of the Vehicle Code, St. 1935, p. 153.

Turning to the appeal by plaintiff we find another of the instances in which juries have been unable to comprehend provisions of section 402 of the Vehicle Code in the matter of the limitation of the liability of the owner of an automobile to the sum of \$5,000. After deliberation the jury returned to the court room with the following verdict: "We, the jury, in the above-entitled action, find for the plaintiff and against defendants Milton R. Unger and Herbert E. Woodward, Incorporated, a corporation, and fix damages in the sum of \$6,677.16. This 7th day of December, 1938. Stanley M. Sundin, foreman." The jury also returned a verdict in favor of defendant Mills Transfer Company. The clerk's transcript shows that the following proceedings then took place:

"The Court: Do you want to poll the jury, Mr. Parker?

"Mr. Parker (acting for Woodward company): If Your Honor please, the verdict being in excess of \$5,000.00 against Woodward & Company, I think that the court should instruct the jury that no verdict can be rendered under the instructions in excess of \$5,000.00 as against Woodward & Company and that that verdict should be corrected in that respect.

"Mr. Young: No objection to the court making that correction. I might state, Your Honor, that that is the amount of liability of the Woodward Company, that is the amount that they would have to pay regardless of what amount they fix.

"The Court: I think it should be fixed in their verdict, however. I will return the verdict to the jury in the court room here. I will ask all present to step out into the hallway except the bailiff, who will

remain outside of the door and we will allow the jury, rather than send them down to the jury room again, to fix up their verdict here.

(Everyone leaves the court room, excepting the jury.)—4:45 P. M.

"The Court: Do you stipulate that the jury are present?

"Mr. Young: So stipulated.

"Mr. Parker: Yes, Your Honor.

"The Court: Mr. Sundin, will you give the bailiff the verdicts?

(The verdicts are handed to the bailiff, who, in turn, hands them to the court.)

"The Court: Mr. Clerk, will you announce the verdicts?

"The Clerk: In the Superior Court of the State of California, in and for the County of Los Angeles. George R. King, plaintiff, against Milton R. Unger, and others, defendants. We, the jury, in the above-entitled action, find for the plaintiff and against defendant Milton R. Unger and assess damages in the sum of \$5,341.71. This 7th day of December, 1938. Stanley M. Sundin, foreman.—In the Superior Court of the State of California, in and for the County of Los Angeles. George R. King, plaintiff, against Milton R. Unger, and others, defendants. We, the jury, in the above-entitled action, find for the plaintiff and against defendant Herbert E. Woodward, Incorporated, a corporation, and fix damages in the sum of \$1,335.45. This 7th day of December, 1938. Stanley M. Sundin, foreman. And then the third one, finding in favor of the defendant Mills Transfer Company, Incorporated, a corporation.

"Mr. Young: If Your Honor please, I make a motion and object to that verdict being received on the ground it is against the law and that the jury should be instructed, in view of their first verdict—that they turn in a verdict against the defendant Unger in the total sum of \$6,677.16—that they turn in a separate verdict in the sum of \$5,000.00 as to defendant Woodward. It means that the total that will be paid will be only \$6,677.16. We submit that that is the correct way that any change from the original verdict should be made.

"Mr. Parker: I submit, Your Honor, that the court instructed the jury that they could not render any judgment in excess of \$5,000.00 against the Woodward Company and that the verdict is not in excess of said sum.

"Mr. Young: On the other hand, we contend that the jury should have been instructed that they should and must bring in a verdict for the actual sum of \$5,000.00 and not less.

"The Court: I think that is within the discretion of the jury. The motion will be denied. The jury was then polled on the verdict against the defendant, Milton R. Unger, in the sum of \$5,341.71, and the jurors stood eleven to one on this verdict, and the jury was then polled on the verdict against Herbert E. Woodward, Inc., in the sum of \$1,335.45, and the jurors stood ten to two on said verdict."

The jury was thereupon dismissed and the last mentioned verdicts were filed. Thereafter plaintiff presented a motion to the court for an order directing that judgment be entered against defendant Unger in the sum of \$6,677.16 and against Herbert E. Woodward Company in the sum of \$5,000. The court denied this motion and ordered judgment for plaintiff against defendant Unger in the sum of \$5,341.71 and against defendant Herbert E. Woodward Company in the sum of \$1,335.45.

It is obvious that the jury fixed the damages suffered by plaintiff in the sum of \$6,677.16. This is apparent not only from the first verdict rendered but also from the latter verdict, in which the total of the verdicts rendered against Unger and against the Woodward company equals the sum of \$6,677.16. The trial court did not give the jury any aid whatever after they had made the error of returning a verdict against the Woodward company in a sum greater than \$5,000 but merely told the jury "to fix up their verdict", assuming, apparently, that they had received sufficient information from the discussion of the lawyers. The jury should have been given more complete and definite instructions on the point. The way was also open to the trial court to adjust the matter on motion for a new trial so that the proper judgment could be entered against the Woodward company. Neither course was followed by the trial court with the obvious result that there has been a miscarriage of justice.

[3-5] It is argued by plaintiff that this court should now direct judgment against Unger in the sum of \$6,677.16 and against the Woodward company in the sum of \$5,000. We are confronted, however, with the fact that the jury has returned a verdict against Unger in the sum of \$5,341.71 on which they have been polled, a ver-

dict that is clearly in conflict with the verdict returned against the same defendant in a larger amount. Plaintiff makes the suggestion that if on the state of the record a judgment against Unger cannot be ordered in the sum of \$6,677.16, this court should permit the judgment to stand against Unger in the sum of \$5,341.71 and should direct that judgment be entered against the Woodward company in the sum of \$5,000. This suggestion should be followed. Undoubtedly plaintiff is entitled to a judgment against defendant Unger, the driver of the car, in the sum of at least \$5,341.71. It follows as a matter of law that he is entitled to a judgment against the Woodward company, the owner of the car, in the sum of \$5,000. It has been held that the judgment against the owner of a car who has permitted another to drive it should be in the same amount as the judgment against the driver who has negligently caused damages, with the limitation that the judgment against the owner cannot be for a sum in excess of \$5,000. *Bradford v. Brock*, 140 Cal.App. 47, 34 P. 2d 1048; *Kerrison v. Unger*, 135 Cal.App. 607, 27 P.2d 927. Since plaintiff has expressed a willingness to accept the judgment against Unger in the sum of \$5,341.71 it would be a useless and extravagant gesture to return the case to the trial court for the purpose of directing a jury to return a verdict against the Woodward company in the sum of \$5,000.

The judgment against Milton R. Unger is affirmed. The judgment against Herbert E. Woodward, Inc., in the sum of \$1,335.45 is vacated and the superior court is directed to enter a verdict against the last-named defendant in the sum of \$5,000, as of the date of December 16, 1938. The appeal from the order of the court denying plaintiff's motion for a judgment against defendant Milton R. Unger in the sum of \$6,677.16 is dismissed. The plaintiff shall recover costs on appeal.

MOORE, Presiding Justice (concurring).

Plaintiff's only injuries were those caused by defendant Unger. The jury assessed the damages flowing therefrom at \$5,341.71. This being the only damage fixed for the only injuries received, it follows that the owner-defendant must pay the por-

tion thereof predetermined by statute as the owners' obligation. To hold otherwise were to substitute the arbitrary notion of a jury for the law of the land. Courts must be on their guard to see that rights established by statute be not abridged or allowed to suffer diminution.

The trial court having refused to follow the proper procedure upon the return of the insufficient verdict after plaintiff's request (*Kerrison v. Unger*, 135 Cal.App. 607, 27 P.2d 927) and the defendants having protested against such further procedure, there is nothing left for this court to do except to authorize that which should have been done by the trial judge, and because of such protest of defendants it does not lie with them on this appeal to make objection now. *Brown v. Regan*, 10 Cal. 2d 519, 75 P.2d 1063.

McCOMB, Justice (dissenting).

The jury in the above-entitled case returned a verdict against the defendant Milton R. Unger, the driver of the automobile, and defendant Herbert E. Woodward, Inc., owner of the car, in the sum of \$6,677.16. Thereafter upon instructions of the court the jury retired and returned a verdict against defendant Unger in the sum of \$5,341.71 and against defendant Herbert E. Woodward, Inc., in the sum of \$1,335.45.

This court by increasing the amount of the verdict against defendant Herbert E. Woodward, Inc., is depriving said defendant of the constitutional right to a jury's determination of one of the main issues in the case, to-wit, the amount of damage to be assessed, and in my opinion is substituting the judgment of this court for that of a trial jury.

It is fallacious to say that the jury fixed the damage against defendant Herbert E. Woodward, Inc., in the sum of \$5,000 by its first verdict, for the reason that by its second verdict it fixed the damage against the same defendant in the amount of \$1,335.45. In fact, there is no way to determine the amount of the verdict the jury intended to return against this defendant, the verdicts which were returned being totally and wholly irreconcilable.

Hence in my opinion the judgment should be reversed and a new trial granted.

SIMON et al. v. GRAYSON et al.

Civ. 11229.

District Court of Appeal, First District,
Division 2, California.

Oct. 13, 1939.

Rehearing Denied Nov. 10, 1939.

Hearing Granted Dec. 12, 1939.

For subsequent opinion see 102 P.2d 1081.

1. Wills ⚡98

An existing document may be incorporated in will, by reference, provided the reference in the will itself is distinct and clearly identifies the document, or renders it capable of identification by extrinsic proof, but document sought to be incorporated must be in existence at time of execution of will.

2. Evidence ⚡70

Letter, which was sought to be incorporated in will, being dated July 3, 1933, must, in absence of evidence to the contrary, be presumed to have been executed on such date. Code Civ.Proc. § 1963, subd. 23.

3. Wills ⚡98

A letter which date showed was not in existence at time will was executed could not be deemed "incorporated in will by reference" because of execution of codicil after date of letter, where codicil made no mention of letter. Code Civ.Proc. § 1963, subd. 23; Probate Code, § 25.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Suit in interpleader by Martin E. Simon and Arthur W. Green, as executors of the estate of S. M. Seeligsohn, deceased, against Blanche M. Grayson, as executrix of the estate of Esther Cohn, deceased, Helen Bauman, and others, wherein controversy became one between defendant Grayson and other defendants. The cause was tried upon the cross-complaints and counter pleadings among the various parties. From judgment for defendant Grayson, the other defendants and the original plaintiffs appeal on the judgment roll.

Judgment in accordance with opinion.

W. H. Spaulding, of San Francisco, for appellants.

R. F. Mogan and Otto C. Stelling, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiffs brought suit as the executors of the estate of S. M. Seeligsohn, de-

ceased, against Blanche M. Grayson, as executrix of the estate of Esther Cohn, deceased, and against the remaining defendants who were residuary legatees of the estate of Seeligsohn. The suit was in interpleader, and the controversy became one between Grayson and these legatees. The cause was tried upon the cross-complaints and counter pleadings among the various parties, and was submitted upon an agreed statement of facts upon which the trial court drew conclusions of law and rendered judgment for Grayson from which the other defendants and the original plaintiffs in their capacity of residuary legatees have appealed on the judgment roll.

In paragraph four of his will Seeligsohn left \$6,000 to his executors "to be paid by them in certain amounts to certain persons as shall be directed by me in a letter that will be found in my effects and which said letter will be addressed to Martin E. Simon and Arthur W. Green and will be dated March 25th, 1932". This will was executed on March 25, 1932. The testator executed a codicil thereto on November 25, 1933. He deceased on January 27, 1935. In his effects were found the will, the codicil, and a letter addressed to his named executors dated July 3, 1933. No letter dated March 25, 1932, was found at any time. Since no evidence was offered, and since the stipulation of facts failed to cover the essential elements, the parties are compelled to rely upon the written documents and upon such presumptions and inferences as become applicable.

It will be conceded that the letter of July 3, 1933, expresses the intention of the testator as it directs his executors to distribute the sum of \$6,000 among three women named therein who would not otherwise participate in his estate. The primary question is whether it is such a document as may be incorporated in the will by the reference therein in paragraph four.

[1] Based on the holding in the early English case of *Allen v. Maddox*, 11 Moore P.C. 454, it is the accepted rule in this state that an existing document may be incorporated into and become a part of a will, by reference, provided the reference in the will itself is distinct and clearly identifies the document, or renders it capable of identification by extrinsic proof. *Estate of Shillaber*, 74 Cal. 144, 147, 15 P. 453, 5 Am.St.Rep. 433; *Estate of Young*,

123 Cal. 337, 342, 55 P. 1011; Estate of Willey, 128 Cal. 1, 8, 60 P. 471; Estate of Miller, 128 Cal.App. 176, 181, 17 P.2d 181; Estate of Martin, 31 Cal.App.2d 501, 505, 88 P.2d 234. But in all these cases it is recognized as an essential element that the document sought to be incorporated must have been in existence at the time of the execution of the will. Estate of Shillaber, *supra*; Garde v. Goldsmith, 204 Cal. 166, 168, 267 P. 104; 28 R.C.L., p. 112.

[2, 3] Respondent asserts that, notwithstanding this rule, the letter should be deemed incorporated in the will because of the codicil. We may concede the logic of this argument if the letter had been mentioned in the codicil in such a manner that its identification could be established under the foregoing rule. But respondent faces these insurmountable difficulties—the letter being dated July 3, 1933, must, in the absence of evidence to the contrary, be presumed to have been executed on that date. Section 1963, Code of Civil Procedure, subdivision 23. This date being more than a year after the date of the execution of the will, the letter may not be deemed incorporated in the will because of the rules above noted. The execution of the codicil some months after the date of the letter must be deemed a republication of the will as modified by the codicil. 26 Cal.Jur., p. 828; Probate Code, § 25. Thus, disregarding the changes made by the codicil, which are not pertinent to the inquiry, the will as it stood at the date of execution of the codicil, is deemed republished and re-executed as of that date. But such will carried no incorporation of the letter because of the rules above noted, and hence the republication must be deemed publication of the existing will only. This follows because of the express stipulation in the codicil that “Except as expressly modified by this Codicil, my Will of March 25th, 1932, shall remain in full force and effect”. Since there is not in the will nor in the codicil any reference to the letter of July 3, 1933, there is no principle of law under which this letter may be deemed to have been incorporated into the will by means of the codicil.

These principles are controlling: The will referred to a letter which “will be addressed” and which “will be dated March 25th, 1932”. There is no proof that any letter was in existence when the will was executed. The letter dated July 3, 1933, must be presumed to have been written as of its date. This letter could

not be incorporated in the will executed prior to its date. The codicil does not mention the letter of July 3, 1933. If the republication of the will by means of the codicil may be deemed to have adopted and incorporated into the will the letter therein mentioned of March 25, 1932, this would not avail respondent because she is relying upon an entirely different letter—that of July 3, 1933.

Though the notice of appeal states that the appeal is from the whole judgment, all the parties are agreed that it should not affect that portion of the judgment which awards the plaintiffs attorney’s fees and costs to be paid out of the fund in litigation.

As to all other portions of the judgment, it is reversed, and the costs of this appeal should likewise be paid out of such fund.

We concur: STURTEVANT, J.; SPENCE, J.



32 Cal.App.2d 524
CITY OF LOS ANGELES et al. v.
AITKEN et al.
Civ. 6132.

District Court of Appeal, Third District,
California.

May 23, 1939.

Eminent domain ☞247(2)

Where property is taken by the state, or any agency of state, prior to trial and entry of an interlocutory decree in a condemnation proceeding, legal interest on an award of compensation to property owner should not be allowed prior to entry of decree.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Supplementary opinion.

For former opinion, see 32 Cal.App.2d 524, 90 P.2d 377.

Ray L. Chesbro, City Attorney, S. B. Robinson, Chief Asst. City Atty., Mark A. Hall, Asst. City Atty., Carl A. Davis, Deputy City Atty., and T. B. Cosgrove, Special Counsel, all of Los Angeles, for plaintiffs and appellants.

Thomas Wade Cochran, Chapman & Chapman, and Ward Chapman, all of Los Angeles, for Venita R. McPherson and Title Ins. Co.

Anderson & Anderson and William R. Law, all of Los Angeles, for Wallis D. McPherson.

PER CURIAM.

Our attention has been called to language in the opinion which might be construed to the effect that legal interest should be allowed the condemnee from the date of the *taking* of the property under condemnation proceedings. Such question was not presented upon this appeal, and we do not want to be understood as holding that legal interest should be allowed prior to the entry of the interlocutory decree, as where property is taken by the state, or any agency of the state, prior to the trial and entry of such decree.



35 Cal.App.2d 171

E. A. BOYD CO. v. UNITED STATES FIDELITY & GUARANTY CO.

Civ. 6193.

District Court of Appeal, Third District,
California.

Oct. 16, 1939.

Hearing Denied Dec. 14, 1939.

1. Insurance ⇨285

Where surety bond indemnifying plaintiff against employees' defalcations contained no clause rendering bond void for former defalcations of an employee, and no questions were asked of plaintiff regarding character of bonded employees, plaintiff's failure voluntarily to disclose fact that it knew of previous charge involving dishonesty of an employee, which occurred seven years before application was made to bond him, did not constitute such fraud as would render bond void, where plaintiff believed in good faith that it could depend on honesty of employee, and particularly where bonding company was possessed of facts which should have placed it on inquiry regarding such charge. St.1935, p. 505, §§ 330-339.

2. Appeal and error ⇨1008(1)

Whether plaintiff, in failing voluntarily to inform bonding company of its knowledge of previous embezzlement of one of its employees and requesting that name of such employee be included among persons covered by surety bond indemnifying plaintiff against defalcations of its employees, acted in good faith on belief that it could depend

on honesty of employee, in spite of previous embezzlement charge, was matter for trial court's determination. St.1935, p. 505, §§ 330-339.

3. Insurance ⇨378(1)

Where local agent of defendant bonding company had full knowledge of previous charge of embezzlement against plaintiff's employee, while employed by another, agent's knowledge would be imputed to defendant, so as to estop defendant from claiming that bond indemnifying plaintiff against defalcations of its employees was void after notice of defalcation of such employee, because of plaintiff's failure to inform defendant of employee's previous embezzlement. St.1935, p. 505, §§ 330-339.

4. Insurance ⇨377(2)

Where defendant bonding company's records contained name of plaintiff's employee as a former embezzler while employee was working for another, defendant was charged with knowledge of such former embezzlement, so as to be estopped from claiming that bond indemnifying plaintiff against defalcations of its employees was void after notice of defalcation of such employee, because of plaintiff's failure to inform defendant of employee's previous embezzlement. St.1935, p. 505, §§ 330-339.

5. Insurance ⇨258

Facts which insurer knows, or which he is bound to know, and may therefore be presumed to know, need not be disclosed by insured.

6. Insurance ⇨285

Even though remedy of rescission may not be available to bonding company under particular circumstances the procuring of bond indemnifying plaintiff against employees' defalcations by means of fraud or concealment, if established, may become a good defense to a suit on the bond in a proper case. St.1935, p. 505, §§ 330-339.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Suit by the E. A. Boyd Company, a co-partnership composed of E. A. Boyd and C. M. Coffing, against the United States Fidelity & Guaranty Company, on a surety bond indemnifying the plaintiff against defalcations of its employees. From judgment for plaintiff, the defendant appeals.

Affirmed.

Horace W. B. Smith, of San Francisco, and Gerald M. Desmond and Stanley W. Reckers, both of Sacramento, for appellant.

Butler, Van Dyke & Harris, of Sacramento, for respondent.

Mr. Acting Presiding Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of \$1,934.58 which was rendered against it in a suit on a surety bond indemnifying the plaintiff against defalcations of its employees.

It is contended the judgment is not supported by the evidence, and that the findings do not support the judgment for the reason that the bond became void because the plaintiff possessed knowledge of the employee's previous embezzlement seven years earlier while he was acting as clerk in the Sacramento branch of the Bank of America, and failed to disclose that fact to the insurance company in requesting that the name of that employee should be included among the persons covered by the bond. It is also asserted the findings are irreconcilably conflicting.

For twenty-five years the plaintiff operated an automobile business at Sacramento. The partnership engaged scores of employees. E. A. Boyd and C. M. Coffing were the only partners. R. H. Mayhood acted as manager of the business. In 1933, Merwin L. Devin served the partnership as a salesman for eight months. He voluntarily left to accept employment with a similar company in San Francisco, where he was working at the time he was engaged by plaintiff to become its cashier and accountant. His conduct was exemplary while he was first employed with the plaintiff. At no time since his difficulty with the Bank of America seven years previously was his honesty or reliability questioned by his employers or by anyone else. The plaintiff believed he was then trustworthy in spite of his former trouble.

During the time involved in this suit the plaintiff carried with the defendant insurance company, a blanket fidelity bond of \$39,500, covering each of its employees for specified sums, by the terms of which it was agreed plaintiff would be compensated for losses sustained on account of any acts of "fraud, dishonesty, forgery, theft, larceny or embezzlement", by its employees. The bond also covered any new employees whose names were subsequently listed by the partnership, after notice thereof to, and acceptance by, the insurance company. The bond provides in that regard: "On application, other employees

may be added hereto by the Insurer issuing its written acceptance."

In 1936, the plaintiff was in need of an accountant in its branch office as Reno, Nevada. Mr. Mayhood, the manager of the partnership business, is an uncle by marriage of Merwin L. Devin. In October of that year, he met Mr. Boyd in San Francisco, and talked with him about employing his nephew as clerk and accountant in his Reno office. At that time they discussed to some extent the former trouble which Mr. Devin had with the Bank of America. Mr. Boyd did not know exactly what that difficulty was, but thought it involved a charge of dishonesty and that Mr. Devin had been imprisoned in the county jail. He said that Devin's conduct had not been questioned since then, and he assumed he was then trustworthy. He testified regarding that conversation:

"I naturally would have discussed his qualifications. * * * He had worked for us before, and he had been working around for about seven years [since that time]. * * * He was doing * * * like kind of work for the C. I. T. Corporation. * * *

"Q. * * * You, of course, knew of the fact that he had been in trouble with the Bank of America in 1929 or 1930, did you not? A. I knew he was in some discrepancy down there, that is true. I wasn't exactly familiar with the whole details, but I did know that he had been in trouble. * * * I didn't know the exact amount of money that he had taken. * * I knew he had been in some trouble down there, and * * * apparently had got it cleared up. But what happened, I don't know. * * * I did know he had served time in the county jail, and I understood from him, as he told me himself, that it was a controversy and everything had been fixed up."

Mr. Boyd said he had confidence in Mr. Devin because he had previously worked for him several months, and for others during that period of seven years, without any question regarding his honesty or reliability having arisen; that Devin was then employed with the San Francisco firm, and would be required to give reasonable notice terminating his service before he could accept the new job. He therefore authorized Mayhood to employ him. Mr. Boyd had no personal part in notifying the bonding company to add Devin's name to the list of insured employees. That was

done by Miss Irwin, the bookkeeper in the Sacramento office.

Mr. Devin was then employed by plaintiff as cashier and accountant in the Reno office about November 1, 1936. J. V. McClatchy Insurance Company of Sacramento was acting as agent for the defendant. The bookkeeper of the Boyd Company notified the McClatchy Company, in writing, November 6, 1936, of the employment of Devin, and requested that his name be included among its bonded employees and covered by insurance in the sum of \$2,000. Plaintiff's premium on the bond was determined by the aggregate sum of insurance carried on all the employees. The McClatchy Company promptly notified the defendant in writing at its San Francisco office of the plaintiff's request to add to the list of employees covered thereby Devin's name as cashier and accountant in the Reno office, for \$2,000 insurance. Gertrude Castro, secretary and bonding clerk in the defendant's San Francisco office, received that communication and promptly entered Devin's name as requested, notifying the Boyd Company of that action within a couple of days of the receipt of that request. The defendant thereby accepted the name of Devin as an insured employee of plaintiff under the bond as required by the contract.

The record discloses the fact, and the court found that the defendant bonding company was one of the insurers of the Bank of America at the time of the defalcation of Devin seven years previously, and actually paid to the bank part of its losses on that account. The records of the defendant disclosed the fact that Devin had been charged with embezzlement of \$11,000 from the bank. His name, however, appeared on their records as M. L. Devin, and not as Merwin L. Devin. The agents of the defendant were reminded of Devin's former peculations when his name was presented as an employee of the Boyd Company, for they soon began an inquiry regarding his identity, but failed to follow it up with diligence.

The plaintiff's written notice of employment of Devin, which was forwarded by the McClatchy Company to the defendant's office at San Francisco, was dated November 6, 1936, and contained the following request:

"Please make the following changes on our schedule bond policy #15258-03-04-34:

"Additions

"Merwin L. Devin	Cashier-Clerk
Boyd Reno	2000.00"

The notice contained seven other names to be added and a request to eliminate from the bond four persons whose services had been discontinued.

The requested changes were made, and the Boyd Company was promptly notified in writing of the acceptance thereof. Defendant's bonding clerk, Gertrude Castro, had authority to accept such changes. The language of the bond did not require as a prerequisite to acceptance of the names of new employees that they should furnish the defendant with signed applications therefor. It was evidently customary for the defendant to accept such requests for changes without written applications therefor signed by the employees. Mr. Copeland, superintendent of the San Francisco branch of the defendant company, testified in that regard: "There is no requirement for an application on this bond form." The custom of the surety company was to automatically make such additions or changes in the names of employees covered by the bond, as were requested by the plaintiff, and notify it to that effect. Later if any question regarding their reliability arose, the defendant requested its agents to procure from the employee a formal written application, upon which the company instituted an investigation. No such written application was provided for by the bond. Although the defendant had knowledge of Devin's previous record, which should have prompted an immediate investigation, through the negligence of its agents none was made. No attempt was made to rescind the bond with respect to its liability for Devin's conduct until he had embezzled the funds and fled.

Replying to the notice which was forwarded to the home office of the defendant informing it that the name of Merwin L. Devin had been added to the bonded list of employees of the Boyd Company, the investigation department of the defendant's home office at Baltimore wrote to its San Francisco office December 17, 1936, saying:

"We will appreciate it very much *if you will pull your file* on the above mentioned individual and inform us if there is anything tending to indicate that this principal M. L. Devin, who we bonded in favor of

the Bank of America, San Francisco, California, are one and the same persons."

On January 12, 1937, the San Francisco branch again wrote to its Sacramento agent as follows:

"On checking our records we find that we have never received application on behalf of Merwin L. Devin, Item 128 under the above schedule. We would thank you to kindly secure application and forward as soon as possible.

"Confidentially, we might advise *we received advice from our home office* that this man might possibly be the same person on whom we previously have had some difficulty with regarding a bond."

No attention was given to any of these requests to check on Devin's previous record or to procure his application to be placed on the bonded list. February 1, 1937, the defendant again wrote to its agent, the McClatchy Company, in that regard, saying:

"To date we have not received an answer to our letter of January 1st requesting applications on the following salesmen,
* * * Merwin L. Devin, Boyd.

"Our home office has again written us for these various applications."

March 8, 1937, the defendant's San Francisco office once more wrote its agent, the McClatchy Company, regarding that matter, as follows:

"The home office have been pressing us for some time to give them information on item #128, Merwin L. Devin. We have written your agency a number of letters in an endeavor to obtain this application.* *

"You will realize these salesmen's jobs are of a hazardous nature and it is most important that we be promptly furnished with applications for investigation purposes.

"We will therefore appreciate this being given your personal attention. If there is to be any further delay in the furnishing of Mr. Devin's application, please let us have your immediate explanation."

Devin's name was never stricken from the bonding list. Information regarding Devin's former peculations while he was employed in the Sacramento branch of the Bank of America was either known to Mr. McClatchy's insurance organization, which was the agent of the defendant, or it was readily available to it. Louis Schroeder, who was an assistant manager of the McClatchy Company at Sacramento, testified that he had been acquainted with Devin

and his family for many years, and that he knew all about his trouble over the alleged embezzlement of funds from the Bank of America several years previously. He said he had not been consulted regarding that matter. Evidently the McClatchy Company made no inquiry or investigation regarding the identity or character of Devin, in spite of the numerous requests from the San Francisco office to do so.

Just prior to March 2, 1937, Devin disappeared from Reno, and upon examination of his books it was discovered he was short in his accounts. The plaintiff notified the surety company on the last-mentioned date of Devin's defalcation, through its Sacramento agent, the McClatchy Company. Liability on the part of the insurance company was denied. The defendant served notice of rescission on April 26, 1937. This suit was then commenced. It was tried by the court sitting without a jury.

The trial court found that when the defendant was requested by plaintiff to place the name of Merwin L. Devin on the list of bonded employees, the partnership possessed information charging it with knowledge of his former trouble with the Bank of America regarding the embezzlement, and that it did not inform the defendant of that fact, but in good faith believed he was then reliable and a safe risk; that the defendant possessed sufficient knowledge of Devin's former peculations to place it on inquiry regarding his character having the name of M. L. Devin in its records as a former embezzler, and, as co-insurer of the bank, having paid a part of the bank's loss on that account; that the defendant disclosed its knowledge of Devin's guilt by several letters of inquiry written to its agents, but negligently failed to follow up its investigation; that the plaintiff violated none of the terms or requirements of its bond and that it was not rendered void for failure to disclose knowledge of Devin's former dishonesty, but on the contrary that defendant was liable upon its bond in the sum of \$1,934.58, since it possessed knowledge of facts which should place a reasonable person on inquiry regarding the former embezzlement of the employee. Judgment was rendered accordingly. From that judgment this appeal was perfected.

We are of the opinion the evidence adequately supports the findings and judgment.

[1-4] The failure of plaintiff to voluntarily inform the defendant of its knowl-

edge of the previous embezzlement of its employee, Devin, at the time his name was accepted for insurance under the bond, does not constitute such fraud or concealment of material facts as will render the bond void under the circumstances of this case. Mr. Boyd in good faith then believed that he could depend on the honesty of Devin, in spite of the fact that he had been charged with embezzlement while he was employed by the Bank of America seven years previously, since he had been subsequently hired by the Boyd Company and by another similar firm for several years without any question of his reliability having arisen. The plaintiff's good faith was a matter for the determination of the trial court. Mr. Boyd made no misrepresentations regarding his character or standing. He was not questioned by the insurance company regarding Devin's honesty or previous conduct. The bond contains no provision declaring that it shall become void for previous acts of dishonesty on the part of the employee. It does not require a written application of the employee as a prerequisite to acceptance under the bond. Mr. Louis Schroeder, an assistant manager in the Sacramento office of the McClatchy Insurance Company, which was the local agent of the defendant bonding company, had full knowledge of the previous charge of embezzlement against Devin, and as an officer of that company his knowledge would be imputed to the defendant. *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422; 32 C. J. 1323, sec. 574. Moreover, the defendant is charged with knowledge of that former embezzlement for the reason that its records contained the name of M. L. Devin as a former embezzler while he was working for the Bank of America at Sacramento, and the defendant as co-insurer of the bank had in fact paid part of that liability to the bank. The fact that his name appeared on its records as M. L. Devin instead of Merwin L. Devin is not material. The defendant knew the defalcation which it had indemnified occurred in Sacramento. It would have been easy to obtain information from the bank, from its agent, the McClatchy Company, or from the plaintiff, positively identifying the employee as the same individual. The defendant evidently believed Merwin L. Devin was the same person whose defalcation it had previously paid to the bank, for its Baltimore office investigation department wrote the San Francisco branch December 17, 1936, asking it to examine its files with respect to

Merwin L. Devin, to see if "M. L. Devin, who we bonded in favor of the Bank of America * * * are one and the same persons". If the defendant's files had been examined, or a further investigation had been made, the defendant certainly would have been conclusively informed that he was the same individual. No further inquiry was made regarding that subject. That information was sufficient to place a reasonably prudent person on further inquiry. With that information available the defendant exercised no further diligence to protect itself. It did not communicate with the plaintiff in that regard. Devin's name was not stricken from the bonded list. All that it did subsequently was to request its local agent to procure the written application of the employee. No effort seems to have been made to fulfill that request. The bond does not require a written application of the employee to be filed. Under such circumstances the defendant is estopped from claiming that the bond is void for the first time after notice of the defalcation of the employee.

Where the bond contains no clause rendering it void for former defalcations of an assured person and no questions are asked of the insured regarding the character or honesty of a bonded employee, and no misstatements are made regarding material facts, the failure to voluntarily disclose the fact that the employer knew of a previous charge involving the dishonesty of an employee which occurred seven years before the application is made to bond him the insured may not be charged with fraud or concealment which will render the bond void, particularly when the insurer is possessed of facts which should place a reasonably prudent person on inquiry regarding that offense, or omission. *Fishbeck v. Phenix Ins. Co.*, supra; *O'Rourke v. John Hancock Mutual Life Ins. Co.*, 23 R.I. 457, 50 A. 834, 57 L.R.A. 496, 91 Am.St.Rep. 643; 3 *Cooley's Briefs on Ins.*, 2d ed. p. 1969, subd. 6 (h). In the authority last cited, at page 1970, after reviewing the authorities concerning undisclosed statements, it is said:

[5] "From these cases the rule may be deduced that facts which the insurer knows, *or which he is bound to know, and may therefore be presumed to know, need not be disclosed.*"

In the *Fishbeck* case, supra, a fire insurance policy was held to be valid and binding on the insurer, although the insured per-

son failed to disclose the fact that his property was already covered by other companies, in spite of the fact that the policy contained a clause rendering it void "if any other insurance *had been* or shall hereafter be made upon the said property, and not consented to by this company, in writing". In that case it appeared the soliciting agent of the insurance company had previous knowledge of the other policies carried by the insured person on the same property. The court held that knowledge of the agent was imputed to the principal, and that the policy was therefore valid, notwithstanding the fact that the insured person failed to disclose the other insurance.

In the O'Rourke case, *supra*, a policy insuring the life of a child was upheld, in spite of the fact that the application therefor contained a false answer to the question, "Has this company ever refused to issue a policy on this life?" To this question the plaintiff falsely replied "No". She testified that she knew that same company had previously rejected an application for life insurance on the child. The reason given for affirming a judgment upholding the policy was that the records of the insurance company disclosed the fact that it had previously rejected an application for insurance on the life of that child, and that it was bound to take cognizance of that fact, in spite of the contrary statement of the applicant. The court said in that regard:

"The previous application was in the hands of the company. The rejection of it was by the defendant itself. The purpose of warranties in a policy is not to set a trap for applicants, but to inform the company about important facts upon which the contract is based. When, therefore, a company is in actual possession of knowledge of a fact, and by turning to its own record can assure itself better than by the imperfect memory of an applicant, it is a perversion of the purpose of a warranty to allow it to avoid a contract. It is evident injustice for one party to allow another to enter into a contract which the former knows, or is bound to know, is invalid. [Citing authorities.]

"The defendant argues that it is unreasonable to hold that a company is bound to have present knowledge of all that appears on its previous files. To this suggestion at the trial the judge asked the pertinent question: 'Any more so than it was to ascertain that fact just after the boy died?'"

[6] For reversal in the present case, the appellant relies on sections 330-339 of the Insurance Code of California, St. 1935, p. 505, as authority authorizing rescission of the bond for failure on the part of the plaintiff to inform the defendant of the previous embezzlement of its employee. The respondent asserts that it was too late for the appellant to rescind the bond on the ground of concealment of material facts after the notice of defalcation had been given. No effort to rescind the bond was made until April 26, 1937, six weeks after the employee absconded. Even though the remedy of rescission may not be available under particular circumstances of a case, the procuring of insurance by means of fraud or concealment may become a good defense to a suit on the bond in a proper case. *California Reclamation Co. v. New Zealand Ins. Co.*, 23 Cal.App. 611, 138 P. 960; 32 C.J. 1271, sec. 485. In the authority last cited it is said in that regard:

"Although by statute, it is provided that a concealment will warrant the rescission of a contract of insurance, rescission is not an exclusive remedy; and *the insurer may set up the concealment in an action on the policy.*"

The provisions of the Insurance Code above cited, upon which the appellant relies, are, however, not in conflict with what we have previously said regarding the estoppel of the insurance company which was created by its knowledge of the uncommunicated facts complained of. Section 332 of that code provides that:

"Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and *which the other has not the means of ascertaining.*"

Section 333 provides in part that:

"Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

"1. Those which the other knows.

"2. Those which, in the exercise of ordinary care, the other ought to know, and of which the party has no reason to suppose him ignorant. * * *

Section 335 provides in part:

"Each party to a contract of insurance is bound to know:

"(a) All the general causes which are open to his inquiry equally with that of the other, and which may affect either the political or material perils contemplated.* "

It follows that since no questions were asked the plaintiff regarding the honesty or previous record of the employee, Devin, and evidence of his former defalcation was available to the appellant in its own records, the failure of the plaintiff to voluntarily inform the insurance company of that fact is not such fraud or concealment as will warrant the cancellation of the bond on that account.

The findings are not inconsistent. They adequately support the judgment.

The judgment is affirmed.

We concur: TUTTLE, J.; DEIRUP, Justice pro tem.



35 Cal.App.2d 117

**STESEL et al. v. SANTA ANA RIVER
WATER CO. et al.**

Civ. 2448.

District Court of Appeal, Fourth District,
California.

Oct. 11, 1939.

1. Receivers ⇨36

In suit for accounting of alleged illegal profits of defendants in their dealings with water company, complaint not alleging water company to be insolvent or in danger of becoming insolvent, or that defendants could not respond to judgment that might be rendered against them, did not justify appointment of receiver for water company. Code Civ.Proc. § 564.

2. Judgment ⇨18(2)

Allegations that three directors had started proceedings to amend articles of incorporation changing water company's place of business from Riverside County to Los Angeles County, would not support an order restraining defendants from changing principal place of business of water company to Los Angeles County.

3. Account ⇨14

Venue ⇨6

An action for accounting is "proceeding in equity" and is essentially a "personal action" which must be tried in county of defendant's residence. Code Civ.Proc. § 395.

[Ed. Note.—For other definitions of "Personal Action" and "Proceeding in Equity," see Words & Phrases.]

4. Venue ⇨6

An action to recover balance found due from defendants on an accounting is "personal" and must be tried in county of defendant's residence. Code Civ.Proc. § 395.

5. Venue ⇨6

An action to restrain defendants from acting as directors of water company organized to furnish water to land did not affect realty so as to be triable in county where land was located. Code Civ.Proc. § 392.

6. Injunction ⇨70

A complaint alleging that directors of water company caused large part of loan to be expended for purposes detrimental to water company and shareholders, and failed to require majority shareholders to pay for water used on land owned by such shareholders, and neglected to fix charges for water sufficient to pay cost of production of water, and sold water to persons other than shareholders at a loss, was insufficient to warrant injunction temporarily restraining directors from acting as directors.

7. Quo warranto ⇨5

De facto directors of corporation can be removed only by a quo warranto proceeding or by proceedings under statute relating to removal of directors. Civ.Code, § 310.

8. Venue ⇨6

An action by former holders of water company's stock which was appurtenant to lands to which water was furnished by county, to cancel stock assessments for nonpayment of which the stock was sold, was "personal" and would only indirectly affect ownership of stock, and hence action was triable in county of defendants' residence and not in county where land was located, notwithstanding that stock was species of "real property." Code Civ.Proc. §§ 392, 395.

[Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

9. Venue ⇐4

Where relief sought is part personal and transitory and part local, defendants are entitled to have place of trial changed to county of their residence. Code Civ. Proc. §§ 392, 395.

10. Venue ⇐41

Where the defendant has his residence or principal place of business in the county in which action was brought, the other defendants cannot change place of trial to county of their residence, unless the first defendant was joined as defendant solely because he could not be joined as plaintiff. Code Civ.Proc. § 395.

11. Venue ⇐22(3)

The joinder of resident of Riverside county as a defendant merely because resident could not be joined as plaintiff in an action in which affirmative judgment was sought in favor of resident against the other defendants residing in Los Angeles county did not warrant refusal to change place of trial to Los Angeles county. Code Civ. Proc. § 395.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Grace Stesel and others against the Santa Ana River Water Company and others for an accounting and other relief. From an order refusing to change place of venue of trial of action from Superior Court of Riverside County to Superior Court of Los Angeles County, the defendants appeal.

Order reversed.

Dana R. Weller, of Los Angeles, for appellants.

David C. Marcus, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from an order refusing to change the place of trial of the action from the superior court of Riverside county to the superior court of Los Angeles county.

No question is raised as to the sufficiency of the moving papers. It is admitted that the defendant Santa Ana River Water Company has its principal place of business in Riverside county and that the other corporate defendants have their principal places of business in Los Angeles county.

It is also admitted that all of the individual defendants reside in Los Angeles county.

Two principal questions are presented for our decision: (1) Is the action one for recovery of real property or some interest or estate therein or for the determination of such right or interest, or for injuries to real property (sec. 392, Code Civ.Proc.), or is it personal or transitory in its nature? Sec. 395, Code Civ.Proc. (2) Does the fact that the Santa Ana River Water Company is joined as defendant give the superior court of Riverside county the right to retain and try the action? A proper answer to these questions requires a somewhat careful analysis of the allegations of the complaint.

Where appropriate, we will hereafter refer to the defendants, other than the Santa Ana River Water Company, as "the defendants", and to the Santa Ana River Water Company as the "Water Company".

We will first examine the allegations of the first cause of action in which it is alleged that:

Defendants Commonwealth Home Builders and United Mortgage and Loan Corporation are corporations organized under the laws of California, conducting business in Riverside county; that defendant Metzler and Company is a Delaware corporation doing business in Riverside county; that defendant Santa Ana River Water Company is organized under the laws of California for the purpose of furnishing water to lands in Riverside county; that its stock is appurtenant to those lands and its principal place of business is in Riverside county; that plaintiffs are owners of parcels of those lands; that prior to the sale of their shares for delinquent assessments they were owners of stock in that company; that the individual defendants wrongfully claim to be and are acting as directors of that company.

Defendants conspired and confederated together to injure the Water Company and its shareholders by enriching themselves by causing the Water Company unnecessarily and illegally to become indebted to the other corporate defendants in which a majority of the individual defendants were stockholders and at the same time being purported directors in the Water Company.

Many acts in consummating the alleged conspiracy are attempted to be alleged and of these we should specify the following:

The incorporation of the Water Company with Commonwealth Home Builders and

Metzler and Company as the original shareholders; that they still own a majority of its issued stock.

The defendants caused the Water Company to adopt by-laws which provided that the directors elected at the first annual meeting hold office for one year and until the election of their successors; that vacancies in the board be filled by the remaining directors; that Troth, Weller and Welch were named in the articles of incorporation as its first directors.

These directors held their first meeting on November 12, 1925, and authorized the Water Company to borrow sums not exceeding \$15,000 from Commonwealth Home Builders or Metzler and Company; that they also authorized the purchase from Hannah Metzler of land having on it a reservoir, pipe lines, wells and a water system for which they paid her 7,997 shares of the stock of the Water Company of the reasonable market value of \$8,000; that the property received from Hannah Metzler was not "of the value of eight thousand dollars or approximately eight thousand dollars or of any substantial part thereof", all of which facts were well known to Troth, Weller and Welch.

The conspiring defendants caused a meeting of the shareholders to be held on June 14, 1927, at which Weller, Troth and Welch were elected directors of the Water Company and at which all prior acts of the directors were ratified and approved.

After November 12, 1925, the directors caused the Water Company to borrow \$15,000 from Commonwealth Home Builders and caused a large part thereof to be expended for purposes beneficial to Metzler and Company and Commonwealth Home Builders, and detrimental to the Water Company and its shareholders. That Commonwealth Home Builders and Metzler and Company were in the business of subdividing and selling land and owned 1,331 acres in Riverside county. They acquired from Hannah Metzler the 7,997 shares of stock in the Water Company which had been traded to her, and made it appurtenant to that land in the ratio of five shares to each acre of land; that each plaintiff is the owner of a parcel of such land which is valuable only because a reasonable amount of water can be furnished to it; that "plaintiffs are entitled to and do receive said water and do use the same on their said land"; that the water cannot be used on any land to which it is not appurtenant.

Since 1925 the board of directors of the Water Company failed and neglected to require Metzler and Company and Commonwealth Home Builders to pay "any sum whatever for large quantities of water which each of said last-named corporations used throughout said period upon the land owned" by them.

The board of directors of the Water Company failed and neglected to fix charges for water sufficient to pay the cost of its production, and prior to August, 1937, failed to levy any assessment on the shares to pay the bills, obligations and expenses of the Water Company and the improvements and additions to its equipment.

Since June, 1927, no meeting of the shareholders of the Water Company has been called or held and no election of directors has been had; that no annual reports have been sent the shareholders "as required by section 258 [358] of the Civil Code"; that on the resignation of a director his place has been filled by the remaining directors electing a successor; that on May 7, 1936, the board of directors authorized the Water Company to borrow \$40,000 from the United Mortgage and Loan Corporation, the loan to be secured by a mortgage on all of the company property; that two of the directors of the Water Company who voted to authorize such loans were stockholders in and directors of the United Mortgage and Loan Company; that the note and mortgage were executed and recorded; that (on information and belief) no part of such \$40,000 was paid to the Water Company; that on July 3, 1937, three of the directors of the Water Company made the books of the company show debts in the sum of \$70,000 when (on information and belief) it did not owe any substantial part of that sum; that the Commonwealth Home Builders and Metzler and Company have sold the Water Company supplies and equipment on which they have made profits without accounting for such profits; that the directors of the Water Company have sold water to persons other than its shareholders at a loss; that three of the directors of the Water Company were at the same time directors of Commonwealth Home Builders, Metzler and Company, and United Mortgage and Loan Corporation or United Mortgage Company and did not disclose such relationships; that the purported indebtedness of the Water Company in the sum of \$70,000 was actually incurred for the benefit of

Metzler and Company and the Commonwealth Home Builders.

On August 9, 1937, the directors of the Water Company purported to levy an assessment of \$1 per share on its issued shares and on January 10, 1938, a second assessment of \$1.50 per share; that "for the current year of 1937 to 1938 the said Water Company has incurred a deficit and has operated at a loss in a sum exceeding \$10-000.00", all to the great damage of plaintiffs; that plaintiffs had no knowledge of any of the foregoing facts until January 1, 1938.

The Santa Ana River Water Company is made defendant because its affairs are controlled by three of the conspiring defendants; that it would be futile to demand of them that the Water Company bring this action; that the purported indebtedness of the Water Company has been caused by the gross mismanagement and illegal acts of the conspiring defendants; that the Water Company claims to own each share of stock owned by plaintiffs.

The second cause of action incorporates by reference many of the allegations of the first and restates other of its allegations in somewhat different language. No other facts of any particular importance are alleged.

The allegations of the third, fourth, fifth and sixth causes of action state the losses of shares of stock of the Water Company by respective plaintiffs by reason of the assessments which they did not pay and which they regard as illegal.

The seventh cause of action alleges that three directors of the Water Company on March 15, 1938, started proceedings to amend its articles of incorporation changing its principal place of business from Riverside county to Los Angeles county.

The purposes of plaintiffs in bringing the action, and the relief sought, appear in the prayer of their complaint which is as follows:

"Wherefore, plaintiffs pray judgment as follows:

"1. That the defendants other than the Santa Ana River Water Company, account to plaintiffs and to said Water Company for all of the moneys received or expended by them or either of them, having to do with each and all of the transactions herein alleged, and any and all other matters as to which it shall appear that said defend-

ants or either of them have received or expended money on behalf of said Water Company, or have purported to act in any way on behalf of said Water Company;

"2. That judgment be given and rendered in favor of said Water Company against the said defendants and each of them for all amounts found to be due said Water Company;

"3. That pending the hearing and determination hereof, said defendants, Weller, Marks and Newell be enjoined from exercising and/or in any way, individually and/or collectively, functioning as directors and/or managers of said Water Company; and for a Temporary Restraining Order enjoining the directors of the Santa Ana River Water Company from acting as directors of said corporation and from changing the principal place of business of said corporation from Riverside to Los Angeles County;

"4. That said assessment of \$1.00 for each share of said Water Company so purported to be made and levied as set forth herein be declared null and void, and that said assessment of \$1.50 for each share of said Water Company so purported to be made and levied as set forth herein be cancelled and annulled and that said directors and officers, purporting to act for said Water Company, be enjoined from taking further proceedings to collect the same;

"5. That a Receiver be appointed for said Santa Ana River Water Company to act in behalf of said Company as this Court may direct; * * *."

While the complaint is needlessly long and repetitious, is full of legal conclusions, and in places contradictory, it is evident that plaintiffs hope to secure the following relief: (1) An accounting of what they maintain are illegal profits of defendants in their dealings with and handling of the affairs of the Water Company; (2) A judgment in favor of the Water Company for any balance found due from defendants in the accounting; (3) A temporary restraining order prohibiting three individual defendants from acting as directors of the Water Company; (4) A temporary restraining order prohibiting the removal of the principal place of business of the Water Company to Los Angeles county; (5) The voiding of the two assessments on the shares of the Water Company; (6) The appointment of a receiver for the Water Company.

[1] We find no allegations in the complaint sufficient to justify granting the last relief asked. Sec. 564, Code Civ.Proc. The Water Company is not alleged to be insolvent nor in danger of becoming insolvent. If the illegal profits of defendants, if any, by any stretch of the imagination be regarded as a fund out of which a refund may be paid to the Water Company, there is no allegation that it is in danger of being lost and there is no intimation that defendants cannot respond to any judgment that might be rendered against them.

[2] There are no allegations in the complaint that would support an order restraining defendants from changing the principal place of business of the Water Company to Los Angeles county.

Therefore, we will give these matters no further attention as they cannot affect the question of the proper place of the trial of the action.

[3] It is well settled in California that "an action for an accounting is a proceeding in equity and is essentially a personal action". *Bardwell v. Turner*, 219 Cal. 228, 25 P.2d 978, 979; *Weygant v. Larson*, 130 Cal.App. 304, 19 P.2d 852.

[4] It is too well settled to need citation of authorities that an action to recover money such as we have here is personal and must be tried in the county of defendants' residence.

[5-7] The same is true of the relief sought, to temporarily restrain the three named defendants from acting as directors of the Water Company. That phase of the action cannot affect real property in any remote degree. Further, the allegations of the complaint are not sufficient to support the granting of any such relief. The three named defendants are *de facto* if not *de jure* directors of the Water Company. They cannot be removed in any such manner but by a *quo warranto* proceeding (*Guaranty Loan Co. v. Fontanel*, 183 Cal. 1, 190 P. 177; *Consumers Salt Co. v. Riggins*, 208 Cal. 537, 282 P. 954) or by proceedings under section 316 of the Civil Code.

We must now consider that portion of the relief sought, namely, the canceling and annulling of the two assessments levied by the Water Company under which the stock formerly belonging to plaintiffs was sold because of nonpayment of the assessments.

[8] Plaintiffs start from the premise that, as the stock was appurtenant to the land, it was a species of real property. This must be admitted. *Stone v. Imperial Water Co.*, 173 Cal. 39, 159 P. 164. From this they argue that a judgment canceling the assessments would have the effect of restoring their stock to them; that, therefore, this portion of the action is really "for the recovery of real property, or of an estate or interest therein" (sec. 392, Code Civ. Proc.); that such an action must be tried in the county in which such property is situated.

While there is some logic in at least the earlier portions of the argument, it cannot be controlling.

The direct relief thus sought is a decree canceling the assessments and restraining the individual defendants from taking any further steps towards collecting them. This relief is personal and will only indirectly affect plaintiffs' ownership of the stock, in other words, their interest in real property. If plaintiffs should be successful in this phase of the case it might furnish the foundation for an action to recover the stock. By analogy the case of *Howe v. Tucker*, 219 Cal. 193, 25 P.2d 832, is controlling on this question. There the plaintiff brought action to cancel a promissory note and deed of trust securing it because of fraud and undue influence. Defendant moved to change the place of trial from the county in which the land described in the deed of trust was situated to the county of his residence. It should be observed that the ultimate result of a judgment in plaintiff's favor would clear his real property from a lien. The court held that as the portion of the action to cancel the promissory note was personal and transitory, the place of trial should have been changed to the place of residence of the defendant.

[9] It has been thoroughly established that where the relief sought is part personal and transitory and part local, defendants are entitled to have the place of trial changed to the county of their residence. This rule was announced in *Smith v. Smith*, 88 Cal. 572, 26 P. 356, 358, where it was said:

"When, however, the subject-matter of the action is local, and the judgment which is sought is to operate directly upon that subject-matter, it is provided that the action shall be tried in the county where the subject-matter of the action is situated.

This being an exception to the general rule, the conditions under which the exception is claimed must be clearly and distinctly shown. The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those 'other cases' provided for in section 395, which the defendant is entitled to have tried in the county of his residence. * *

"An action for an accounting is a proceeding in equity, and is essentially a personal action. The defendant has the right under section 395, Code Civil Proc., to have such action tried in the county of his residence. The plaintiff cannot deprive him of this right by uniting in his complaint with such action a demand for an accounting for certain rents, issues, and profits alleged to have been received by the defendant from certain real estate situated in another county, and that he be adjudged to reconvey said real estate. Unless the cause of action set forth in the complaint falls wholly within the provisions of section 392, or of one of the two next succeeding sections, the provisions of section 395 prevail." See, also, *Howe v. Tucker*, supra; *Bardwell v. Turner*, supra.

The next question to be considered is: Does the fact that the Water Company (which has its principal place of business in Riverside county) has been joined as defendant support the order of the trial judge in refusing to change the place of trial from Riverside county?

[10] Generally speaking, where one defendant has his or her or its residence or principal place of business in the county in which the action was brought, the other defendants cannot change the place of the trial to the county of their residence. However, there is an important exception to this general rule which is controlling

here. It was thus stated in *Donohoe v. Wooster*, 163 Cal. 114, 124 P. 730, 731:

"On the other hand, the respondents contend that Freeman was not a 'defendant' within the meaning of section 395 of the Code of Civil Procedure.

"The latter view was the one adopted by the trial court, and we think the action taken was correct. * * *

"The joinder of Freeman as a party defendant is justified by the provision of section 382 of the Code of Civil Procedure that, 'if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant; the reason therefor being stated in the complaint.' The fact, however, that Freeman's refusal to join in bringing the action made it necessary to designate him as a defendant, does not alter the essential relations of the parties to one another. The cause of action alleged is one in favor of Donohoe, Freeman, and Barceloux, jointly, against Wooster. The plaintiffs are seeking no relief against Freeman; the only purpose of joining him being to have before the court all of the parties necessary to an adjudication of their claim against Wooster. Freeman has no such interest as would entitle him to a voice in fixing the place of trial. He must take one of two positions—either that he wishes to participate with the plaintiffs in such recovery as may be had against Wooster or that he does not desire any benefit from the action. In either view his attitude will be substantially that of a plaintiff. In the one case that of a plaintiff asserting his right to recover; in the other, that of a plaintiff who waives such right." See, also, *San Francisco Milling Co. v. Mordecai*, 134 Cal.App. 755, 26 P.2d 669; *Rowland v. Bruton*, 125 Cal.App. 697, 14 P.2d 116.

[11] It is clear from the complaint that the Water Company was joined as defendant solely because it could not be joined as plaintiff. The complaint prays for an affirmative money judgment in its favor against the other defendants. Because it is made a defendant for the reason that it could not be joined as plaintiff furnishes no valid reason for refusing to change the place of trial to Los Angeles county where all the other defendants have their domicile.

The order appealed from is reversed.

We concur: BARNARD, P. J.; GRIF-FIN, J.

ROSE et al. v. STATE et al.**Civ. 10835.**District Court of Appeal, First District,
Division 1, California.

Oct. 13, 1939.

Hearing Granted Dec. 12, 1939.

See 105 P.2d 302.

1. Appeal and error ⇨931(1)

On appeal from judgment for plaintiffs suing for damages from construction of subway fronting plaintiffs' property, District Court of Appeal would assume that material allegations of amended complaint concerning plaintiffs' property rights, and the taking and value thereof as found by trial court, were sustained by the evidence.

2. Highways ⇨86**Municipal corporations ⇨665**

The owner of property abutting on street or highway has as appurtenant thereto private easements which are his private property.

3. Eminent domain ⇨266**Highways ⇨87****Municipal corporations ⇨671(1)**

An injury to public easement in street or highway gives abutting property owner no cause of action, but injury to or impairment of owner's private easements in street or highway is a "damage to" or "taking of private property" for which action will lie. Const. Cal. art. 1, §§ 13, 14; U.S.C.A.Const. Amends. 5, 14.

[Ed. Note.—For other definitions of "Damages to Property" and "Taking (In Eminent Domain)," see Words & Phrases.]

4. Eminent domain ⇨79

The right to compensation for taking or damaging of private property for public use is personal right for benefit of property owner which, when properly asserted, will be secured to him, and is not an absolute right, and may be waived. Const. Cal. art. 1, §§ 13, 14; U.S.C.A.Const. Amends. 5, 14.

5. Eminent domain ⇨79

Whether property owner has waived his right to compensation for taking or damaging of private property for public use must be determined on facts and law applicable thereto in each case. Const. Cal. art. 1, §§ 13, 14; U.S.C.A.Const. Amends. 5, 14.

6. Eminent domain ⇨280

A property owner can, without prejudice and without waiving his right to compensation, sit by and see the making of extensive public improvements which are an infringement of or an impairment to his property rights, and make no effort to repel such invasion of his rights, where the law affords him adequate remedy for recovery of just compensation thereafter. Const. Cal. art. 1, §§ 13, 14; U.S.C.A.Const. Amends. 5, 14.

7. Eminent domain ⇨79

A property owner must assert his right to compensation for taking or damaging of private property for public use, or be deemed to have acted advisedly and to have waived his right, where no subsequent remedy for collection of compensation is open, nor a proper tribunal available. Const. Cal. art. 1, §§ 13, 14; U.S.C.A.Const. Amends. 5, 14.

8. States ⇨191(1)

Prior to enactment of general statute permitting actions against state, the only remedy afforded persons having claim against state upon contractual liability or for negligence was to present claim to state board of examiners for allowance or appeal to Legislature for appropriation to pay claim, notwithstanding constitutional provision authorizing suits to be brought against the state in such manner and in such courts "as shall be directed by law." Const. art. 20, § 6.

9. States ⇨193

The California statute authorizing suit against state on a claim on express contract or for negligence created no new liability against the state, and did not enlarge or diminish liability of state, but merely created remedy at law for collection of such claims in addition to the then existing and sole right to present claim to state board of examiners or state board of control. Pol. Code, § 688, as amended by St. 1933, p. 2299; Const. art. 20, § 6.

10. States ⇨191(1)

The constitutional provision vesting Legislature with authority to determine by law the manner and the courts in which suits against state should be brought clothed Legislature with authority to amend such law at any time. Const. art. 20, § 6.

11. States ⇨191(1)

Laws authorizing suits against state are in derogation of sovereignty and must

be strictly construed. Pol.Code, § 688, as amended by St.1933, p. 2299; Const. art. 20, § 6.

12. States ⇨191(1)

The scope of statute providing that actions arising out of express contracts and negligence were maintainable against the state could not be extended by judicial construction to include implied contracts. Pol. Code, § 688, as amended by St.1933, p. 2299.

13. States ⇨112

The statute authorizing suit against state on claim for negligence created no liability for negligence, but merely afforded a remedy at law to those who had such a claim against the state. Pol.Code, § 688, as amended by St.1933, p. 2299.

14. States ⇨112

Generally, the state or its agencies in the performance of governmental functions cannot be held for negligence or misfeasance of officers thereof, in absence of statute clearly assuming such liability.

15. Automobiles ⇨187

Highways ⇨187(3)

States ⇨112

The state can expressly assume liability for negligent operation of its automobiles or dangerous or defective conditions of its streets, highways, buildings, or works. Vehicle Code, § 400; St.1935, p. 152; St.1931, p. 2476; Const. art. 20, § 6.

16. Constitutional law ⇨305

Eminent domain ⇨267

The statute authorizing suit against state on claim on express contract or for negligence pertained only to legal remedy, and hence did not diminish, destroy, or otherwise affect rights secured by constitutional provisions prohibiting deprivation of life, liberty, or property without due process of law, and taking or damaging of private property for public use without just compensation. Pol.Code, § 688, as amended by St. 1933, p. 2299; U.S.C.A.Const. Amend. 5; Amend. 14, § 1; Const.Cal. art. 1, §§ 1, 13, 14.

17. Constitutional law ⇨29

Constitutional provisions which are self-executing require nothing more to render them effective, and they cannot be rendered invalid by a mere legislative act.

18. Counties ⇨146

Drains ⇨19

Municipal corporations ⇨745

Waters and water courses ⇨228¾

Generally, governmental agencies such as drainage and irrigation districts, municipal or county governments, or other quasi public corporations exercising governmental functions, are not liable for negligence or misfeasance of their officers, agents and employees, in absence of statute to contrary.

19. Municipal corporations ⇨744, 745

A municipal officer charged with duty prescribed by law is responsible for injury resulting from his wrongful act or omission, but the municipality is not, unless the act is commanded by municipality and is inherently wrong, in which event both agent and municipality are liable.

20. Municipal corporations ⇨744, 745

Where injury results from negligence or improper manner in which work is performed and not from wrongful plan or character of work, the person so negligently acting is responsible, and the municipality may or may not be responsible, depending upon the relationship which it may sustain to such person.

21. Eminent domain ⇨55

A public agency vested with power of eminent domain must exercise such power strictly in accordance with forms of constitution and the statute vesting the power. Const. art. 1, § 14.

22. Eminent domain ⇨266

A public agency presuming to take or damage private property for public use without first instituting condemnation proceedings therefor or otherwise complying with statute by which agency's authority is defined may be held liable therefor, and such liability may or may not be based upon negligence, depending upon circumstances in each case. Const. art. 1, § 14.

23. Eminent domain ⇨266

Where, in absence of condemnation proceedings, the plan of the work undertaken contemplates the taking or damaging of private property, and the work is deliberately and skillfully performed in accordance with specifications, the tort is a trespass and is not based on negligence. Const. art. 1, § 14.

24. Eminent domain ⇨266

The liability of public agency for taking or damaging private property, regardless of whether dependent upon presence or absence of negligence, is primarily based on constitutional guaranty that private property shall not be taken or damaged for public use without just compensation. Const. art. 1, § 14.

25. Eminent domain ⇨279(1)

A public agency cannot defend action for taking or damaging private property for public use without just compensation on ground that agency was in exercise of its governmental functions. Const. art. 1, § 14.

26. Eminent domain ⇨271

An action for damages will lie for taking or damaging private property for public use without just compensation, whether private property is taken or damaged designedly or as consequence of otherwise proper act. Const. art. 1, § 14.

27. Eminent domain ⇨285

A municipal or county government or other public agency is liable for the taking or damaging of private property for public use without just compensation, and an action to recover damages will lie. Const. art. 1, § 14.

28. States ⇨191(1)

The State of California, regardless of the exception concerning its agencies, cannot be sued without its express consent. Const. art. 20, § 6.

29. Eminent domain ⇨166

Public agencies and officers seeking to take private property for public use must proceed in the manner provided by law by which the constitutional rights of the owners will be properly protected. Const. art. 1, § 14.

30. States ⇨66

The state can speak and act only by law.

31. Eminent domain ⇨271

Property owners could not maintain action against state for damaging of private property consisting of private easement in street which was in front of plaintiffs' property and in which subway was built, where statute provided manner in which changes in grades of highways affecting property should be accomplished, and failure of public officers to comply with such procedure was the wrong of such officers for which state was not liable. St.1935, p. 300, § 858; Const. art. 1, § 14.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Mary V. Rose and others against the State of California, a Commonwealth, and the People of the State of California, acting by and through the Department of Public Works, for damages allegedly resulting from the construction of a subway fronting plaintiffs' property. From the judgment, the defendants appeal.

Reversed.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellants.

John T. Wentz and Booth B. Goodman, both of Oakland, for respondents.

GEARY, Justice pro tem.

Appeal by defendants from a judgment of the superior court of Alameda county in favor of plaintiffs for damages alleged to have been sustained by plaintiffs as the result of the construction of a subway fronting plaintiffs' property on Jackson street in the town of Hayward. This is one of several appeals from judgments entered in actions arising out of highway construction work in Alameda county. Inasmuch as the facts and the rights and liabilities of the respective parties in each case are substantially the same the law applicable thereto though presented in separate appeals will be fully considered and determined herein.

[1] Respondents are and at all times pertinent to the facts herein were the owners of 3.05 acres fronting some 118 feet on Jackson street and with a depth of some 745 feet. Their property is devoted to a fruit orchard and is improved by a five-room residence, windmill, a tank house and barn. Jackson street is a portion of the state highway system connecting East Fourteenth street at Mt. Eden with that portion of the state highway leading to the San Mateo toll bridge. It is alleged that in December, 1935, appellant State of California, acting through its department of public works and under authority of an order of the railroad commission awarded a contract for the construction of a subway on Jackson street which would eliminate a crossing at grade of Jackson street and the tracks of the Western Pacific Railroad Company. In front of respondents' property Jackson street is 66 feet in width. The subway is 24 feet wide and in the center of Jackson street, gradually descending under and then ascending to grade beyond the

railroad tracks. On each side of the subway are blind lanes 14.6 feet and sidewalks four feet in width which do not cross the tracks but serve the owners of property adjacent thereto as means of ingress and egress to and from Jackson street and their respective parcels of land. The property of respondents had been zoned as "industrial property" prior to the construction of the subway. The amended complaint alleges that the construction of the subway resulted in a substantial impairment of respondents' access to Jackson street with the consequent depreciation of the market value of their property in the sum of \$5,000. The case was tried by the court without a jury and from the judgment for respondents as prayed appellant prosecutes this appeal. For the purposes of the appeal we may properly assume that the material allegations of the amended complaint concerning the property rights of respondents, the taking and the value thereof as found by the trial court are sustained by the evidence.

At the very threshold of our consideration of the appeal herein we are confronted—as was the trial court upon ruling upon the demurrer to the amended complaint—with appellants' contention that the court had no jurisdiction of the subject of the action nor of the person of the defendant, and that the amended complaint did not state facts sufficient to constitute a cause of action.

[2-7] That the owner of property abutting upon a street or highway has as appurtenant thereto certain private easements in the street or highway in front of or adjacent to the lot—distinguished from the public easements therein—which are a part and portion of his property and are the private property of the lot owner as fully as the lot itself is not open to question. An injury to the public easement gives him no cause of action, yet an injury to or an impairment of his own private easements therein, or any of them is a damage to or a taking of his private property for which an action will lie. *Williams v. Los Angeles Ry. Co.*, 150 Cal. 592, 594, 595, 89 P. 330; *McCandless v. City of Los Angeles*, 214 Cal. 67, 70, 71, 4 P.2d 139, and cases therein cited. The rights of the lot owner to the protection of this species of private property are fully recognized in the cases cited. His rights therein are guaranteed by the fifth and fourteenth amendments to the Constitution of the United States, U.S. C.A., and by the Constitution of California.

The latter, by article I, section 13, declares: " * * * No person shall be * * * deprived of life, liberty, or property without due process of law * * *." Article I, section 14 thereof declares: "Eminent Domain. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *; provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. * * *." The right so conferred by our Constitution and by the federal Constitution is a personal one for the benefit of the property owner which when properly asserted will be secured to him. The right is not an absolute one, however, and may be waived. *Bigelow v. Ballerino*, 111 Cal. 559, 564, 44 P. 307; *Gurnsey v. Northern Cal. Power Co.*, 160 Cal. 699, 709, 710, 117 P. 906, 36 L.R.A., N.S., 185; *Sala v. City of Pasadena*, 162 Cal. 714, 124 P. 539. Whether a property owner has waived his rights to compensation is a question to be determined upon the facts and the law applicable thereto in each case. A property owner may—without prejudice—sit by and see extensive public improvements made which are an infringement of or an impairment to his property rights, and make no effort to repel such invasion of the rights guaranteed to him by the Constitution where the law affords him an adequate remedy for the recovery of just compensation thereafter. In such case, no waiver of his right to compensation will be presumed and he may recover the same. Where, however, no subsequent remedy for the col-

lection of compensation is open, nor a proper tribunal available, he must assert his rights, or be deemed to have acted advisedly and to have waived the same. *Sala v. City of Pasadena*, supra, 162 Cal. at page 718, 124 P. at page 539; *Cooley's Constitutional Limitations*, 8th ed., vol. II, p. 1205.

[8] The California Constitution by article XX, section 6, provides: "Suits against state. Suits may be brought against the state in such manner and in such courts as shall be directed by law." Despite the above constitutional authorities for many years no general statute was enacted by the legislature to permit actions against the state. During such period of time the only remedy afforded those so unfortunate to have a claim against the state upon contractual liability or for negligence was to present the same to the state board of examiners for allowance, or appeal to the legislature for an appropriation to pay the same. *Galbes v. Girard*, C.C., 46 F. 500, 501; *Sawyer v. Colgan*, 102 Cal. 283, 292, 36 P. 580, 834; *Chapman v. State*, 104 Cal. 690, 696, 38 P. 457, 43 Am.St.Rep. 158; *County of San Luis Obispo v. Gage*, 139 Cal. 398, 404, 73 P. 174. In February, 1893, the legislature enacted chapter XLV, Statutes 1893, page 57, entitled "An Act to authorize suits against the State, and regulating the procedure therein," which provided in part: "Section 1. All persons who have, or shall hereafter have, claims on contract or for negligence against the State not allowed by the State Board of Examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the State in any of the Courts of this State of competent jurisdiction, and prosecute the same to final judgment. The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided. * * *" The term "contract" as used in the statute was interpreted to include implied as well as express contracts in the case of *Welsbach Co. v. State of California*, 206 Cal. 556, 558, 560, 275 P. 436. In 1929, and within a few days following the decision in *Welsbach v. State of California*, supra, the act of 1893 was repealed (Stats.1929, p. 890), and the legislature adopted an act adding certain sections to the Political Code, of which section 688 provided in part: "Claims against state. Any person who has, or shall hereafter have, a claim on express contract or for negligence against the state

must present the claim to the state board of control in accordance with the provisions of section 667 of this code. Should the claim not be allowed by the state board of control, the person having the claim is hereby authorized, subject to the conditions contained in this section, to bring suit against the state on such claim and to prosecute such suit to final judgment. * * *" In 1931, Political Code section 688 was amended by eliminating the term "express" therefrom. Stats.1931, p. 849, § 15.

[9-12] In 1933 the section was again amended by restoring the term "express" thereto, so that at all times pertinent hereto that section provided, "Any person who has, or shall hereafter have, a claim on *express* contract or for negligence against the State must present the claim * * *." Stats.1933, p. 2299. The Statutes of 1893, nor Political Code, § 688, and the various amendments thereto, created no new liability against the state but merely created a remedy at law for the collection of such claims against the state in addition to the then existing and sole right to present the same to the state board of examiners or the state board of control. *Chapman v. State*, supra; *Melvin v. State of California*, 121 Cal. 16, 23, 53 P. 416; *Denning v. State of California*, 123 Cal. 316, 319, 55 P. 1000; *Pacific Gas etc. Co. v. State of California*, 214 Cal. 369, 373, 6 P.2d 78. The liability of the state was neither created, enlarged nor diminished by these acts of the legislature; only the legal remedy available to those who sought to enforce such liability as existed independent of the legislative acts in question was affected. *Memphis & C. Railroad Co. v. Tennessee*, 101 U.S. 337, 25 L.Ed. 960, 961; *Denning v. State*, supra; *Western Assurance Co. v. Drainage Dist.*, 72 Cal. App. 68, 76, 237 P. 59; *Walker v. Department of Public Works*, 108 Cal.App. 508, 516, 291 P. 907; and cases cited. By the amendment of 1933 to Political Code section 688 the legislature provided that those who thereafter might have a claim against the state on express contract or for negligence could bring suit thereon upon the terms and conditions therein stated; that those whose claims were based upon an implied contract would thereafter enjoy no such remedy. The authority of the legislature to enact the Statute of 1893, and section 688, Political Code, and the various amendments thereto, is expressly conferred by article XX, section 6, Cali-

fornia Constitution. Since that article vested the legislature with authority to determine *by law* the manner and the courts in which suits against the state should be brought, it is obvious the legislature was clothed with authority to amend that law at any time. Such laws, since they are in derogation of sovereignty, must be strictly construed by the court. *Westinghouse Electric Co. v. Chambers*, 169 Cal. 131, 139, 145 P. 1025. In view of the legislature's positive limitation as expressed in section 688, Political Code, that only actions arising out of express contracts and negligence are maintainable against the state the scope of the section cannot be extended by judicial construction to include implied contracts as well. The case of *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 5 S.Ct. 306, 28 L.Ed. 846, 848, is cited as authority for the proposition that where a government appropriates property for public use without condemnation action the property owner has a right of action against the government for his damages as an implied contract to pay. A clear distinction exists between the case cited and the one considered here. In the case cited the Supreme Court held the court of claims had jurisdiction of the claim in question since the very statute conferring jurisdiction upon it included actions founded upon both express and implied contracts. Assuming that from "fundamental principles of the rules of equity" (*Crescent Wharf etc. Co. v. Los Angeles*, 207 Cal. 430, 436, 278 P. 1028, 1030), there is an implied promise that respondents shall be compensated, this court is not authorized to set aside a positive legislative prohibition and hold that actions upon implied contracts are maintainable against the state.

[13-15] What has heretofore been remarked concerning the effect of section 688, Political Code, concerning the liability of the state upon contract is equally true of claims arising for negligence. The code section created no liability for negligence but merely afforded a remedy at law to those who had such a claim against the state. In the absence of a statute clearly assuming such liability the general rule is that the state or its agencies in the performance of governmental functions cannot be held for the negligence or misfeasance of its officers. *Sievers v. San Francisco*, 115 Cal. 648, 654, 47 P. 687, 56 Am.St.Rep. 153; *Perkins v. Blauth*, 163 Cal. 782, 789, 127 P. 50; *Davie v. Board of Regents, University of Cali-*

fornia, 66 Cal.App. 693, 699, 227 P. 243; *Western Assurance Co. v. Drainage Dist.*, supra. Of course, this rule is not applicable where the state has expressly assumed such liability, as in the negligent operation of its automobiles or the dangerous or defective conditions of its streets, highways, buildings or works. *California Vehicle Code*, § 400, St.1935, p. 152; *Stats.1931*, chap. 1168, p. 2476; *State of California v. Superior Court*, 14 Cal.App.2d 718, 720, 58 P.2d 1322.

[16, 17] Nor is the 1933 amendment to section 688, Political Code, unconstitutional and void as contended, because "the legislature has no power to abrogate a right granted by a self-executing provision of the Constitution". Since, as has been pointed out, the code section pertains only to a legal remedy by empowering actions against the state in certain instances, it does not diminish, destroy, or otherwise affect any constitutional rights recognized and secured by the California Constitution, article I, sections 1, 13 and 14 thereof, nor Article V, and section 1 of Article XIV of the amendments to the federal Constitution, U.S.C.A. If the constitutional provisions relied upon are in fact "self-executing" they require nothing more to render them effective—and they cannot be rendered invalid by a mere legislative act. *Beveridge v. Lewis*, 137 Cal. 619, 622, 67 P. 1040, 70 P. 1083, 59 L.R.A. 581, 92 Am.St.Rep. 188.

[18-26] Are the above-mentioned articles and sections to our state and federal Constitutions, and the amendment to the latter, "self-executing" to the extent relied upon by respondents herein? It appears settled that while generally governmental agencies, as drainage and irrigation districts, municipal or county governments or other quasi-public corporations exercising governmental functions are not liable for the negligence or misfeasance of their officers, agents and employees in the absence of a statute to the contrary, there is an exception to this rule. The rule and the exception are thus stated in *Perkins v. Blauth*, supra [163 Cal. 782, 127 P. 53]: " * * * when an injury results from the wrongful act or omission of a municipal officer charged with duty prescribed and limited by law, the doctrine of respondeat superior is inapplicable. * * * and, while for his tortious acts he will be held responsible, the municipality will not. * * * Upon the other hand, if the act is one commanded by the municipality itself, if inherently wrong,

the municipality and the agent who performed will both be liable. *Brownell v. Fisher*, 57 Cal. 150; *DeBaker v. Railway Co.*, 106 Cal. 257, 39 P. 610, 46 Am.St.Rep. 237. If the injury results, however, not from the wrongful plan or character of the work, but from the negligent or improper manner in which it is performed, the one so negligently acting will always be responsible, and the public corporation may or may not be responsible, depending upon the relationship which it may sustain to that agent." A public agency, vested with the power of eminent domain, must exercise that power strictly in accordance with the forms of the Constitution and the statute vesting the same. *Jacobsen v. Superior Court*, 192 Cal. 319, 325, 219 P. 986, 29 A.L.R. 1399. When it presumes to take or damage private property for public use without first instituting condemnation proceedings therefor or otherwise complying with the statute by which its authority to take such property is defined it may be held liable therefor. As we have seen, such liability may or may not be based upon negligence, depending upon the circumstances in each case. Where, in the absence of condemnation proceedings the very plan of the work undertaken contemplates the taking or damaging of the private property in question, and the work is deliberately and skillfully performed in accordance with the specifications there is no foundation for the suggestion of negligence. In such a case the tort is a trespass. *Robinson v. Southern Cal. Ry. Co.*, 129 Cal. 8, 11, 61 P. 947; *Perkins v. Blauth*, supra, 163 Cal. 786, 127 P. 50; *Kafka v. Bozio*, 191 Cal. 746, 750, 218 P. 753, 29 A.L.R. 833. The liability of the public agency under either of the noted exceptions to the rule and regardless of whether dependent upon the presence or absence of negligence is primarily based upon the constitutional guaranty that private property shall not be taken or damaged for public use without just compensation. Nor is it a defense in such cases that the public corporation was exercising its governmental functions. *Whiteman v. Irrigation Dist.*, 60 Cal.App. 234, 237, 212 P. 706. When private property is so taken, or damaged, either designedly or as a consequence of an otherwise proper act, an action for damages will lie. *Reardon v. San Francisco*, 66 Cal. 492, 505, 506, 6 P. 317, 56 Am.Rep. 109; *Bigelow v. City of Los Angeles*, 85 Cal. 614, 618, 24 P. 778; *Tyler v. Tehama County*, 109 Cal. 618, 625, 42 P. 240; *Weissand v. City of Petaluma*, 37 Cal.App. 296, 307, 174 P. 955; *Perkins v.*

Blauth, supra, 163 Cal. at page 789, 127 P. at page 50; *Elliott v. County of Los Angeles*, 183 Cal. 472, 475, 191 P. 899; *Western Assurance Co. v. Drainage Dist.*, supra, 72 Cal.App. at page 77, 237 P. at page 59; *Stone v. Cordua Irr. Dist.*, 72 Cal.App. 331, 338, 237 P. 554; *Newberry v. Evans*, 76 Cal.App. 492, 504, 245 P. 227; *Northwestern Pacific R. Co. v. Currie*, 100 Cal.App. 173, 175, 279 P. 1057.

[27] The cases cited establish beyond question that a municipal or county government or other public agency may be liable in the circumstances mentioned and that an action to recover damages will lie. Is the exception to the rule equally applicable to the State of California so as to permit such an action to be maintained against it? It is stated in *Perkins v. Blauth*, supra, 163 Cal. at page 789, 127 P. at page 53: "One important principle, however, is to be noted in this connection. Wherever the injury complained of is the taking or damaging of private property for public use without compensation then under the guarantee of the federal Constitution against such invasion of the private rights of property, neither the state itself nor any of its agencies or mandatories may claim exemption from liability. Amendment Const. U. S., art. 5; *Hopkins v. Clemson College*, [221 U.S. 636, 31 S.Ct. 654, 55 L.Ed. 890, 35 L.R.A., N.S., 243], supra." In the case of *Perkins v. Blauth*, supra, the action and judgment appealed from was against the trustees of a reclamation district, personally, hence the statement quoted is purely dictum, in so far as it applies to "the state itself". The same is true of the other above-cited cases from this jurisdiction as regards the question whether the exception to the rule may apply to the state.

[28-31] *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 31 S.Ct. 654, 656, 55 L.Ed. 890, 35 L.R.A., N.S., 243, was an action for damages to private property resulting from the construction of a dyke by defendant college acting through its board of trustees. The defendant raised the defense that the construction was authorized by the state, and had been built by the college as a public agent and that by reason thereof it could not be sued. The complaint was dismissed in the trial court and the judgment of dismissal affirmed by the supreme court of South Carolina, 77 S.C. 12, 57 S.E. 551. Upon appeal the United States Supreme Court reversed the judgment and in its opinion stated: "With the exception named in the Consti-

tution, every state has absolute immunity from suit. Without its consent it cannot be sued in any court, by any person, for any cause of action whatever. * * * But immunity from suit is a high attribute of sovereignty,—a prerogative of the state itself,—which cannot be availed of by public agents when sued for their own torts. The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens.

* * * Besides, neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. * * * But neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty." That portion of the opinion wherein it is stated, "With the exception named in the Constitution" at first blush would seem to indicate that immunity from suit does not extend even to states in actions involving the rights of individuals under the fourteenth amendment to the federal Constitution. An examination of the authorities, however, including citations of the case in question, will not sustain such a view. *Ashton v. Cameron County* W. I. Dist. No. One, 298 U.S. 513, 531, 56 S.Ct. 892, 80 L.Ed. 1309, (dissenting opinion of Justice Cardozo); *State of Missouri v. Homesteaders Life Ass'n*, D. C., 16 F.Supp. 69, 74; *In re Lindsay-Strathmore Irr. Dist.*, D.C., 21 F.Supp. 129, 132; *Melvin v. State*, 121 Cal. 16, 53 P. 416; *Union Trust Co. v. State of Cal.*, 154 Cal. 716, 728, 729, 99 P. 183, 24 L.R.A., N.S., 111. *Cooley's Constitutional Limitations*, 8th ed., vol. I, pp. 22-25. If such exception of a state from its sovereign immunity were ever the rule it appears to have been definitely abandoned. In *Palmer v. State of Ohio*, 248 U.S. 32, 39 S.Ct. 16, 63 L.Ed. 108, a more recent decision, the same court expressly holds that the rights secured to citizens by the federal and state Constitutions do not include the right to sue a state, for that right "cannot be derived from the Constitution or laws of the United States. *It can come only from the consent of the state.*" 25 R.C.L. 413; 59 *Cor.Jur.*, p. 302, sec. 460. (Italics ours.) This case further holds that the question whether the Constitution of a particular state gives the right to sue without further legislative action is a question of state law the determination of the state court being controlling where no federal ques-

tion is involved. The cases convince that in California the rule has ever been that the state itself—regardless of the exception concerning its agencies—cannot be sued without its express consent. The reason for the rule is manifest. Neither our Constitution nor statutes pursuant thereto have created or empowered—for, indeed, they could not—an officer, a board of officers or a public agency to seize private property for public use without just compensation and a strict compliance with the detailed provisions of the law of eminent domain. The law makes it incumbent upon public agencies and officers seeking to take private property for public use to proceed in the manner provided by law by which the constitutional rights of the owner will be properly protected. The California Streets and Highway Code, division 1, chapter 6, article I, section 858 (St.1935, p. 300), expressly provides the manner in which changes in the grades of highways affecting property shall be accomplished. By the provisions of this code the State of California and the people of the state have indicated the precise procedure to be followed. Neither the state, nor the people thereof, have expressed by word or act a purpose contrary to the express provisions of law relating to the subject. If the course pursued by public officers in the instant case was not in conformity with the laws of the State of California—upon which point we need express no opinion—respondents were not without their remedy. No liability, however, may attach to the state by reason of the dereliction—if any—either upon contract, express or implied, or negligence. For the state can "speak and act only by law" and the wrong herein complained of "is the mere wrong and trespass of those individual persons who falsely speak and act in its name". *Poin-dexter v. Greenhow*, 114 U.S. 270, 5 S.Ct. 903, 914, 962, 29 L.Ed. 185, 192; *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171; *Cooley's Constitutional Limitations*, supra, vol. I, pp. 22-25, and notes; 25 R.C.L. 415.

In view of the foregoing the court was and is without jurisdiction of the named defendants, and it is unnecessary to consider the other questions presented upon the appeal. It follows the judgment must necessarily be reversed, it is so ordered.

We concur: KNIGHT, Acting P. J.;
WARD, J.

1

Maria Simas BETTENCOURT, Plaintiff and Respondent, v. STATE of California, Defendant and Appellant.

Civ. 10826.

District Court of Appeal, First District,
Division 1, California.

Oct. 13, 1939.

Hearing Granted Dec. 12, 1939.

For subsequent opinion see 105 P.2d 316.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for the State.

E. H. Christian and Eugene K. Sturgis, both of Oakland, for respondent.

GEARY, Justice pro tem.

This is one of several appeals from judgments entered in actions for damages arising out of highway construction work. All material points here presented are disposed of in a decision this day filed in the case of Rose et al. v. State of California et al., Cal.App., 94 P.2d 1058. Upon the grounds and for the reasons there given, the judgment herein is reversed.

We concur: KNIGHT, Acting P. J.; WARD, J.



2

Joseph F. BRANDON, also known as Joe Brandon, Plaintiff and Respondent, v. STATE of California, Defendant and Appellant.

Civ. 10827.

District Court of Appeal, First District,
Division 1, California.

Oct. 13, 1939.

Hearing Granted Dec. 12, 1939.

For subsequent opinion see 105 P.2d 316.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for the State.

E. H. Christian and Eugene K. Sturgis, both of Oakland, for respondent.

GEARY, Justice pro tem.

The appeal herein is one of a group of five taken by the defendant from a judgment awarding damages on account of the construction of a subway on the highway in the town of Hayward. All questions presented by the present appeal have been fully considered and determined in the decision this day filed in Rose et al. v. State of California et al., Cal.App., 94 P.2d 1058, wherein the judgment was reversed. Accordingly the judgment herein must be reversed, and it is so ordered.

We concur: KNIGHT, Acting P. J.; WARD, J.



3

A. S. JONES and R. P. King, Plaintiffs and Respondents, v. STATE of California, Defendant and Appellant.

Civ. 10828.

District Court of Appeal, First District,
Division 1, California.

Oct. 13, 1939.

Hearing Granted Dec. 12, 1939.

For Subsequent opinion see 105 P.2d 317.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for the State.

E. H. Christian, and Eugene K. Sturgis, both of Oakland, for respondents.

GEARY, Justice pro tem.

This is an appeal by defendant from a judgment of the superior court of Alameda county in favor of plaintiffs for damages alleged to have been sustained by plaintiffs as the result of the construction of a subway fronting plaintiffs' property. It is a companion case of Rose et al. v. State of California et al., Cal.App., 94 P.2d 1058, this day decided. All vital points raised herein are disposed of by the decision in that case. Therefore upon the grounds and for the reasons therein set forth the judgment herein is reversed.

We concur: KNIGHT, Acting P. J.; WARD, J.

**Ella T. LAUGHLIN (a Widow), Plaintiff
and Respondent, v. STATE of California,
Defendant and Appellant.**

Civ. 10830.

**District Court of Appeal, First District,
Division 1, California.**

Oct. 13, 1939.

Hearing Granted Dec. 12, 1939.

For subsequent opinion see 105 P.2d 317.

**Appeal from Superior Court, Alameda
County; James G. Quinn, Judge.**

**C. C. Carleton, Frank B. Durkee, C. R.
Montgomery, and Robert E. Reed, all of
Sacramento, for the State.**

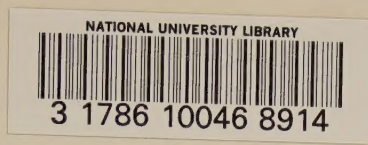
**Louis J. Trabucco and Eugene K.
Sturgis, both of Oakland, for respondent.**

GEARY, Justice pro tem.

Appeal by defendant from a judgment of the superior court of Alameda county in favor of plaintiff awarding damages alleged to have been sustained by plaintiff as the result of the construction of a sub-way fronting plaintiff's property. All material questions here presented are disposed of in a decision that day filed in the case of *Rose et al. v. State of California et al.*, Cal.App., 94 P.2d 1058. Upon the authorities there cited and for the reasons there given, the judgment herein is reversed.

**We concur: KNIGHT, Acting P. J.;
WARD, J.**





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